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**OLUWATIMILEHIN IFARAMOYE
AND
THE STATE
IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA**

SC. 593/2013

FRIDAY 10TH FEBRUARY, 2017

BEFORE THEIR LORDSHIPS

**IBRAHIM TANKO MUHAMMAD
MARY UKAEGO PETER-ODILI
OLUKAYODE ARIWOOLA
AMINA ADAMU AUGIE
EJEMBI EKO**

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

APPEAL: Ground of appeal – Purpose.

*CASE LAW: Principles in **FRN vs. Usman (2012) 8 NWLR (Pt. 1308) 141.***

COURT: Appellate court – Power to expunge inadmissible evidence

COURT: Conviction of accused – Whether accused can be convicted based on only legally admissible evidence – Relevance considerations thereto.

COURT: Conviction of accused based on confessional statement where the interpreters/translators of statement were not called as witnesses – Whether conviction was proper.

COURT: Inadmissible evidence – Power of trial court to expunge.

COURT: Relying on inadmissible evidence to convict – Consequences thereof.

COURT: When evidence before the court amounts to hearsay – Court cannot convict on hearsay evidence.

CRIMINAL LAW AND PROCEDURE: Statement of accused recorded in Pidgin English – Statement was not translated to English – No denial of fair hearing.

CRIMINAL LAW AND PROCEDURE: Appellant made statement in Yoruba – Yoruba version subsequently translated to English – Both Yoruba and English translators not called as witnesses – Implications.

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

CRIMINAL LAW AND PROCEDURE: Burden of proof in criminal cases – Presumption of innocence – Rationale for proof beyond all reasonable doubt.

CRIMINAL LAW AND PROCEDURE: Distinction between interpreter and translator.

CRIMINAL LAW AND PROCEDURE: Proof – Failure of, prosecution to prove a material point beyond reasonable doubt – Implication.

CRIMINAL LAW AND PROCEDURE: Statement not made in English – Need to be translated to English, which is the official language of the court – Judge does not have the power to translate – Translation must be by a translator or an interpreter.

CRIMINAL LAW AND PROCEDURE: Statement of accused not recorded in English – Statement subsequently translated to English – Necessity for translator to testify in court.

CRIMINAL LAW AND PROCEDURE: Statement of appellant made in Yoruba and translated to English – Police man who tendered statements worked as part of an investigating team with translators – Translators not called as witnesses – Whether evidence in statements is hearsay.

CRIMINAL LAW AND PROCEDURE: Trial within trial – Whether a distinct or independent proceedings from trial proceedings.

CRIMINAL LAW AND PROCEDURE: Where a person is to testify as an

interpreter/translator – Procedure thereto.

CRIMINAL LAW AND PROCEDURE: Interpreted statement of the accused – Statement admitted in evidence without calling the interpreter – Impropriety of – Effect.

EVIDENCE: Admissibility of evidence – Inadmissible evidence is illegal evidence.

EVIDENCE: Admissibility of evidence – Objection on ground of involuntariness – Appropriate time thereto.

EVIDENCE: Admissibility of evidence – Statement's admissibility objected to not on ground of involuntariness – No need for trial within trial.

EVIDENCE: Allegation of involuntariness – Need to conduct trial within trial – Purpose.

EVIDENCE: Hearsay evidence – Evidence in an interpreted statement interpreter not called as a witness – Evidence in the statement amount to hearsay.

EVIDENCE: In admissible evidence – Where there is no objection thereto – Whether court can use.

EVIDENCE: Inadmissibility of evidence – Inadmissibility can be raised at anytime even for the first time in the Supreme Court.

EVIDENCE: Objection to the admissibility of confessional statements – Whether trial within trial necessary in all cases.

EVIDENCE: Relevant evidence – Not admissible in all cases.

EVIDENCE: Statement made in pidgin language – Whether need to be translated to English Language in order to constitute legally admissible evidence.

EVIDENCE: Whether wrongful admission of evidence by a trial court constitutes findings of facts – Where process is affirmed by a lower court – The principle of concurrent findings of facts will not apply.

WORDS AND PHRASES “Corroboration” – Meaning.

WORDS AND PHRASES “Relevant” – Meaning.

Issue for Determination

Whether, having regard to the facts and circumstances of this case, the court below was correct in affirming the trial judgment in admitting the extra-judicial confessional statement of the appellant (**Exhibits B-B1**) notwithstanding the fact that none of the persons who recorded and translated the said confessional statement was called as a witness.

FACTS OF THE MATTER

The appellant and three others were arraigned before the Ondo State High Court, on a charge of murder. They were alleged to have murdered one Maria Joseph Erhiyore, a palm oil dealer, who had left Okpitipupa for Ode-Erinje to buy palm oil, and was never seen again until her body was found in a pit at the back of the second accused person's house. The second accused pleaded guilty and was convicted and sentenced accordingly.

The appellant who became the second accused, pleaded not guilty to the charge. The prosecution called four witnesses, including Inspector Omojeje John, who was part of a team of policemen that investigated the crime at SIIB, Akure. He testified as **Pw3**.

The appellant's statement to the police was tendered in evidence through **PW3**, who explained that it was recorded in Yoruba language by *Sgt. Mogaji* and translated into English by *Inspector Rufus Ibitoye*, and they were not called as witnesses.

The appellant's counsel objected to the admissibility of the statements in evidence through **PW3** on the ground that they “*were not tendered by the makers* and no proper foundation was laid as to the reasons why *the makers* are not called.

The trial court overruled the objection and convicted the accused. His appeal to the Court of Appeal was dismissed, hence the further appeal to the Supreme Court.

Held (*unanimously allowing the appeal*)

1. *The purpose of a ground of appeal*

The appellant appealed and we must look at his grounds of appeal and particulars of error since the ground of appeal is the totality of the reasons why a decision that is complained of by a party is considered wrong, and the purpose of particulars is to advance reasons for the complaints in

grounds of appeal – [Ehinlanwo vs. Oke (2008) 16 NWLR (Pt. 1113) 357 and Diamond Bank Ltd. vs. P.L.C. Ltd (2009) 78 NWLR (Pt. 1172) 67. (P 25 paras F–H.)

2. *The issue of inadmissibility can be raised even at the stage of the Supreme Court.*

The appellant's complaint is that Exhibits B-B1 are inadmissible since those officers were not called as witnesses, and no proper foundation was laid as to why they were absent before being tendered through PW3. If Exhibits B-B1 are inadmissible in law, the question of their inadmissibility can be raised even at this stage because a court is enjoined to decide a case on legal evidence only – [Olalekan vs. State (2001) 12 SC (Pt. 1) 38]. In other words, even if no objection was taken at the trial court, an appellate court has inherent jurisdiction to expunge evidence wrongly received – [Haruna vs. The Att-Gen, Fed. (2012) LPELR-7821 (SC). (P 28 paras H–A).

3. *Interpreted statement tendered without calling the interpreter as a witness.*

This is not a novel issue, and there are a number of authorities from those days of the West African Court of Appeal [WACA] to the present day by this court, from which we can find answers. There is - Rex vs. Gidado (1940) 6 WACA 60, R. vs. Ogbuewu (1949) 12 WACA 483, R. vs. Zakwakwa (1960) FSC 12, Nwaeze vs. State (1996) 2 NWLR (Pt. 428) 1, and the case of FRN vs. Usman (supra), cited by the appellant, to name a few.

In **Gidado's Case (supra)**, the interpreter was not called, and in allowing the appeal, **WACA** very aptly held as follows:

“It seemed to us that this failure on the part of the trial judge to appreciate the inadmissibility in evidence of alleged statements by the appellant, when such statements were not confirmed and established by the persons acting as interpreters, was fatal to the conviction herein in that the learned trial judge misdirected himself in accepting such statements as having been proved”.

In **R. vs. Zakwakwa of Yorro** (*supra*), the accused person had made his statement in Mumuye. Two police witnesses said it was L/CPL Umoru, who translated it into Hausa, but the said Statement showed PC Musa as the interpreter into Hausa, and he was not called. The statement was the only direct evidence of the assault admitted by the appellant charged with murder. In allowing the appeal, the Federal Supreme Court held that if it was PC Musa, who did the interpretation and not Umaru, then since Musa was not called as a witness and subjected to cross-examination, the Hausa and the English versions are hearsay. (*Pp 30–31 paras F–C.*)

4. *Where the interpreted statement was tendered but the interpreter did not testify*
In **Nwaeze vs. State** (*supra*), the statement was tendered and admitted in evidence through the interpreter, who could not testify at the trial because he was sick. This court held that:

“The court below was perfectly right in holding that the statement, Exhibit “A”, was inadmissible as the interpreter of the statement, made by the appellant from Igbo to English to the investigating police officer who recorded it in English, was not called to testify on the point. The legal position is that if the statement of an accused is made in a language other than English and it is interpreted into English by an interpreter to the recorder, the interpreter must be called to give evidence, on the point, at the trial of the accused otherwise the contents of the statement will be hearsay and the statement will be inadmissible”. (*P 31 paras C–G*)

5. *A conviction based on inadmissible evidence cannot stand.*
In **FRN vs. Usman** (*supra*), the statements were recorded in English through two interpreters, who interpreted from Hausa to English and vice versa, but the two did not testify in court. The court below held that the conviction could not stand in the absence of their evidence and set aside the judgment of the trial court and then acquitted and discharged the respondents. In affirming that decision, this court per Rhodes-Vivour, (JSC), explained the rationale behind it in explicit details, as follows:

“I must do some explanation. The police officer detailed or directed to obtain a statement from the accused person may

not understand the language spoken by the accused person, and so the service of an interpreter is needed. The interpreter acts as interpreter between the police officer and the accused Person. The interpreter understands the language spoken by the accused person and the English language. He speaks to the accused person in the accused person's local dialect and tells the police officer in English exactly what the accused person said. The police officer records it in English and that is the statement of the accused person. Usually the statement is recorded in the local dialect with English translation and both documents are admissible in evidence as the statements of the accused person. Before these documents are admitted in evidence the police officer who recorded the statement and the interpreter must testify in court. This is vital testimony. In court the interpreter is expected to tell the court the questions he asked the accused person on behalf of the police officer and the response given by the accused person. It is only when this is properly done that it can be said that the truth of the statement has been established. The court would have no difficulty concluding that the statement is a correct reproduction of what the accused person told the interpreter. When the purpose for tendering a statement is to establish the truth of its contents, and the statement was obtained with the help of an interpreter, both the interpreter and the person who recorded the statement must give evidence in court. The statement is hearsay and inadmissible if the interpreter does not testify in court". (Pp 31 – 32 paras G– E).

6. *What constitutes hearsay evidence:*

In answering the question – what constitutes hearsay evidence, this court further stated as follows in FRN vs. Usman (*supra*):

“If the witness testifies on what he heard some other person say, his evidence is hearsay. Such evidence is to inform the court of what he heard the other person say e.g. in cases of slander. If, on the other hand, his testimony is to establish the truth of an event in question or as in the instant case, to

establish the truth of the contents of appellant's statements, it is hearsay and inadmissible evidence. Hearsay evidence is secondary evidence of an oral statement best described as second-hand evidence. What a witness says he heard from another person is unreliable for many reasons. For example, he may not have understood the information/interpreters, or he may say things that were never said. Such evidence remains hearsay evidence because it cannot be subjected to cross-examination in the absence of the informant/interpreters. (Pp 32–33 paras G–B)

7. *What is hearsay evidence?*

See also *Shivero vs. State* (1976) NSCC (Vol. 10) 197, relied on by this court in *FRN vs. Usman* (*supra*), where the appellant went to a local police station to give himself up after he stabbed the deceased with a knife in the presence of two eyewitnesses. The police officer-in-charge could not understand or speak his language, so he asked another policeman to act as interpreter. As a result of what the interpreter told the said police officer, the appellant was asked to take the police officer to where he had hidden the knife with which he had stabbed the deceased. He took them to the place and the knife was recovered there.

At his trial, the officer testified as to admission made to him by the appellant through the interpreter, who did not testify, but the trial court relied on the admission and other evidence in convicting him. This court held that since the interpreter did not testify at the trial, the admission made in those circumstances is, certainly, hearsay and was, therefore, clearly inadmissible.

At the end of the day, *Shivero's* conviction stood based on the admissible evidence of the eye-witnesses, and in particular, the testimony about his voluntary visit to the police station and as to how the knife used to attack the deceased was recovered. (P 33 paras C–G)

8. *Effect when conviction is based on a confessional statement that is hearsay*

However, in relation to this case, the point being made is that where a conviction is based solely on a confessional statement, and the person, who acted as interpreter when it was obtained, did not testify, the confessional statement is hearsay evidence and the accused person is, therefore, entitled to an acquittal.

The authorities refer to *interpreters* in particular, and the question that comes to mind is whether they apply in this case, where the said officers *recorded* and *translated* the statements. First of all, we must understand that the language of the court is English, which is why when such a statement is recorded in *vernacular* from an accused person, there always has to be an English translation – [Nwali vs. The State (1991) 3 NWLR (Pt. 182) 663],

Where this court per Olatawura, (JSC), explained:

“Nigeria has no *lingua franca*. There are over 200 languages in this country. The medium of communication and expression in our courts – is the English language. This has its roots in our colonial days when those, who administered justice in our courts were expatriates. To allow them to follow the proceedings, interpreters were provided for the benefit of the accused persons and the courts. Furthermore the different languages spoken in the country make it imperative that notwithstanding the impressive record in our judicial system, and because Nigerians of different tribes now administer justice, the proceedings in the courts must of necessity be recorded in English language. The set-up of our courts demands that the English language will still be used. It is for this reason that when a statement is recorded in vernacular from an accused, there is always an English translation”. (Pp 33–34 paras G–D).

9. *The judge cannot do the interpretation*

In *Damina vs. The State (1995) 8 NWLR (Pt. 415) 546*, wherein the statement in Hausa [Exhibit 2] was translated into English [Exhibit 2A] by the same officer [PW5], who took down the statement in Hausa. PW5 read out the Exhibit 2 in court, but in his Judgment, the learned trial judge stated as follows

“The English translation of the Hausa statement – Exhibit 2 is very poor and does not convey the real meaning of the Hausa statement. The proper translation of the Hausa statement Exhibit 2 is, therefore, as follows ---

This court, per Uwais, (JSC) (as he then was)), held as follows:

“Now it is a matter of common knowledge and indeed of judicial notice that the lingua franca of Nigeria and the official language of the superior courts in this country is English. Therefore, when a witness testifies in any proceedings before the superior courts in any Nigerian language or “vernacular”, such testimony is simultaneously translated by a court interpreter into English for the benefit of the court and the parties. Similarly, if documents written in any other language other than English are to be put in evidence, they are caused by the party who needs them to prove his case, to be translated into English. Where the party omits to have the document so translated, the superior court has a duty to cause the document to be translated by the official interpreter of the court, if any, or by a person that is fluent and competent to do so. Documents properly tendered cannot be rejected by the court merely on the ground that the documents have been written in a language or vernacular other than English. If they are so admitted, the courts are expected and indeed obliged to look at them when they come to assess or evaluate the evidence adduced. But they cannot do so unless they have the documents translated into English, and the translated copies put in evidence in the normal way. Thus, the interpreter or translator must be called to give evidence, in the course of which he will be expected to state the qualification, which makes him a competent interpreter or translator, and he will be examined, cross-examined and re-examined by the parties in order to ensure that he has done a good job of the translation. A judge cannot, therefore, engage in the translation or interpretation of such documents since he cannot perform the role of a witness and a Judge at the same time”. (Pp 34–35 paras E–F)

10. *The distinction between interpreters and translators*
The interpreter and translator are interchangeable; same principles apply. To interpret means to translate orally and the interpreter provides

oral translation between speakers, who speak different languages. The translator is also a person, who translates written messages from one language to another. So, one translates orally and the other one translates in writing. There is no difference between them in the eyes of the law, and the translator falls under the same hammer as the interpreter.
(P 35 paras F–H).

11. *The appellant is right on the facts herein*

In this case, the appellant's position is that his conviction and sentence to death cannot stand because the police officer, who recorded Exhibit B, the Yoruba version of his statement, and the officer, who translated Exhibit B1, the English version, did not testify at his trial, and the authorities are in his favour. There is no question whatsoever that the appellant is right that the court below erred when it affirmed the trial court's decision.

(P 35 paras H–I)

To start with, there is no evidence on record that the team of Investigators took a joint decision to “record and translate” the appellant's Statement. Secondly, and more importantly, PW3 told the court that Sgt. Mogaji had recorded it in Yoruba; there is nothing wrong with that, and the court will not reject the Statement merely because it is recorded in Yoruba language – [Damina vs. The State (*supra*)].

But the court does not speak or understand Yoruba, and for the statement to be admissible in evidence, there had to be an English translation and there was.

PW3 also told the court that Inspector Ibitoye translated the said statement recorded in Yoruba into English, which is the language of the court. The twist in the tale is that for the statement recorded in Yoruba and its English translation to be admissible in evidence, the Sgt. Mogaji, who recorded it, and Inspector Ibitoye, who translated it, must testify in court – [FRN vs. Usman (*supra*)].

They both had to be present in court to explain what transpired when they recorded and translated the said appellant's statement, which includes both versions. Not only did the two officers have to be present to explain, they had to be cross-examined as to details of what transpired, particularly in this case where the stakes were so high and the appellant's life depended on it; the only evidence on which he was convicted was the confessional Statement- Exhibits B-B1. *(P 36 paras D–H.)*

12. *PW3 who testified did not record nor translate the statements*

In this case, the two officers, Sgt. Mogaji and Inspector Ibitoye, were very vital witnesses, who needed to be cross-examined, and failure to call them rendered the statements inadmissible. PW3, through whom the statement was tendered in evidence, was not there and never claimed to have anything to do with it. There was, therefore, no basis for the court below to say that:

“He put himself on the line as a witness competent enough to take questions arising from the documents if the need arose”. (P 38 paras A–C)

13. *A trial court cannot properly convict on hearsay evidence*

The trial court relied on the confessional statement tendered through PW3, who played no part in recording or translating it, to convict the appellant. As I pointed out earlier, the law is that when the purpose for tendering a statement is to establish the truth of its contents, the interpreter, which includes translator, and the person, who recorded it in another language must give evidence at the trial. The statement is hearsay and, therefore, inadmissible because it cannot be subject to cross-examination in the absence of the recorder and translator of the statement.

[Damina vs. State (*supra*), where this court clearly said:

“The *interpreter* or *translator* will be examined, cross-examined and re-examined in order to ensure (that) he has done a good job of the translation”. (P 37 paras D–F)

14. *Statement recorded in Pidgin English is admissible*

In Olanipekun vs. The State (2016) 13 NWLR (Pt. 1528) 100, the statement was recorded in Pidgin English. This court held that Pidgin English is English language – spoken or written, and as regards this issue, Akaahs, (JSC) aptly observed as follows:

The issue of fair hearing would have arisen if the appellant did not understand English at all and the statement had to be recorded in the language he speaks or understands and later translated into English I am not unaware of the

decisions in Queen vs. Zakwakwa and Nwali vs. State The two cases stress the importance of getting the original statement and the translations and those, who did the translations produced in court for purposes of comparison and testing the veracity of the translated versions.
(Pp 37– 38 paras G–A)

Per Eko, (JSC):

“Sgt. Mogaji who recorded the statement of the appellant in Yoruba Language did not testify. He was not called to testify as his whereabouts were unknown. Inspector Ibitoye who translated Exhibit B to English (Exhibit B1) also did not testify. Exhibit B and B1 are therefore hearsay and inadmissible in evidence, unless their recorder and interpreter were called to attest to the veracity of their recording and interpretation”. *(P 55 paras H–J)*

Per Eko (JSC):

Exhibits B-B1 were admitted in evidence through PW.3, who neither claimed any role in the recording or translation, nor was he present when they were recorded and translated. The recording of the statement (Exhibit B) in Yoruba language by Sgt. Mogaji presupposes the appellant allegedly spoke to Sgt. Mogaji in Yoruba language. PW.3 did not claim that he spoke and or understood Yoruba. When an interpreted or translated version of an accused's statement is sought to be tendered in evidence, unless the interpreter or translator is called as a witness the translated version is hearsay and therefore inadmissible in evidence. [QUEEN vs. ZAKWAKWA 5 FSC 12 At 13; DOGO ADATU vs. THE STATE (1980) 2 NCR 33; UTIE vs. THE STATE (1980) 2 NCR 69; OALEKAN vs. THE STATE (supra); OKEKE vs. OBIDEFE (supra)].

This case is in all fours with **FRN vs. USMAN (2012) 8 NWLR (pt. 130) 141 at 159** where it was held:

“Before these documents are admissible in evidence, the police officer who recorded the statements and the interpreter (translator) must testify in court. Where a conviction is based solely on a confessional statement, and the (police officer who recorded it) and the interpreter (or translator) who (interpreted it) when the statement was obtained did not testify, the confessional statement is hearsay evidence and the accused person is entitled to an acquittal”. (Pp 55–56 paras F–C)

Per Eko, (JSC):

“Exhibits B-B1, relied upon for the conviction of the 3rd accused/appellant for the murder of the deceased are inadmissible evidence, both of them being hearsay pieces of evidence produced and tendered by PW.3 who had no hand in their recording and interpretation. The conviction and sentence of the appellant upon a clearly inadmissible evidence is itself evidence of miscarriage of justice. Accordingly, I shall not subscribe to the contention of the respondent that the appellant has not shown that he suffered any miscarriage of justice by the admission in evidence of Exhibits B-B1 and their use in the conviction and sentence of the appellant. The law enuring in favour of every accused person is that he can only be convicted on an alleged offence if, and only if, the prosecution established his guilt beyond reasonable doubt by legal evidence lawfully admitted in evidence against him”. (P 56 paras C–F)

15. *The meaning of 'relevant'*

Another angle to the equation *relevancy vis-à-vis admissibility*. The Evidence Act does not provide any definite meaning but relevant means connected with the matter at hand, pertinent, and relevant evidence is that which is applicable to the issue, and which ought to be received. Admissibility is the concept in law that determines whether or not evidence can be received by the court. The evidence must first be relevant, but even relevant evidence must be tested for its admissibility. When it is said that a piece of evidence is admissible, it means that the

evidence is relevant and is one that can be admitted by the court because it does not offend any exclusionary rule. (P p 38–39 paras H–A)

16. *A relevant evidence may be inadmissible evidence*

A fact, ordinarily admissible, may become inadmissible for some legal reason or the fact is too remote to be material. Thus, that a suspect confessed is relevant but if the confession was obtained involuntarily, it will be excluded as inadmissible. In other words, for the piece of evidence to be admissible, it must be relevant but this is not necessarily *vice versa* since a piece of evidence could be relevant without being admissible, which is the case here. If all things were equal, the Exhibits will “*in connection with other facts make the issue of the murder of the deceased probable or improbable*” as the court below said. But all things are NOT equal. Exhibits B-B1 are relevant but cannot be received by the court because they are inadmissible, and standing inadmissible, the window that would have allowed the court to look into any relevant facts therein is sealed shut. (P 39 paras A–D)

17. *The purpose of trial-within-trial.*
Per Augie (JSC):

“It is settled that *trial within trial* is only used to test the voluntariness of a confessional statement; not what value or weight to attach to evidence. I came across a South African case *S vs De Vries* 1989 (1) SA 228 (A), where Nicholas AJA, summarized its purpose brilliantly, as follows:

It is essential that the issue of voluntariness should be kept clearly distinct from the issue of guilt. This is achieved by insulating the enquiry into voluntariness in a compartment separate from the main trial. Where, therefore, the question of admissibility of a confession is clearly raised; an accused person has the right to have that question tried as a separate and distinct issue. At such trial, the accused can go into the witness-box on the issue of voluntariness without being exposed to general cross-examination on the issue of his guilt”.

See also **Onyenye vs. State (2012) 15 NWLR (Pt. 1324) 586**, where this court per Adekeye, (JSC), expounded as follows:

“It has now become a matter of routine for an accused person to retract a confessional statement in the course of trial court. The court has adopted two reactions in the circumstances as follows:

- (a) Where the accused has clearly expressed his ordeal in the process of obtaining the statement accredited to him in effect that it was obtained by force, tricks or undue influence or any other non-recognizable legal ways, there would be need for a trial within trial.**
- (b) Where the accused retracted the confessional statement on the ground that it was not read to him before he signed it or that he never made it at all, the requirement of trial within trial is not applicable.**

In Ogudo vs. State (2011) LPELR -860 (SC) this court held:

“Where the accused person says that he did not voluntarily make the statement credited to him, such a stand by the accused person calls for the holding of a trial within trial. Where, on the other hand, the accused person says he did not sign the statement, the statement should be admitted in evidence, thereafter, the question of what weight should be attached to such a statement becomes an issue for the Judge to decide at the end of the trial”

The bottom line is that a *trial within trial* is not applicable where the objection to admissibility is that a confessional statement was not read to the accused person before he signed it; or that his signature is not affixed on it; or that it was written by the Prosecution and he only endorsed it; or that he is not the maker [Sule vs. State (2009) 17 NWLR (Pt. 1169) 33].

(P 41 paras A–H)

18. When to object on ground of involuntariness

The appropriate time to object on the ground that a confessional statement was made involuntarily is when it is being tendered; not when the accused opens his defence nor during that defence [Ogudo vs. State (*supra*)].

In this case, the appellant did object at the right time but on the ground that the makers were not called, which is not a ground for holding a *trial within a trial*.

He only raised the issue of being tortured to make the said statement when he was testifying in his own defence as DW2, which was too late in the day, and not the proper stage to raise such an objection that would warrant a call for a *trial within trial*. (Pp 41 – 42 paras H–A)

19. *A trial within trial is a distinct procedure*

The said *trial within trial* did not concern the appellant and I must also add that a *trial within trial* is a separate and distinct proceeding from the main trial, thus, evidence adduced therein, cannot be transplanted, injected or imported into the main trial. (P 42 paras B)

20. *The meaning of corroboration*

The meaning of corroboration as stated by Lord Reading, CJ, in *Rex v Baskerville* [1916] 2 KB 658, adopted by this court in *Okabichi vs. State* (1975) 3 SC 96, is captured as follows:

“We hold that evidence in corroboration must be independent testimony, which affects the accused by connecting or tending to connect him with the crime. It must be evidence, which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. Corroborative evidence is evidence, which shows or tends to show that the story that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by him”.

In the said *Okabichi vs. State* (*supra*), Coker, JSC, added that:

“Corroboration is evidence, which may be direct or circumstantial but in any case, it is the duty of the court to ascertain that whatever evidence is used or regarded as corroborative is independent of the evidence to be corroborated and is such as supports the story of the main evidence to the effect that it renders the story more probable that it implicates the accused in some material particular. No stereotyped category of evidence is envisaged and a great deal depends on the circumstances of each case for what may in a given set of circumstances amount to corroboration may not be so in another set of circumstances. Exhibit A is the autopsy report issued by PW1, and the said Exhibits F-F5 are pictures and negatives of the body of the deceased admitted in evidence through PW3. These Exhibits prove conclusively that the murder victim died; nothing more. There is nothing in the Exhibits that implicates the appellant or connects him to her death.

If we scratch out **Exhibits A & F-F5** and **PW2's** testimony from the picture without **Exhibits B-B1**, what is left in terms of evidence against the appellant? Nothing, absolutely nothing; there is no evidence outside **Exhibits B-B1** to implicate him or connect him to the murder of the said Maria Joseph Erhiyore.

The **Exhibits** were the linchpin of the prosecution's case, but they are inadmissible, and with the said **Exhibits** pulled out, the prosecution's case collapses; there is nothing to hold it up. There is nothing outside **Exhibits B-B1** to show its story is true, and the appellant is right that the conviction must be set aside. (*Pp 42 – 43 ; 44 paras E – B, G – H; C – E*)

21. *The burden of proof in criminal proceedings*
At the time of this proceeding at the trial court the provisions of Section 137 (now Section 135 of the Evidence Act, 2011) were not only extant, they governed the proceedings on the burden of proof in any proceedings in which commission of a crime by a party is directly in issue. The law is now trite that in a criminal case it is essential that proof of material facts should necessarily be beyond reasonable doubt. [**OBUE vs. THE STATE** (1976) 2 SC. 79; **ELIZABETH OGUNDIYAN vs. THE STATE** (1991) 4 SCNJ 44; (1991) 4 SC. 100]. (*P 52 paras A – B*).

22. *Failure of prosecution to prove a material point beyond reasonable doubt.*
Where the prosecution failed to prove a material fact in a criminal proceeding beyond reasonable doubt the law imposes on the court to resolve the benefit of doubt in favour of the accused person. It does not lie in the office of the adjudicator to resort to speculation in order to fill in the gap for the prosecutor. Speculation, being an unfortunate and undesirable frolic, the familiar admonition is that a court of law must refrain from indulging in it. As Uwaifo, JSC had put it in *ACB PLC vs. EMOSTRADE LTD.* (2002) 8 NWLR (pt. 770) 501: “It is not part of judicial exercise but a mere curious guess work”. (P 52 paras B–D)

23. *Trial court committed some judicial blunders.*
Per-Eko, (JSC)

“I noticed, from the portion of the proceedings of the trial court that I had earlier reproduced that the learned trial judge had committed some judicial blunders in the bid to admit Exhibits B-B1. This is:

- “i. Notwithstanding his holding that proper foundation should be laid as to the reasons why the makers of these statements are not called, he nonetheless admitted in evidence gratuitously without proper foundation. He ought to have resolved the benefit of doubt in favour of the accused/appellant;**
- ii. He undertook the frolic of speculating that the defences of the accused persons are likely to be based on these statements i.e. whether or not they are voluntarily made; and**
- iii. By dint of Section 27(2) Evidence Act then extant (now Section 29(2) of Evidence Act, 2011) it behoved the trial court to admit in evidence upon proof beyond reasonable doubt that the confession was voluntarily made or “that the confession (notwithstanding that it may be true) that was not obtained in a manner contrary to the Provisions of” Section 27 of the Act. The law does not therefore permit the trial court to admit in evidence, on a nebulous claim of interest of justice, a confessional statement that was obtained or made involuntarily”. (Pp 52– 53 paras D–A)**

24. *The effect of the use of inadmissible evidence*
The trial court proceeded on these three basic or fundamental errors to admit Exhibits B-B1 in evidence. It made extensive use of Exhibits B-B1 to convict the 3rd accused/appellant for the alleged murder. The law is settled that if evidence is inadmissible, the court can not use it at any stage; even where no objection has been raised against it at the trial. [ALADE vs. OLUBADE (1976) 2 FNR 10 at 13]. It is clear from ALADE vs. OLUBADE (supra) and ILIYASU SUBERU vs. THE STATE (2010) 3 SC. (pt. 2) 105 that admitting in evidence a piece of evidence, which by law, is inadmissible is an illegality. It is for this reason that if a piece of evidence which is inadmissible in evidence is wrongly admitted in evidence the court can not use it at any stage of the proceedings; even where no objection was raised against it at the trial. An inadmissible evidence, admitted in evidence with or without objection at the time it was admitted, remains nonetheless irrelevant and inadmissible. [BISICHI TIN CO. LTD. vs. COMMISSIONER OF POLICE (1963) NNLR 71]. (Pp 53; 55 paras A–C; C–E)
25. *Whether evidence wrongly admitted can be expunged by trial court*
In DELE v. STATE (2011) 1 NWLR (pt. 1229) 508 the law was re-stated, emphatically, that a confessional statement that was not voluntarily made by the accused person is not admissible in evidence, and where it is wrongly admitted in evidence, without the court conducting the necessary trial-within-trial to determine if it was voluntarily made, it ought to be expunged from the evidence before the court. (P 53 paras C–D)
26. *Wrongful admission of evidence is not a finding of fact.*
Wrongful admission in evidence of a fact or piece of evidence which in law, ought not to have been in the first place is a matter of law, and not a finding of fact as such. The principle on concurrent findings of fact by the courts below does not apply. (P 55 para C)
27. *Presumption of innocence*
Every person charged with a criminal offence shall be presumed to be innocent until he is proved guilty. See Section 36(5) of the 1999 Constitution. Section 137 of the then extant Evidence Act (now Section 135 of the Evidence Act, 2011) imposes a strict burden on the prosecution

to prove crime beyond reasonable doubt. If they fail to discharge the burden, their allegation that an offence had been committed fails. [OGUNBANJO vs. THE STATE (2002) 15 NWLR (pt. 789) 76; NWOBODO vs. ONOH & ORDS. (1984) NSCC 1; (1984) 1 SCNLR 1]. (P 56 para F–H)

Nigerian Cases cited in this Judgment

ACB PLC vs. EMOSTRADE LTD. (2002) 8 NWLR (pt. 770) 501;
Alade vs. Olubade (1976) 2 FNR 10].
BISICHI TIN CO. LTD. vs. COMMISSIONER OF POLICE (1963) NNLR 71].
Damina vs. The State (1995) 8 NWLR (Pt. 415) 546
DELE vs. STATE (2011) 1 NWLR (pt. 1229) 508
Diamond Bank Ltd. vs. P.L.C. Ltd (2009) 18 NWLR (Pt. 1172) 67.
Dogo Adatu vs. THE STATE (1980) 2 NCR 33;
Ehinlanwo vs. Oke (2008) 16 NWLR (Pt. 1113) 357
Elizabeth Ogundiyin vs. The State (1991) 4 SCNJ 44; (1991) 4 SC. 100].
FRN vs. USMAN (2012) 8 NWLR (pt. 1301) 141
Haruna vs. The Att-Gen, Fed. (2012) LPELR-7821 (SC)].
Ilyasu Suberu vs. The State (2010) 3 SC. (pt. 2) 105
Nwaeze vs. State
Nwali vs. The State (1991) 3 NWLR (Pt. 182) 663],
Nwobodo vs. Onoh & ors. (1984) NSCC 1; (1984) 1 SCNLR 1].
Obue vs. The State (1976) 2 SC. 79;
Ogudo vs. State (2011) LPELR -860 (SC)
Ogunbanjo vs. The State (2002) 15 NWLR (pt. 789) 76;
Okabichi vs. State (1975) 3 SC 96
Olalekan vs. State (2001) 12 SC (Pt. 1) 38
Olanipekun vs. The State (2016) 13 NWLR (Pt. 1528) 100,
Onyenye vs. State (2012) 15 NWLR (Pt. 1324) 586
QUEEN vs. ZAKWAKWA 5 FSC 12
R. vs. Ogbuewu (1949) 12 WACA 483,
R. vs. Zakwakwa (1960) FSC 12,
Rex vs. Gidado (1940) 6 WACA 60,
Shivero vs. State (1976) NSCC (Vol. 10) 197,
Sule vs. State (2009) 17 NWLR (Pt. 1169) 33].
UTIE vs. THE STATE (1980) 2 NCR 69;

A Nigerian Statutes cited in this judgment*Criminal Procedure Law of Ondo State – S.215**The 1999 Constitution of the Federal Republic of Nigeria – S.36(5) & 36(6)**The Evidence Act – S. 27 (2)***B** *The Evidence Act, 2011) – S.135***Representation**

Fred Onuobia, (Esq.) With

C Solomon Ezike, (Esq.), for the **appellant**

Olanrewaju Osinaike, (Esq.) With

Adewara Adeola, (Esq.) for the **respondent**

D ADAMU AUGIE, (JSC) (Delivering the Lead Judgment): The appellant and three others were arraigned before the Ondo State High Court, on a charge of murder. They were alleged to have murdered one Maria Joseph Erhiyore, a palm oil dealer, who had left Okpitipupa for Ode-Erinje to buy palm oil, and was never seen again until her body was found in a pit at the back of the second accused person's house. The second accused pleaded guilty and was convicted and sentenced accordingly.

F The appellant who became the second accused, pleaded not guilty. The prosecution called four witnesses, including Inspector Omojeje John, who was part of a team of policemen that investigated the crime at SIIB, Akure. He testified as **PW3**.

G The appellant's statement to the police was tendered in evidence through **PW3**, who explained that it was recorded in Yoruba language by *Sgt. Mogaji* and translated into English by *Inspector Rufus Ibitoye*, and they were not called as witnesses.

H The appellant's counsel objected to the admissibility of the statements in evidence through **PW3** on the ground that they “*were not tendered by the makers* and no proper foundation was laid as to the reasons why **the makers** are not called.”

The trial court, in overruling the objection, stated as follows:

I **Since the defences of the accused persons are likely to be based on these statements i.e. whether or not they are voluntarily made, it will be in the interest of justice that the statements are admitted at this stage. The statements are admitted [as] Exhibits B-B1.**

J

A In his testimony as **DW2**, the Appellant denied the allegations, and put up an *alibi* that on the day in question he was assisting his mother in her farm at Ugboran. He also alleged that he was tortured by the police and forced to “*thumb print the statement*”.

B In its judgment delivered on **29/9/2006**, the trial court held that his defence of *alibi* and retraction of his confessional statements “*were fabrications*”. It found him guilty as charged and convicted and sentenced him to death by hanging.

C The gravamen of his appeal to the court below centered on the said **Exhibits B-B1**. In dismissing the appeal, the court below held that since PW3 was part of the team that obtained the statements, he had put himself on the line as a competent witness to take questions arising from the documents, if any.

D Dissatisfied, the appellant appealed to this court with a notice of appeal, which he amended. The amended notice of appeal has six grounds of appeal. He distilled three issues for determination in his amended brief settled by Fred. Onuobia, Esq., Fidelis Adewola, Esq. and Chinedu Kema, Esq. That is:

- E
1. **Whether, having regard to the facts and circumstances of this case, the court below was correct in affirming the trial court's judgment in admitting the extra-judicial confessional statement of the appellant (Exhibit B-B1) notwithstanding the fact that none of the persons who recorded and translated the said confessional statement was called as a witness.**
- F
2. **Whether, having regard to the facts and circumstances of this case, the court below was correct in affirming the trial court's judgment convicting the appellant based on his retracted extra-judicial confessional statement of the appellant (Exhibits B-B1) when there was no iota of evidence corroborating the said retracted confessional statement; and**
- G
3. **Whether the proceedings conducted on 17/2/2004 as contained on pages 37-41 of the record compiled with the provisions of Section 36(6) of the [1999] Constitution (as amended) and Section 215 of the Criminal Procedure Law of Ondo State or is valid in law at all?**
- H
- I
- J

A The respondent also formulated three issues in its brief settled by Olanrewaju Osinaike, Esq. and Muyiwa Alatise, Esq. I.e.:

- B (1) **Whether the court below was justified in upholding the decision of the trial court admitting the confessional statement of the appellant (Exhibit B-B1) in evidence.**
- C (2) **whether, in the circumstances of this case, the court below was right in upholding the decision of the trial court which placed reliance on Exhibit B-B1 and acted on it in convicting and sentencing the appellant to death.**
- D (3) **Whether the proceedings conducted by the trial court on 17/2/2004 relating to [his] arraignment were done in contravention of the provisions of section 36(6) of the Constitution and Section 215 of the Criminal Procedure Law as to render [his] conviction and sentence by the trial court null and void.”**

E Before I go into the Issues proper, I must address a preliminary point raised by the respondent under the ambit of its **Issue 1**.

F Its grouse is in relation to the appellant's reference to the term “**the maker**” at the trial court and court below vis-à-vis “**the recorder and translator**” he used in this court. The issue is founded on the observation of the court below that the said Sgt. Mogaji and Inspector Ibitoye merely assisted the appellant to write and translate the said statements, therefore, ordinarily, “*these officers are not the **makers** of the statements [and] the substantive **maker** of the statements remains the appellant*”.

G The respondent argued that the appellant is now saying that the statements ought not to have been allowed in evidence since **PW3** was not the recorder and translator thereof when his contention at the lower courts was that **PW3** is not **the maker**; that the ground on which he opposed their admission at the trial court, and the ground on which he requested the court below to reverse the decision of the trial court, was that the **makers** were Sgt. Mogaji and Inspector Ibitoye, and it was on that basis that the court below resolved the issue against him; and that a look at his brief shows he has acknowledged in this court that the recorder and translator of the exhibits were not the **makers**.

H This court was urged to discountenance his arguments as a party will not be allowed to set up a new case on appeal other than that which was ventilated at the

- A** trial court. **PDP vs. INEC [2015] 2 WRN 1, Osho vs. Foreign Finance Corp. & Anor [1991] 4 NWLR (Pt. 184) 157 and American Cynamid Co. vs. Vitality Pharmaceuticals [1991] 2 NWLR (Pt. 171) 15 cited.**

- B** The appellant, however, submitted in his reply brief that the respondent's argument is misconceived and misleading; that his objection has been consistent that the **makers** of the said exhibits were not called and that no proper foundation was laid before they were admitted; that by the “**maker**” he meant the recorder and translator, and not himself, that he was in court, and his counsel could not have argued that no explanation was given as to whereabouts of the “**maker**” if he was referring to him; and that the civil cases cited are inapplicable to this case.

- C** What is the position? Is the respondent right to complain? At the trial court, defence counsel objected to the admission of the statements through **PW3** because they were “*not tendered by the **makers** and no proper foundation was laid as to the reasons the **makers** are not called*”. The prosecution argued that the said statements “*are admissible since it is in evidence that this witness worked with the **makers of the statements** and can recognize their handwritings and signatures*”.

- D** The trial court was also of the view “*that proper foundation should be laid as to reasons why the **makers** of this (sic) statements are not called*”. Evidently, at that point in time there was no argument as to who **makers** of the Exhibits were.
- F** The defence counsel, the prosecution and the trial court acted on the premise that the **makers** were the said police officers, who had not been called as witnesses by the prosecution, and no reason was given as to why they were not present in court.

- G** The appellant appealed and we must look at his grounds of appeal and particulars of error since the ground of appeal is the totality of the reasons why a decision that is complained of by a party is considered wrong, and the purpose of particulars is to advance reasons for the complaints in grounds of appeal see **Ehinlanwo vs. Oke (2008) 16 NWLR (Pt. 1113) 357** and **Diamond Bank vs. P.L.C. Ltd (2009) 78 NWLR (Pt. 1172) 67**.

- H** In this case, the appellant complained in *ground one* of his grounds of appeal at the court below that the trial court erred when it convicted and sentenced him to death based solely on **Exhibits B-B1**. Particulars of Error No. c. Alleges:

- I**
- Proper foundation was not laid before Exhibits B-B1 were tendered and admitted in evidence in a murder trial.**

- J** In resolving the issue arising therefrom, the court below held:

A This court appreciates the fact that in the absence of the maker
of a document that proper foundation ought to be laid as to why
the maker is not available before such can be admissible – The
B overall essence of having the maker present in court is for
purposes of answering questions arising from the document in
issue. PW3 being the witness through whom Exhibit B-B1 were
tendered made it clear that he was part of the investigating
Police team that obtained statements, including Exhibits B-B1
C from the appellant and his co-accused. By that piece of
evidence he had put himself on the line as a witness competent
enough to take questions arising from the documents if the need
arose. He also said that he had worked with Sgt. Mogaji, the
D recorder of the Yoruba version and Inspector Rufus Ibitoye, the
translator into English language for three to four years and
that he was in a position to identify and recognize their
respective handwriting and signature. We indeed find that
E these pieces of evidence put forward by PW3 from sufficient
and proper foundation for the said Exhibits B-B1 to be
admitted in evidence through him. Be that as it may, PW3
ought to have gone a step further to tell the trial court the
F whereabouts of the said Sgt. Mogaji and Inspector Ibitoye.

To set the record straight, I must point out that **PW3** never said he was present
when Sgt. Mogaji recorded the said statement in Yoruba and when Inspector
G Ibitoye translated it into English. Yes, he was one of the four policemen led by
Inspector Ibitoye, who were '*assigned for the investigation*', however, it was only
the statement of the 4th accused person, which he recorded in Yoruba language that
was admitted in evidence through **PW3**. He merely stated that he worked
H together with the said officers, and identified their handwriting and signature, but
he never said he was there with them when the statements "*were obtained*".

That said; the question is whether the appellant is making a different case
in this court, as the respondent has alleged.

I **Ground One** of his grounds of appeal complains as follows:

J The learned justices of the Court of Appeal erred in law when
they found that Exhibit B-B1, which were admitted by the trial
court without proper foundation was not fatal to the

A **admissibility of the statements in evidence.**

Particulars of Error

- B** **(i) The learned justices of the court below found -- that the mere fact that PW3 stated that he was part of the team that investigated the case and recognized the handwriting of Sgt. Mogaji and Inspector Rufus Ibitoye, who recorded the Statements in Exhibits B-B1 to be sufficient and proper foundation needed to admit Exhibits B-B1 in evidence.**
- C**
- D** **(ii) The only proper foundation required to admit Exhibits B-B1 are the reasons why Sgt. Mogaji and Inspector Rufus Ibitoye , who recorded the statements in Exhibits B-B1 were absent in court to tender the exhibits directly and be cross-examined by the defence. The learned justices of the court below noted this at page 12 of the judgment but held that the omission is not fatal to the admissibility of the exhibits.**
- E**
- F** **(iii) In cases where an accused person resiled from the statement sought to be tendered like in this case, the defence must be afforded the opportunity to cross-examine the investigating police officer(s) who recorded the statement.**
- G** **(iv) The admission of Exhibits B-B1 without proper foundation and without affording the defence counsel an opportunity to cross-examine Sgt. Mogaji and Inspector Rufus Ibitoye , who recorded the Statements occasioned a miscarriage of justice, particularly in this case where the appellant resiled from the statements.**

H

Ground Three thereof complains that the court below erred in law when it held that the Prosecution proved its case beyond reasonable doubt, and its particulars of error No (ii) alleges:

- I**
- J** **The prosecution failed to call or lay proper foundation for not calling Sgt. Mogaji and Inspector Rufus Ibitoye, who recorded the statements in Exhibits B-B1 that linked the appellant with the killing of the victim, which appellant denied making, and**

A **which required independent evidence to show it was true.**

The appellant's **Issue 1** is distilled from the two **Grounds** i.e.:

B **Whether, having regard to the facts and circumstances of this**
case, the court below was correct in affirming the trial
judgment in admitting the extra-judicial confessional
statement of the appellant (Exhibits B-B1) notwithstanding the
C **fact that none of the persons who recorded and translated the**
said confessional statement was called as a witness.

That is what we have, and I cannot see what the cry is all about. Firstly, there is no
D nexus between the trial court and this court; whatever was said or done at the trial
 court cannot climb the ladder to this court. In fact, there is no ladder that can go
 from a trial court to this court, whatever is decided at the trial court is intercepted
 at the court below, and it is what is said or done or decided at the court below that
E gets to this court on appeal. In other words, this court is only concerned with the
 decision of the court below as it impacts on the findings of the trial court.

Secondly, and more importantly, the issue that reared its head from the trial
 court to the court below and to this court, boils down to admissibility or otherwise
F of the said statements. The trial court admitted the said statements as **Exhibits B-**
B1 in the interest of justice notwithstanding the fact that no proper foundation was
 laid as to why the said officers were not called.

The court below held that the fact that **PW3** was part of the team that
G obtained statements from the accused persons, and was in a position to identify
 and recognize the handwriting and signature of the recorder and translator of the
 statements, *“form sufficient and proper foundation for the Exhibits B-B1 to be*
admitted in evidence through him”. It also pointed out that *“PW3 ought to have*
H *gone a step further to tell the trial court the whereabouts of the said Sgt. Mogaji*
and Inspector Ibitoye”.

The narrative is the same, and the appellant's complaint is that **Exhibits B-**
B1 are inadmissible since those officers were not called as witnesses, and no
 proper foundation was laid as to why they were absent before being tendered
 through **PW3**. If **Exhibits B-B1** are inadmissible in law, the question of their
 inadmissibility can be raised even at this stage because a court is enjoined to
 decide a case on legal evidence only see **Olalekan vs. State (2001) 12 SC (Pt. 1)**
J 38. In other words, even if no objection was taken at the trial court, an appellate

A court has inherent jurisdiction to expunge evidence wrongly received see **Haruna vs. The Att-Gen, Fed. (2012) LPELR-7821 (SC)**.

As to whether **Exhibits B-B1** tendered through **PW3** are admissible in evidence, the appellant's position is that the lapse rendered the confessional
B Statements inadmissible in evidence and occasioned a miscarriage as he was denied opportunity of cross-examining the recorder and translator of the statements, especially with regard to his retraction of the said statements. **Olalekan vs. State (supra) also (2001) 18 NWLR (Pt. 746) 793 at 818 and Okeke vs. Obidefe et al. (1965) ALNR 51 cited.**

C He argued that interest of justice is not a ground or basis for admissibility of documents; that the court below erred when it upheld the decision of the trial court since no foundation was laid anywhere in the record to explain the absence
D of the said Sgt. Mogaji and Inspector Ibitoye; and it upheld the admission of the statements on the same reasoning as the trial court and therefore, committed the same error as the trial court, which is a radical departure from the settled principle of law affirmed by this court in **FRN vs. Usman [2012] 8 NWLR [1301] 141 at 159.**

Furthermore, that its reasoning that **Exhibits B-B1** are “*relevant facts*” and that the trial court could convict on same, is unsupportable in law as relevance is not the only basis for admitting a document in evidence and such a document
F must be admissible in law **Okonji vs. Njokamma [1991] 7 NWLR (Pt. 202) 131**; and that contrary to its reasoning, **PW3** was not present when the Statement was recorded and translated, and so, was not in any position to answer any questions thereon.

G The respondent, however, urged this court not to disturb the decision of the court below. It argued that if a decision was jointly taken by a police team to record and translate the said statements, and these duties were done by only two members, as in this case, then it would not be out of order to infer that the
H recording and translation was done by each and every one of them, and that it would be preposterous to take the position that every man on the team ought to have signed the said exhibits.

It further submitted that the appellant ought to show that the decision
I deprived him of something, thereby occasioning a miscarriage of justice, which he could have done by telling this court that certain pertinent questions were asked **PW3** that he could not answer; that the law is that he ought to show what he was deprived of when the police officers were not presented as witnesses. **Sun J Insurance Officer Ltd. vs. Ojemuyiwa [1965] 1 All NLR 1, Mobil Producing**

A Unlimited vs. Monokpo [2004] 2 MUSC 17, Adekeye vs. Adesina [2011] 20 WRN 1.

Furthermore, that having failed to show what he suffered, the appellant's agitation is an academic exercise **Salik vs. Idris [2015] 16 WRN 1, AG Plateau**

B State vs. AGF [2006] 3 NWLR (Pt. 967) 346; and that it was not the business of the defence to dictate to the prosecution what number or kind of witnesses they ought to present in discharging the burden of proof placed on them Ejirofor vs. State [2006] 6 NSCCR (Pt. 1) 2009 at 237 (sic), Akra vs. State [2008] 4 SCNJ C 250 at 265.

The appellant submitted that the respondent's argument negates a rule that a statement is inadmissible unless a person, who translated it, is called with the person, who wrote it down **Olalekan vs. State** (supra), which is to forestall the admission of hearsay evidence and ensure that innocent accused persons are not convicted on a mere *ipse dixit* of a ruthless policeman masquerading as the “*confessional statement*” of an accused.

E He argued that miscarriage of justice is not a test/ground for the admission of such statements in criminal trials; that once the document is wrongfully admitted in violation of established rules of evidence, a party is entitled *ex debito justiae* to have it expunged, and the court can *suo motu* expunge the document from evidence, Ogudo vs. State [2011] Vol. 202 LRCN 1, Olayinka vs. State F (2007) 9 NWLR (Pt. 1040) 561; and that the Prosecution is duty-bound to abide by the rules of evidence in providing its case, and to this end, failure to call the recorder and translator of Exhibit B-B1 renders it inadmissible in evidence.

G What does the law say? Whose argument would prevail? This is not a novel issue, and there are a number of authorities from those days of the West African Court of Appeal [WACA] to the present day by this court, from which we can find answers. There is - Rex vs. Gidado (1940) 6 WACA 60, R. vs. Ogbuewu (1949) 12 WACA 483, R. vs. Zakwakwa (1960) FSC 12, Nwaeze vs. H State (1996) 2 NWLR (Pt. 428) 1, and the case of FRN vs. Usman (supra), cited by the appellant, to name a few.

In **Gidado's Case** (supra), the interpreter was not called, and in allowing the appeal, WACA very aptly held as follows:

I It seemed to us that this failure on the part of the trial judge to appreciate the inadmissibility in evidence of alleged statements by the appellant, when such statements were not confirmed and established by the persons acting as interpreters, was fatal to J

A the conviction herein in that the learned trial judge misdirected himself in accepting such statements as having been proved.

B In **R. vs. Zakwakwa of Yorro** (*supra*), the accused person had made his statement in Mumuye. Two police witnesses said it was L/CPL Umoru, who translated it into Hausa, but the said statement showed PC Musa as the interpreter into Hausa, and he was not called. The statement was the only direct evidence of the assault admitted by the appellant charged with murder. In allowing the appeal, the **C** Federal Supreme Court held that if it was PC Musa, who did the interpretation and not Umaru, then since Musa was not called as a witness and subject to cross-examination, the Hausa and the English version are hearsay.

D In **Nwaeze vs. State** (*supra*), the statement was tendered and admitted in evidence through the interpreter, who could not testify at the trial because he was sick. This court held that:

E The court below was perfectly right in holding that the statement, Exhibit “A”, was inadmissible as the interpreter of the statement, made by the appellant from Igbo to English to the investigating police officer who recorded it in English, was not called to testify on the point. The legal position is that if the statement of an accused is made in a language other than English and it is interpreted into English by an interpreter to the recorder, the interpreter must be called to give evidence, on the point, at the trial of the accused otherwise the contents of the statement will be hearsay and the statement will be inadmissible.

F

G

H In **FRN vs. Usman** (*supra*), the statements were recorded in English through two Interpreters, who interpreted from Hausa to English and vice versa, but the two did not testify in court. The court below held that the conviction could not stand in the absence of their evidence and set aside the Judgment of the trial court and then acquitted and discharged the respondents. In affirming that decision, this court per **I** Rhodes-Vivour, JSC, explained the rationale behind it in explicit details, as follows:

J I must do some explanation. The police officer detailed or directed to obtain a statement from the accused person may not

- A** understand the language spoken by the accused person, and so the service of an interpreter is needed. The interpreter acts as interpreter between the police officer and the accused person. The interpreter understands the language spoken by the
- B** accused person and the English language. He speaks to the accused person in the accused person's local dialect and tells the police officer in English exactly what the accused person said. The police officer records it in English and that is the statement
- C** of the accused person. Usually the statement is recorded in the local dialect with English translation and both documents are admissible in evidence as the statement of the accused person. Before these documents are admissible in evidence the police
- D** officer who recorded the statement and the interpreter must testify in court. This is vital testimony. In court the interpreter is expected to tell the court the questions he asked the accused
- E** person on behalf of the police officer and the response given by the accused person. It is only when this is properly done that it can be said that the truth of the statement has been established. The court would have no difficulty concluding that the
- F** statement is a correct reproduction of what the accused person told the interpreter. When the purpose for tendering a statement is to establish the truth of its contents, and the statement was obtained with the help of an interpreter, both the
- G** interpreter and the person who recorded the statement must give evidence in court. The statement is hearsay and inadmissible if the interpreter does not testify in court ---

H In answering the question what constitutes hearsay evidence, this court further stated as follows in **FRN vs. Usman** (*supra*):

- I** If the witness testifies on what he heard some other person say, his evidence is hearsay. Such evidence is to inform the court of what he heard the other person say e.g. in cases of slander. If on the other hand his testimony is to establish the truth of an event in question or as in this case, to establish the truth of the contents of appellant's statements, it is hearsay and
- J** inadmissible evidence. Hearsay evidence is secondary evidence

A of an oral statement best described as second-hand evidence. What a witness says he heard from another person is unreliable for many reasons. For example he may not have understood the information/interpreters, or he may say things that were never said. Such evidence remains hearsay evidence because it cannot be subject to cross-examination in the absence of the informant/interpreters.

C See also **Shivero vs. State (1976) NSCC (Vol. 10) 197**, relied on by this court in **FRN vs. Usman (supra)**, where the appellant went to a local police station to give himself up after he stabbed the deceased with a knife in the presence of two eyewitnesses. The police officer-in-charge could not understand or speak his language, so he asked another policeman to act as interpreter. As a result of what the interpreter told the said police officer, the appellant was asked to take the police officer to where he had hidden the knife with which he had stabbed the deceased. He took them to the place and the knife was recovered there.

D At his trial, the officer testified as to admission made to him by the appellant through the interpreter, who did not testify, but the trial court relied on the admission and other evidence in convicting him. This court held that since the interpreter did not testify at the trial, the admission made in those circumstances is, certainly, hearsay and was, therefore, clearly inadmissible.

E At the end of the day, **Shivero's** conviction stood based on the admissible evidence of the eye-witnesses, and in particular, the testimony about his voluntary visit to the police station and as to how the knife used to attack the deceased was recovered. However, in relation to this case, the point being made is that where a conviction is based solely on a confessional statement, and the person, who acted as interpreter when it was obtained, did not testify, the confessional statement is hearsay evidence and the accused person is, therefore, entitled to an acquittal.

G The authorities refer to interpreters in particular, and the question that comes to mind is whether they apply in this case, where the said officers recorded and translated the statement. First of all, we must understand that the language of the court is English, which is why when such a statement is recorded in vernacular from an accused person, there always has to be an English translation see **Nwali vs. The State (1991) 3 NWLR (Pt. 182) 663**, where this court per Olatawura, JSC, explained:

J

A **Nigeria has no lingua franca. There are over 200 languages in this country. The medium of communication and expression in our courts is the English language. This has its roots in our colonial days when those, who administered justice in our**
B **courts --- were expatriates. To allow them to follow the proceedings, interpreters were provided for the benefit of the accused persons and the courts. Furthermore the different**
C **languages spoken in the country make it imperative that notwithstanding the impressive record in our judicial system, and because Nigerians of different tribes now administer**
D **justice, the proceedings in the courts – must of necessity be recorded in English language. The set-up of our courts demands that the English language will still be used. It is for this reason that when a statement is recorded in vernacular from – an accused, there is always an English translation.**

E See also **Damina vs. The State (1995) 8 NWLR (Pt. 415) 546**, wherein the statement in Hausa [Exhibit 2] was translated into English [Exhibit 2A] by the same officer [PW5], who took down the statement in Hausa. PW5 read out the Exhibit 2 in court, but in his Judgment, the learned trial Judge stated as follows:

F **The English translation of the Hausa Statement – Exhibit 2 is very poor and does not convey the real meaning of the Hausa Statement. The proper translation of the Hausa Statement –**
G **Exhibit 2 is, therefore, as follows ---**

This court, per Uwais, (JSC) (as he then was)), held as follows:

H **'Now it is a matter of common knowledge and indeed of judicial notice that the lingua franca of Nigeria and the official language of the superior courts in this country is English. Therefore, when a witness testifies in any proceedings before**
I **the superior courts in any Nigerian language or “vernacular”, such testimony is simultaneously translated by a court interpreter into English for the benefit of the court and the parties. Similarly, if documents written in any other language**
J **other than English are to be put in evidence, they are caused by**

- A** the party - who needs them to prove his case, to be translated into English. Where the party omits to have the document so translated, the superior court has a duty to cause the document to be translated by the official interpreter of the court, if any, or
- B** by a person that is fluent and competent to do so. Documents properly tendered - - cannot be rejected by the court merely on the ground that the documents have been written in a language or vernacular other than English. If they are so admitted, the
- C** courts are expected and indeed obliged to look at them when they come to assess or evaluate the evidence adduced. But they cannot do so unless they have the documents translated into English, and the translated copies put in evidence in the normal
- D** way. Thus, the interpreter or translator must be called to give evidence, in the course of which he will be expected to state the qualification, which makes him a competent interpreter or translator, and he will be examined, cross-examined and re-
- E** examined by the parties in order to ensure that he has done a good job of the translation. A judge cannot, therefore, engage in the translation or interpretation of such documents since he cannot perform the role of a witness and a judge at the same
- F** time.

- There it is – the interpreter and translator are interchangeable; same principles apply. To interpret means to translate orally and the interpreter provides oral
- G** translation between speakers, who speak different languages. The translator is also a person, who translates written messages from one language to another. So, one translates orally and the other one translates in writing. There is no difference between them in the eyes of the law, and the translator falls under the same
- H** hammer as the interpreter.

- In this case, the appellant's position is that his conviction and sentence to death cannot stand because the police officer, who recorded **Exhibit B**, the Yoruba version of his Statement, and the officer, who translated **Exhibit B1**, the
- I** English version, did not testify at his trial, and the authorities are in his favour. There is no question whatsoever that the appellant is right that the court below erred when it affirmed the trial court's decision.

- It said the right things, for instance, that proper foundation had to be laid as
- J** to why the officers were not available before the statement can be admissible; and

- A** that the *overall essence* of having them in court *is for purposes of answering questions arising* from the Statement. However, it based its finding of *sufficient and proper foundation* for the Exhibits to be admitted through **PW3**, on a very faulty premise. As I pointed out earlier, **PW3** never said he was present when the
- B** said statement was recorded and translated into English by the said police officers, and even if he said so, his testimony would have been hearsay.

The appellant made the same point that **PW3**, who was not present when the statement was recorded and translated, was not in any position to answer

C questions arising therefrom. The respondent says that if the said team took a joint decision to record and translate the Statement, it would be preposterous to hold that each member ought to have signed the Statement. But the respondent's argument misses the point completely.

- D** To start with, there is no evidence on record that the team of investigators took a joint decision to “*record and translate*” the appellant's statement. Secondly, and more importantly, **PW3** told the court that Sgt. Mogaji had recorded it in Yoruba; there is nothing wrong with that, and the court will not
- E** reject the statement merely because it is recorded in Yoruba language – **Damina vs. The State** (*supra*). But the court does not speak or understand Yoruba, and for the statement to be admissible in evidence, there had to be an English translation and there was.

- F** **PW3** also told the court that Inspector Ibitoye translated the said statement recorded in Yoruba into English, which is the language of the court. The twist in the tale is that for the statement recorded in Yoruba and its English translation to be admissible in evidence, the Sgt. Mogaji, who recorded it, and Inspector
- G** Ibitoye, who translated it, must testify in court – see **FRN vs. Usman** (*supra*). They both had to be present in court to explain what transpired when they recorded and translated the said appellant's statement, which includes both versions.

- H** Not only did the two officers have to be present to explain, they had to be cross-examined as to details of what transpired, particularly in this case where the stakes were so high and the appellant's life depended on it; the only evidence on which he was convicted was the confessional Statement- **Exhibits B-B1**. The two
- I** courts below made that clear. The trial court said:

- J** **There was no eye account evidence of how the deceased was killed. The prosecution tendered the statements of each of the accused person - The statements of the 2nd accused person**

A [appellant] were also tendered in evidence. The statements as confessional, the police treated the statements as confessional and the court admitted the statements in evidence as confessional statements.

B Further on in its judgment, the trial court found as follows

C On the second ingredient, there was sufficient evidence from the confessional statements of each of the accused persons in which each of them explained clearly and unequivocally the role each played in the death of the deceased.

D The trial court relied on the confessional statement tendered through **PW3**, who played no part in recording or translating it, to convict the appellant. As I pointed out earlier, the law is that when the purpose for tendering a statement is to establish the truth of its contents, the interpreter, which includes translator, and the person, who recorded it in another language must give evidence at the trial. The statement is hearsay and, therefore, inadmissible because it cannot be subject to cross-examination in the absence of the recorder and translator of the statement – See **Damina vs. State** (*supra*), where this court clearly said:

F The interpreter or translator - - will be examined, cross-examined and re-examined in order to ensure (that) he has done a good job of the translation.

G In **Olanipekun vs. The State** (2016) 13 NWLR (Pt. 1528) 100, the statement was recorded in Pidgin English. This court held that Pidgin English is English language spoken or written, and as regards this issue, Akaahs, JSC aptly observed as follows:

I The issue of fair hearing would have arisen if the appellant did not understand English at all and the statement had to be recorded in the language he speaks or understands and later translated into English - - - I am not unaware of the decisions in **Queen vs. Zakwakwa** - - and **Nwali vs. State** The two cases stress the importance of getting the original statement and the translations and those, who did the translations produced in

J

A court for purposes of comparison and testing the veracity of the translated versions.

In this case, the two officers, Sgt. Mogaji and Inspector Ibitoye, were very vital witnesses, who needed to be cross-examined, and failure to call them rendered the statement inadmissible. PW3, through whom the statement was tendered in evidence, was not there and never claimed to have anything to do with it. There was, therefore, no basis for the court below to say that:

He put himself on the line as a witness competent enough to take questions arising from the documents if the need arose.

But that is not all; the court below further stated as follows:

By Section 9(b) of the Evidence Act 2011, facts which otherwise are not relevant become relevant if they themselves or in connection with other facts they make the existence or nonexistence of any fact in issue or relevant fact probable or improbable. Thus Exhibits B-B1 if not by themselves alone will in connection with other facts make the issue of the murder of the deceased in this case probable or improbable. Aside from this, evidence obtained improperly or even in contravention of a law, shall be admissible pursuant to Section 14 of the Evidence Act, unless the court is of the opinion that the desirability of admitting the evidence is out-weighed by the undesirability of admitting evidence that has been obtained in that manner. We are satisfied that Exhibits B-B1 were found to be relevant and legally admissible pursuant to the forgoing statutory provisions hence the trial court allowed same.

Another angle to the equation – *relevancy vis-à-vis admissibility*. The **Evidence Act** does not provide any definite meaning but relevant means connected with the matter at hand, pertinent, and relevant evidence is that which is applicable to the issue, and which ought to be received. Admissibility is the concept in law of evidence that determines whether or not evidence can be received by the court. The evidence must first be relevant, but even relevant evidence must be tested for its admissibility. When it is said that a piece of evidence is admissible, it means that the evidence is relevant and is one that can be admitted by the court because it

A does not offend any exclusionary rule.

A fact, ordinarily admissible, may become inadmissible for some legal reason or the fact is too remote to be material. Thus, that a suspect confessed is relevant but if the confession was obtained involuntarily, it will be excluded as

B inadmissible.

In other words, for the piece of evidence to be admissible, it must be relevant but this is not necessarily *vice versa* since a piece of evidence could be relevant without being admissible, which is the case here. If all things were equal,

C the **Exhibits** will “*in connection with other facts make the issue of the murder of the deceased probable or improbable*” as the court below said. But all things are

NOT equal. **Exhibits B-B1** are relevant but cannot be received by the court because they are inadmissible, and standing inadmissible, the window that would

D have allowed the court to look into any relevant facts therein is sealed shut.

Even so, Section 227 (1) of the Evidence Act, 1990, which is the same as Section 251 (1) of the 2011 Act, provides that:

E **The wrongful admission of evidence shall not of itself be a**
ground for the reversal of any decision in any case where it
appears to be court on appeal that the evidence so admitted
cannot reasonably be held to have affected the decision and that
F **such decision would have been the same if such evidence had**
not been admitted.

With **Exhibits B-B1** out of the way, is there any other evidence presented by the

G prosecution to justify a conviction for murder? The appellant argued that there is no other evidence and that the trial court and court below were wrong to have based his conviction on his retracted statement. He also submitted that:

H **The confessional statement - - was retracted - - following which**
a trial within trial was conducted by the trial court. Although
the trial court found that the - - extra-judicial confessional
statement (ExhibitB-B1) was voluntarily made - - it is
I **nonetheless desirable to have a modicum of evidence**
confirming that [it] was true especially in a murder case.

The respondent, on its part, also argued as follows in its brief:

J

A **One curious development about the proceedings of the trial court before the exhibit was admitted in evidence was that the judgment showed that a trial within trial was conducted. An examination of the objection - - and the subsequent oral evidence of the appellant reveals that [he] did not allege that he did not voluntarily make the exhibit. What both his objection and subsequent oral testimonies in court boiled down to was that of outright denial of making the exhibit. - - This being the case, - the trial within trial conducted by the lower (sic) court preceding the admission of the exhibit was indeed a surplusage. - It is, therefore, our submission that the trial court actually extended some benevolent act to the appellant when the court still went the whole hog of conducting a trial within trial before admitting Exhibits B-B1.**

E They must be referring to another record because the record before this court shows that the *trial within a trial* conducted by the trial court had nothing whatsoever to do with the appellant.

F **Exhibits B-B1** had been admitted before the prosecution sought to tender the confessional statement of first accused, who objected on the ground of voluntariness, and the trial court then conducted a *trial within a trial* to determine its admissibility, which is the right step to take. It is settled that *trial within trial* is only used to test the voluntariness of a confessional statement; not what value or weight to attach to evidence. I came across a South African case *S vs. De Vries* 1989 (1) SA 228 (A), where Nicholas AJA, summarized its purpose brilliantly, as follows:

H **It is essential that the issue of voluntariness should be kept clearly distinct from the issue of guilt. This is achieved by insulating the enquiry into voluntariness in a compartment separate from the main trial - - Where, therefore, the question of admissibility of a confession is clearly raised; an accused person has the right to have that question tried as a separate and distinct issue. At such trial, the accused can go into the witness-box on the issue of voluntariness without being exposed to general cross-examination on the issue of his guilt.**

J

A See also **Onyenye vs. State (2012) 15 NWLR (Pt. 1324) 586**, where this court per Adekeye, (JSC), expounded as follows:

B **It has now become a matter of routine for an accused person to retract a confessional statement in the course of trial. The court has adopted two reactions in circumstances as follows:**

C (c) **Where the accused has clearly expressed his ordeal in the process of obtaining the statement accredited to him in effect that it was obtained by force, tricks or undue influence or any other non-recognizable legal ways, there would be need for a trial within trial.**

D (d) **Where the accused retracted the confessional statement on the ground that it was not read to him before he signed it or that he never made it all, the requirement of the trial within trial is not applicable.**

E In **Ogudo vs. State (2011) LPELR -860 (SC)** this court held:

F **Where the accused person says that he did not voluntarily make the statement credited to him, such a stand by the accused person calls for the holding of a trial within trial. Where, on the other hand, the accused person says he did not sign the statement, the statement should be admitted in evidence, thereafter, the question of what weight should be attached to such a statement becomes an issue for the judge to decide at the end of the trial.**

H The bottom line is that a *trial within trial* is not applicable where the objection to admissibility is that a confessional statement was not read to the accused person before he signed it; or that his signature is not affixed on it; or that it was written by the prosecution and he only endorsed it; or that he is not the maker – see also **Sule vs. State (2009) 17 NWLR (Pt. 1169) 33**. Also, the appropriate time to object on the ground that a confessional statement was made involuntarily is when it is being tendered; not when the accused opens his defence or during that defence – see **Ogudo vs. State (supra)**. In this case, the appellant did object at the right time but on the ground that the makers were not called, which is not a ground for holding a *trial within a trial*.

A He only raised the issue of being tortured to make the said statement when he was testifying in his own defence as **DW2**, which was too late in the day, and not the proper stage to raise such an objection that would warrant a call for a *trial within trial*.

B The said *trial within trial* did not concern the appellant and I must also add that a *trial within trial* is a separate and distinct proceeding from the main trial, thus, evidence adduced therein, cannot be transplanted, injected or imported into the main trial.

C Back to the question whether there is any other evidence, apart from **Exhibits B-B1** to bear out his conviction for murder. The appellant contends that there is no corroborative evidence confirming **Exhibits B-B1**, so the prosecution failed to prove beyond reasonable doubt that he murdered the deceased and that
D such an act was intentional with knowledge that death or grievous bodily harm was its probable consequence. But the respondent insist that the court below was right of affirm the decision of the trial court that based its conviction on the said **Exhibits B-B1**, corroborated by **PW1, PW2**, and **Exhibit A**.

E The meaning of corroboration as stated by Lord Reading, CJ, in *Rex vs. Baskerville* [1916] 2 KB 658, adopted by this court in **Okabichi vs. State** (1975) 3 SC 96, is captured as follows:

F **We hold that evidence in corroboration must be independent testimony, which affects the accused by connecting or tending to connect him with the crime. - - It must be evidence, which implicates him, that is, which confirms in some material**
G **particular not only the evidence that the crime has been committed, but also that the prisoner committed it. - - Corroborative evidence is evidence, which shows or tends to show that the story - - that the accused committed the crime is**
H **true, not merely that the crime has been committed, but that it was committed by him.**

In the said **Okabichi vs. State** (*supra*), Coker, JSC, added that:

I **Corroboration is evidence, which may be direct or circumstantial but in any case, it is the duty of the court to ascertain that whatever evidence is – used or regarded as**
J **corroborative is independent of the evidence to be**

- A** corroborated and is such as supports the story of the main evidence to the effect that it renders the story more probable that it implicates the accused in some material particular. No stereotyped category of evidence is envisaged and a great deal depends on the circumstances of each case for what may in a given set of circumstances amount to corroboration may not be so in another set of circumstances.
- B**
- C** In this case, the trial court connected every ingredient of the offence of murder to **Exhibits B-B1**, in convicting the appellant. In affirming that decision, the court below held as follows:
- D** Aside from the voluntary confession of the appellant, the prosecution in order to establish the death of the deceased tendered exhibit A i.e. the autopsy report, which exhibit was admitted in evidence without any objection whatsoever. Either
- E** of Exhibits A and F-F5 is conclusive evidence that the deceased died. Exhibits B-B1 dully admitted in evidence contains the voluntary confession of the appellant that he partook in the act that led to the death of the deceased. Having regard to the
- F** circumstances of the instant appeal, we have come to the conclusion that the prosecution discharged the burden of proof placed upon it beyond reasonable doubt.
- G** Exhibit A is the autopsy report issued by PW1, and the said Exhibits F-F5 are pictures and negatives of the body of the deceased admitted in evidence through PW3. These Exhibits prove conclusively that the murder victim died; nothing more. There is nothing in the Exhibits that implicates the appellant or connects
- H** him to her death. Her husband, PW2, testified that:
- I** On the 3rd day after the deceased went to Erinje, the police led by the DPO and other people including myself left for Erinje in search of the deceased. During the search, we got to the place where we saw her body stucked (sic) into a pit and covered with soil. The rains that fell thereafter eroded the soil and her legs came out.
- J** Under cross-examination by counsel, PW2 stated as follows:

A

I know Sunday John, the 4th accused and Ayodele Ikuemoniham, the 1st accused well before the pendency of this case. I don't know other accused well before the pendency of

B

this case.

C **PW2** did not even mention the appellant. In what way did his testimony implicate him or connect him to the death of his wife? The fourth witness, [**PW4**], only testified as to the statement of the third accused, and he had nothing to do with the appellant.

D If we scratch out **Exhibits A & F-F5** and **PW2**'s testimony from the picture without **Exhibits B-B1**, what is left in terms of evidence against the appellant? Nothing, absolutely nothing; there is no evidence outside **Exhibits B-B1** to implicate him or connect him to the murder of the said Maria Joseph Erhiyore.

E The **Exhibits** were the linchpin of the prosecution's case, but they are inadmissible, and with the said **Exhibits** pulled out, the prosecution's case collapses; there is nothing to hold it up. There is nothing outside **Exhibits B-B1** to show its story is true, and the appellant is right that the conviction must be set aside. This issue is also resolved in his favour. In the circumstances, it will not be necessary to consider **Issue 3**, on his arraignment.

F The appeal succeeds and it is allowed. The judgment of court below affirming the decision of the trial court is set aside. The verdict of guilt, and conviction and sentence to death are thereby, set aside. The appellant is acquitted and discharged.

G

Amina Adamu Augie.
Justice, Supreme Court

H **I.T. MUHAMMAD, (JSC):** I was privileged to have read before now, the judgment of my learned brother, Augie, (JSC). I am in agreement with my lord's reasoning and conclusion which I adopt. I allow the appeal. I adopt consequential orders made in the lead judgment.

I

Ibrahim Tanko Muhammad,
Justice, Supreme Court

J **PETER-ODILI, (JSC):** I agree with the judgment and reasonings just delivered by my learned brother, Amina Adamu Augie (JSC) and to underscore my support, I shall make some comments.

A This is an appeal from the judgment of the Court of Appeal, Akure
 Division delivered on the 3rd day of May, 2013 in which the court affirmed the
 appellant's conviction and sentence to death for an offence of murder handed
 down by the High Court of Ondo State sitting at Okitipupa per P. I. Odunowo J, a
B judgment delivered on the 29th September, 2006.

FACTS:

C The appellant and three others were charged before the Ondo State High Court,
 Okitipupa division on a one count charge of murder of one Maria Joseph
 Erhioyore on the 2nd June, 1995 at Ode Erinje Village near Okitipupa.

D The case of the prosecution was that the deceased, a palm oil dealer, came
 to the village to buy palm oil from the 1st accused person who knew the deceased
 for a long time and had promised to supply her with kegs of palm oil. That when
 the deceased got to the village, the 1st accused took her to the house of the 2nd
 accused where the appellant and the 4th accused were already waiting. There the
E four accused persons tied the neck and mouth of the deceased with a piece of cloth
 and raped her in turns and in the process she died of suffocation. That they stole
 her money with which she came to buy the palm oil, N13,500.00 in all and
 disposed of her body in a shallow pit latrine at the back of the house of 2nd accused.
F Following a search party her corpse was found and the accused persons arrested
 and each made a confessional statement.

G At the trial, 2nd accused pleaded guilty of the charge and was convicted and
 sentenced to death summarily while the other accused pleaded not guilty and in
 the end the three accused persons including the appellant were convicted and
 sentenced to death. Appellant appealed to the Court of Appeal which dismissed
 his appeal, hence the recourse of the apex court.

H . On the 17th day of November, 2016 date of hearing, learned counsel for the
 appellant, Fred Onuobia Esq. adopted the amended appellant's brief filed on
 17/2/16 and deemed filed on the 10/3/16 and a reply brief on 16/5/16.

Three issues for determination of the appeal were distilled from the
 grounds of appeal and they are thus:

- I** 1. **Whether, having regard to the facts and circumstances of**
this case, the court below was correct in affirming the
trial judgment in admitting the extra-judicial
J **confessional statement of the appellant (Exhibits B-B1)**
notwithstanding the fact that none of the persons who

- A** recorded and translated the said confessional statement was called as a witness. (This issue is distilled from ground one and ground three of the Amended notice of appeal).
- B** 2. Whether, having regard to the facts and circumstance of this case, the court below was correct in affirming the trial judgment convicting the appellant based on his retracted extra-judicial confessional statement of the
- C** appellant (Exhibits B-B1) when there was no iota of evidence corroborating the said retracted confessional statement. (This issue is distilled from ground two and ground four of the amended notice of appeal).
- D** 3. Whether the proceedings conducted on February 27, 2004 as contained on pages 37 – 41 of the record complied with the provisions of Section 36 (6) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and Section 215 of the Criminal Procedure
- E** Law of Ondo State or is valid in at all? (This issue is distilled from ground Five of the amended notice of appeal).
- F** Olarenwaju Osinaike of counsel for the respondent adopted the brief of the respondent filed on the 4/5/16 and raised three issues for determination which are as follows:
- G** 1. Whether, the court below was justified in upholding the decision of the trial court admitting the confessional statement of the appellant (Exhibits B-B1) in evidence.
- H** 2. Whether, in the circumstances of this case, the court below was right in upholding the decision of the trial court which placed reliance on Exhibit B-B1 and acted on it in convicting and sentencing the appellant to death.
- I** 3. Whether the proceedings conducted by the trial court on 17th February, 2004 relating to the arraignment of the appellant, were done in contravention of the provision of Section 36 (6) of the Constitution of the Federal Republic of Nigeria, 1999 (as Amended) and Section 215
- J** of the Criminal Procedure Law of Ondo State as to

A render the conviction and sentence of the appellant by the trial court null and void.

For ease of reference I shall utilise the issues as crafted by the appellant.

B

ISSUES 1 & 2

- 1. Whether having regard to the facts and circumstances of this case, the court below was correct in affirming the trial judgment in admitting the extra-judicial confessional statement of the appellant (Exhibits B-B1) notwithstanding the fact that none of the persons who recorded and translated the confessional statement was called as a witness.**
- 2. Whether having regard to the facts and circumstances of this case, the court below was correct in affirming the trial judgment convicting the appellant based on the extra-judicial confessional statement of the appellant (Exhibits B-B1) when there was no iota of evidence corroborating the said retracted confessional statement.**

F Learned counsel for the appellant, Mr. Onuobia submitted that it was mandatory that the recorder or translator of a confessional statement must be called as a witness to tender the confessional statement for such a confessional statement to be admissible in evidence and failure as in this case was fatal to the case of the prosecution. He cited **Olalekan vs State (2001) 18 NWLR (Pt. 746) 818; Okeke vs. Obidefe (1965) All NLR 51 at 54 etc.**

That the statements having been wrongly admitted should be expunged. He referred to **Ali vs. Audu (1996) 6 NWLR (Pt. 453) 148 at 167.**

H He stated that the conviction of the appellant cannot be sustained since there was no corroboration or something outside the statement to show that the confession was true. He relied on **Akinye vs. State (1988) 3 NWLR (Pt. 85) 72; Salawu vs. State (1971) NMLR 249 etc.**

I Mr. Osinaike of counsel for the respondent urged the court not to disturb the concurrent findings of the two courts below as there was no miscarriage of justice as appellant failed to show how he suffered on account of the recorder of the confessional statements and the translator not having come forward to testify.

J He cited **Sun Insurance Office Ltd vs. Ojemuyiwa (1965) 1 All NLR 1;**

A Adekeye vs. Adesina (2011) 20 WRN 1 at 16; Ejiofor vs. The State (2006) 6 NSCCR (Pt. 1) 2009 etc.

That nothing in the evidence contradicted the confessional statements, rather, the evidence of PW1, PW2 and Exhibit A, the medical report corroborated the confessional statements. He cited **B Ogedengbe vs. State (2015) 18 WRN 1; Ntaha vs. State (1972) 4 SC 1.**

The summary of what the appellant sets out in these issues is that since neither the recorder nor the translator of the appellant's alleged confessional statement were called as witnesses by the respondent at the trial court, the lapse rendered the confessional statement inadmissible in evidence. That a miscarriage of justice ensued on the use of such a confessional statement to sustain the conviction and sentence of the appellant. That there is no corroborative evidence direct or circumstantial confirming that the statements, Exhibits B and B1 were true.

Respondent's counsel stance is that the Exhibits B B1 having been identified by PW3 who had worked with the recorder and translator and could identify their handwriting, it was good enough.

On what should happen where an accused person gave an extra-judicial confessional statement, recorded by a police officer or third party and translated. This court in **F Olalekan vs. State (2001) 18 NWLR (Pt. 746) 793 at 818**, held that the statement is inadmissible unless the person who interpreted it is called as a witnesses as well as the person who wrote it down. Therefore, the trial court in this instance had gone outside the prescription of what is required when it admitted the confessional statements without the recorder and translator testifying. The trial court rather took the evidence of PW3, who had been a police officer working with the duo to identify their handwritings in the said statements as meeting the standard required to admit and utilise such confessional statements. The Court of Appeal upheld what the trial court did and this is a clear departure of the settled principle on what should obtain. I refer to **H FRN vs. Usman (2012) 8 NWLR (Pt. 1303) 141 at 159** thus:

I “The police officer detailed or directed to obtain a statement from the accused person may not understand the language spoken by the accused person, and so the services of an interpreter is needed.... Usually, the statement is recorded in the local dialect (sic) with English translation.... Before these documents are admissible in evidence, the police officer who

A recorded the statement and the interpreter (translator) must testify in court. This is vital testimony. It now becomes clear that where a conviction is based solely on a confessional statement, and the (police officer who recorded it) and the
B interpreter (translator) who acted as interpreter (translator) when the said statement was obtained did not testify, the confessional statement is hearsay evidence and the accused person is entitled to an acquittal”.

C It is to be said that Exhibits B – B1 having been wrongly admitted ought to be expunged or at the worst ignored for the court to look elsewhere for a useful piece of evidence. See **Ali vs. Audu (1996) 6 NWLR (Pt. 453) 148 at 167.**

D Evident in this matter is that there was no independent evidence in some material particulars on which the offence charged could be properly linked with the appellant. Firstly, the co-accused retracted their statements and so even though such retraction may not affect the admissibility of such statements it
E would be difficult to use them in finding for the culpability of the appellant as a co-accused. This is as stipulated by Section 29 (3) of the Evidence Act, 2011 which provides thus:

F “Where more persons than one are charged jointly with an offence and confession made by one of such person in the presence of one or more of the other persons so charged is given in evidence, the court shall not take such statement into
G consideration as against any of such other persons in whose presence it was made unless he adopted the said statement by words or conduct”.

H In the light of the above and especially the absence of an independent evidence making the connection between the appellant and the offences charged, it is difficult for the appellant to be said to have caused the death of the deceased and that with the intention on the part of the appellant to have caused the death or
I grievous bodily harm with the consequence of the death of the deceased. See **Salawu vs. State (1971) NMLR 249; Akinye vs. State (1988) 3 NWLR (Pt. 85) 72.**

From the foregoing and the better reasoning of my learned brother Adamu-
J Augie (JSC), this appeal has merit and is allowed by me. I abide by the

A consequential orders made.

Mary Ukaego Peter-odii
Justice, Supreme Court

B **OLU ARIWOOLA, (JSC):** I have been obliged before now with a copy of the lead judgment of my learned brother, **Amina Augie, (JSC)** just delivered. I am in complete agreement with the reasoning and conclusion that this appeal has merit and should be allowed. I too will allow the appeal.

C Appeal is allowed.

I abide by the consequential orders in the said lead judgment. The appellant is acquitted and discharged.

Olu Ariwoola
Justice, Supreme Court

D

EJEMBI EKO, (JSC): On 29th September, 2006 the Ondo State High Court, sitting at Okitipupa (Coram Odunwo, J.) convicted and sentenced the appellant herein to death for the offence of murder. The conviction and sentence were affirmed on appeal by the Court of Appeal, Akure Division on 3rd May, 2013. The appellant, not satisfied, has further appealed to this court.

F The appellant and 3 others were jointly tried on one count charge of the murder of one Mrs. Maria Joseph Erhioyoro (deceased), said to have been committed on 2nd June, 1995 at Odo Erinje Village near Okitipupa.

G The deceased, a palm oil dealer, came to Odo Erinje village, on a market day to buy palm oil. She had with her N13,500.00. She had previously been dealing with the 1st accused. On the fateful day the deceased, acting allegedly on the undertaking of the 1st accused to supply kegs of palm oil, went straight to the house of the 1st accused, ostensibly to buy palm oil. The 1st accused, as alleged, took the deceased to the house of the 2nd accused, where the appellant and the 4th accused were already waiting. The prosecution further alleged that the four (4) accused persons (including the 3rd accused/appellant) in the house of the 2nd accused tied the neck and mouth of the deceased with a piece of cloth and raped her in turns. She died of suffocation in the process. The accused persons, allegedly, stole the N13,500.00 the deceased came with. They later dumped her corpse in a shallow pit latrine at the back of the 2nd accused's house. A search party later found the corpse after a rainfall exposed it. The four accused persons, including the 3rd accused/appellant, were arrested and each of them made extra-judicial statements to the police.

J

- A** Specifically, the statement of the 3rd accused/appellant, confessional in nature, was admitted in evidence as Exhibits “B and B1”. The appellant made his statement in Yoruba language. One Sgt. Mogaji, a police officer, recorded the statement in Yoruba language. Exhibit “B”, is the Yoruba version of the statement.
- B** Inspector Ibitoye, also a Police officer, translated the statement from Yoruba language, it was recorded by Sgt. Mogaji into English. The English language version of the statement is Exhibit “B1”.

- At trial, neither Sgt. Mogaji nor Inspector Ibitoye testified. Exhibit “B”
- C** (recorded by Sgt. Mogaji) and “B1” (the English translated version of Exhibit “B” by Inspector Ibitoye) were tendered and admitted in evidence through the PW.3, a police officer, who claimed to be part of the police investigation team. The PW.3 never claimed that he was present when the appellant made his statement
- D** recorded by Sgt. Mogaji in Yoruba language. He also did not claim that Inspector Ibitoye translated the statement from Yoruba to English languages in his presence. Exhibits “B-B1” were admitted in evidence through PW.3 on the only ground that he had worked with Sgt. Mogaji and Inspector Ibitoye for some time
- E** in the same station and was acquainted with their handwritings, and not that he vouched or could vouch for the veracity, correctness or authenticity of either exhibit.

- Chief Kuewumi, defence counsel, had objected to admitting the statements
- F** exhibits “B-B1” through the PW. 3 on the ground that “the statements are not tendered by the makers and no proper foundation laid as to the reasons why the makers are not called”. The learned trial judge nonetheless admitted the statements in evidence, reasoning *inter alia*:

- G** “While I agree that this witness may tender the statements in law, as stated by the learned DDPP, I hold the view that proper foundation should be laid as to the reasons why the makers of the statements are not called. The learned DDPP argued further that this court is a
- H** Court of Justice and technicalities to prevail over justice. I hold the view that since the defences of the accused persons are likely to be based on these statements i.e. whether or not they are voluntarily
- I** made, it will be in the interest of justice that the statements are admitted at this stage. The statements of the 3rd accused person are admitted in evidence and marked Exhibit “B and B1”.

- At the time of this proceeding at the trial court the provisions of Section 137 (now
- J** Section 135 of the Evidence Act, 2011) were not only extant, they governed the

- A** proceedings on the burden of proof in any proceedings in which commission of a crime by a party is directly is issue. The law is now trite that in a criminal case it is essential that proof of material facts should necessarily be beyond reasonable doubt. See for instance, **OBUE vs. THE STATE (1976) 2 SC. 79;**
- B** **ELIZABETH OGUNDIYAN vs. THE STATE (1991) 4 SCNJ 44; (1991) 4 SC. 100.** Where the prosecution failed to prove a material fact in a criminal proceeding beyond reasonable doubt the law imposes on the court to resolve the benefit of doubt on favour of the accused person. It does not lie in the office of the
- C** adjudicator to resort to speculation in order to fill in the gap for the prosecutor. Speculation, being an unfortunate and undesirable frolic, the familiar admonition is that a court of law must refrain from indulging in it. As Uwaifo, (JSC) had put it in **ACB PLC vs. EMOSTRADE LTD. (2002) 8 NWLR (pt. 770) 501:** It is not
- D** part of judicial exercise but a mere curious guess work.

I notice, from the portion of the proceedings of the trial court that I had earlier reproduced that the learned trial judge had committed some judicial blunders in the bid to admit Exhibits B-B1. This is:

- E**
- “i. **Notwithstanding his holding that proper foundation should be laid as to the reasons why the makers of these statements are not called, he nonetheless admitted in**
- F** **evidence gratuitously without proper foundation. He ought to have resolved the benefit of doubt in favour of the accused/appellant;**
- G** **ii. He undertook the frolic of speculating that the defences of the accused persons are likely to be based on these statements i.e. whether or not they are voluntarily made; and**
- H** **iii. By dint of Section 27(2) Evidence Act then extant (now Section 29(2) of Evidence Act, 2011) it behoved the trial court to admit in evidence upon proof beyond reasonable doubt that the confession was voluntarily made or “that the confession (notwithstanding that it**
- I** **may be true) that was not obtained in a manner contrary to the provisions of” Section 27 of the Act. The law does not therefore permit the trial court to admit in evidence, on a nebulous claim of interest of justice, a confessional**
- J** **statement that was obtained or made involuntarily”.**

A

The trial court proceeded on these three basic or fundamental errors to admit Exhibits B-B1 in evidence. It made extensive use of Exhibits B-B1 to convict the 3rd accused/appellant for the alleged murder. The law is settled that if evidence is

B inadmissible, the court can not use it at any stage; even where no objection has been raised against it at the trial. See **ALADE vs. OLUBADE (1976) 2 FNR 10 at 13**. In **DELE vs. THE STATE (2011) 1 NWLR (pt. 1229) 508** the law was re-

C by the accused person is not admissible in evidence, and where it is wrongly admitted in evidence, without the court conducting the necessary trial-within-trial to determine if it was voluntarily made, it ought to be expunged from the evidence before the court.

D The judgment of the trial court is copied at pages 96 – 123 of the records of appeal. The learned trial Judge, in the Judgment, acknowledged that there was objection to the admissibility of the confessional statements, Exhibits B-B1, which he admitted in evidence upon overruling the objection.

E The evidence on which the learned trial judge found that the prosecution had proved beyond reasonable doubt the guilt of the 3rd accused/appellant for the offence of murder alleged against him came largely from Exhibit B-B1. At pages 121-122 of the record he had found *inter alia*:

F

“even the confessional statements of each of the accused persons showed abundantly that the prosecution succeeded in establishing that the deceased i.e. Mrs. Maria Joseph Erhiyore died on 2/6/95.

G

On the second ingredient, there was sufficient evidence from the confessional statements of each of the accused persons in which each of them explained clearly and unequivocally the role each played in the death of the deceased. These confessional statements, as said earlier, were voluntarily obtained, properly tendered and admitted in evidence. Each accused admitted that they tied up the deceased at the mouth and neck region, had sexual intercourse with her one after the other until the woman gave up the ghost, and later in the night buried her in a pit latrine from where the corpse was later recovered. It is very clear that the acts of each of the accused persons as stated above caused the death of the deceased.

H

I

J

- A The learned trial judge found consequently that the act of the
accused persons, admitted in their respective confessions,
caused the deceased to die as a result of suffocation and that
they, each, “knew that or grievous bodily harm would be the
B probable consequence”.**

- The Court of Appeal affirmed the conviction and sentence of the appellant for the murder of the deceased. The intermediate court held that the procedure whereby
**C Exhibits B-B1 were tendered and admitted in evidence through PW.3 was proper
in law, and that Exhibits B – B1, pursuant to Section 15 of the Evidence Act were
“found to be relevant and legally admissible” in evidence “hence the trial court
allowed same in evidence”. In affirming the conviction and sentence of the
D appellant for the alleged murder the Court of Appeal held at page 298 of the
records of appeal that “Exhibits B-B1, duly admitted in evidence contains the
voluntary confession of the appellant that he partook in the act that led to the death
of the deceased”. It is this decision of the Court of Appeal that has prompted this
E further appeal by the appellant to this court.**

I have perused the briefs of argument filed and adopted for the determination of this appeal. I think Issue 1 formulated and argued by the appellant will completely resolve this appeal. That is:

- F “Whether having regard to the facts and circumstances of this
case, the court below was correct in affirming the trial
judgment in admitting the extra-judicial confessional
statement of the appellant (Exhibits B-B1) notwithstanding the
G fact that none of the persons who recorded and translated the
confessional statement was called as a witness”.**

- H Mr. Omobia, of counsel for the appellant submits on this issue that failure to call
the recorder and/or translator of the confessional cum self incriminating
statement of the appellant, as in Exhibits B-B1 renders the statement inadmissible
in evidence. He relies on **OLALEKAN vs. THE STATE (2001) 18 NWLR (pt.
I 746) 818; OKEKE vs. OBIDEFE (1965) ALL NLR 51 At 54 etc. Counsel
further submits, relying on ALI vs. AUDU (1996) 6 NWLR (pt. 453) 148 at
167, that Exhibits B-B1 having been wrongly admitted in evidence could be, and
should be, expunged.****

- J Mr. Osinaike for the respondent, on his part, submits that the appellant has**

A not shown that he suffered any miscarriage of justice by the failure of the recorder and translator of the appellant's confessional statement to come forward to testify; and that we should not disturb the concurrent findings of facts by the lower courts. He cited *inter alia* **SUN INSURANCE OFFICE LTD vs. OJEMUYIWA**
 B (1965) 1 ALL NLR 1; **EJOFOR vs. THE STATE** (2006) 6 NSCCR (Pt. 1) 2009; **ADEKEYE vs. ADESINA** (2011) 20 WRN 1 at 16.

Wrongful admission in evidence a fact or piece of evidence which in law, ought not to have been in the first place is a matter of law, and not a finding of fact as such. The principle on concurrent findings of fact by the courts below does not apply. It is clear from **ALADE vs. OLUBADE (supra) and ILIYASU SUBERU vs. THE STATE** (2010) 3 SC. (pt. 2) 105 that admitting in evidence a piece of evidence, which by law, is inadmissible is an illegality. It is for this
 D reason that if a piece of evidence which is inadmissible in evidence is wrongly admitted in evidence the court can not use it at any stage of the proceedings; even where no objection was raised against it at the trial. An inadmissible evidence, admitted in evidence with or without objection at the time it was admitted,
 E remains nonetheless irrelevant and inadmissible. See **BISICHI TIN CO. LTD. vs. COMMISSIONER OF POLICE** (1963) NNLR 71.

Exhibits B-B1 were admitted in evidence through PW.3, who neither claimed any role in the recording or translation, nor was he present when they
 F were recorded and translated. The recording of the statement (Exhibit B) in Yoruba language by Sgt. Mogaji presupposes the appellant allegedly spoke to Sgt. Mogaji in Yoruba language. PW.3 did not claim that he spoke and or understood Yoruba. When an interpreted or translated version of an accused is
 G sought to be tendered in evidence, unless the interpreter or translator is called as a witness the translated version is hearsay and therefore inadmissible in evidence. See **QUEEN vs. ZAKWAKWA** 5 FSC 12 At 13; **DOGO ADATU vs. THE STATE** (1980) 2 NCR 33; **UTIE vs. THE STATE** (1980) 2 NCR 69;
 H **OALEKAN vs. THE STATE (supra); OKEKE vs. OBIDEFE (supra).**

Sgt. Mogaji who recorded the statement of the appellant in Yoruba Language did not testify. He was not called to testify as his whereabouts were unknown. Inspector Ibitoye who translated Exhibit B to English (Exhibit B1)
 I also did not testify. Exhibit B and B1 are therefore hearsay and inadmissible in evidence, unless their recorder and interpreter were called to attest to the veracity of their recording and interpretation. This case in all fours with **FRN vs. USMAN** (2012) 8 NWLR (pt. 1308) 141 at 159 where it was held:

J

A “Before these documents are admissible in evidence, the police officer who recorded the statement and the interpreter (translator) must testify in court ----- Where a conviction is based solely on a confessional statement, and the (police officer who recorded it) and the interpreter (or translator) who (interpreted it) when the statement was obtained did not testify, the confessional statement is hearsay evidence and the accused person is entitled to an acquittal”.

C Exhibits B-B1, relied upon for the conviction of the 3rd accused/appellant for the murder of the deceased are inadmissible evidence, both of them being hearsay pieces of evidence produced and tendered by PW.3 who had no hand in their recording and interpretation. The conviction and sentence of the appellant upon a clearly inadmissible evidence is itself evidence of miscarriage of justice. Accordingly, I shall not subscribe to the contention of the respondent that the appellant has not shown that he suffered any miscarriage of justice by the admission in evidence of Exhibits B-B1 and their use in the conviction and sentence of the appellant. The law enuring in favour of every accused person is that he can only be convicted or an alleged offence if, and only if, the prosecution established his guilt beyond reasonable doubt by legal evidence lawfully admitted in evidence against him.

F Every person charged with a criminal offence shall be presumed to be innocent until he is proved guilty. See Section 36(5) of the 1999 Constitution. Section 137 of the then extant Evidence Act (now Section 135 of the Evidence Act, 2011) imposes a strict burden on the prosecution to prove crime beyond reasonable doubt. If they fail to discharge the burden, their allegation that an offence had been committed fails. See **OGUNBANJO vs. THE STATE (2002) 15 NWLR (pt. 789) 76; NWOBODO vs. ONOH & ORDS. (1984) NSCC 1; (1984) 1 SCNLR 1.**

H All I have been trying to demonstrate is that the conviction and sentence of the appellant on Exhibits B-B1, which are inadmissible hearsay evidence, by the trial court were wrong in law. It follows also that the affirmation of the conviction and sentence of the appellant by the Court of Appeal was equally wrong in law. Coming, as I do, to this conclusion, I hereby join my learned brother, AMINA ADAMU AUGIE, JSC, in not only allowing the appeal but also setting aside the conviction and sentence of the appellant for the offence of murder charged. The conviction and sentence of the appellant are hereby set aside and in their place I

A hereby enter in favour of the 3rd accused/appellant, an order of discharge and acquittal.

Ejembi Eko,
Justice, Supreme Court.

B

Representations

Fred Onuobia, (Esq.) with
Solomon Ezike, (Esq.) for the **appellant**

C Olanrewaju Osinaike, (Esq.) with
Adewara Adeola, Esq. for the **respondent**

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**OWOLABI KOLADE
AND
THE STATE**

SC. 579/2015

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

FRIDAY, 24TH FEBRUARY 2017

BEFORE THEIR LORDSHIPS

**OLABODE RHODES-VIVOUR
CLARA BATA OGUNBIYI
AMIRU SANUSI
AMINAAUGIE
PAUL ADAMU GALINJE**

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

APPEAL: Concurrent findings of two courts – How to displace.

APPEAL: Where no issue is formulated from a ground(s) of appeal – Effect

COURT: Defences – Duty on court to consider all defences proffered.

COURT: Murder charge – Duty of court thereto.

COURT: Evidence – Assessment and appraisal of evidence – Exclusive jurisdiction of trial court – When an appellate court may interfere.

CRIMINAL LAW AND PROCEDURE: Confessional statement – Retracted confessional – Statement already in evidence – What court should do.

CRIMINAL LAW AND PROCEDURE: Confessional statement – Where corroborated – Effect.

CRIMINAL LAW AND PROCEDURE: Confessional statement – Where tendered without objection – Implication.

CRIMINAL LAW AND PROCEDURE: Confessional statement – Where tendered without objection – Relevance.

CRIMINAL LAW AND PROCEDURE: Defence of alibi – Failure of police to investigate – Whether fatal in all cases.

CRIMINAL LAW AND PROCEDURE: Defence of Alibi – What details are necessary to be investigated.

CRIMINAL LAW AND PROCEDURE: Guilt of an accused – How established.

CRIMINAL LAW AND PROCEDURE: Guilt of an accused – When can be established by confessional statement alone.

CRIMINAL LAW AND PROCEDURE: Inconsistency Rule – Whether applies to an accused person.

CRIMINAL LAW AND PROCEDURE: Ingredients of an offence – Whether all ingredients of an offence must be proved.

CRIMINAL LAW AND PROCEDURE: Ingredients of an offence – Failure of prosecution to prove any of the ingredients – Effect.

CRIMINAL LAW AND PROCEDURE: Proof – Onus of proof on prosecution – How discharged.

CRIMINAL LAW AND PROCEDURE: Accused intention – How determined

CRIMINAL LAW AND PROCEDURE: Defences – Alibi – When can be properly raised.

CRIMINAL LAW AND PROCEDURE: Defences – Alibi – Duty on accused thereto.

CRIMINAL LAW AND PROCEDURE: Defences – Provocation – When avails the accused.

CRIMINAL LAW AND PROCEDURE: Defences – Alibi – Import.

CRIMINAL LAW AND PROCEDURE: Defences – Self defence – When avails the accused.

CRIMINAL LAW AND PROCEDURE: Murder – Ingredients – What prosecution must prove

CRIMINAL LAW AND PROCEDURE: Offence of murder – Section 316 Criminal Code – Scope.

EVIDENCE: Confessional statement – Mere denial by the accused – Procedure to be adopted.

EVIDENCE: Confessional statement – Weighty nature of.

EVIDENCE: Confessional statement – When corroborated – Implication.

EVIDENCE: Corroboration – Nature and meaning.

EVIDENCE: Presumption – Doctrine of last seen – Considerations thereof.

EVIDENCE: Presumption – The principle of last seen – The person last seen with the deceased bears responsibility for his death – Application.

EVIDENCE: Retracted confessional statement – When can an accused be said to have retracted his confessional statement.

STATUTE: S. 316 Criminal Code – Six circumstances that make accused person culpable for the offence of murder – Sufficiency of any of such circumstances.

WORDS AND PHRASES: “Confess” – Meaning.

WORDS AND PHRASES: “Proof beyond reasonable doubt” – Meaning.

Issues for Determination

- 1. Whether the learned justices of the Court of Appeal were right to have affirmed the decision of the trial court that the prosecution proved the offence of murder against the appellant.**

2. **Whether the learned justices of the Court of Appeal were right to have held that the learned trial judge was right in relying on the confessional statement of the appellant in convicting him.**
3. **Whether the learned justices of the Court of Appeal were right to have held that the defence of Alibi raised by the appellant at the trial of this case cannot avail the appellant.**

Facts of the Matter

The facts of this case are that on or about the 3rd day of December, 2011, the PW1 in this case was on his way to his father's (deceased) house when he saw the accused (who is also the PW1's brother) on the deceased's motorcycle. The accused informed the PW1 that the deceased had died. When the PW1 got to where the deceased was, he noticed marks on the neck of the deceased. The PW1 then went to inform some others of the incident. The PW1 was later informed that the accused/appellant had carried the deceased's corpse and that the appellant had been arrested by immigration officers.

The appellant confessed to the murder of the deceased. The case was reported to the police and an autopsy was carried out on the deceased's corpse.

The PW2 was the doctor who examined the corpse of the deceased at General hospital, Ilaro while PW3 named Corporal Oyelakin Segun was the divisional I.P.O who recorded the statement of the appellant at the divisional police station and admitted in evidence as Exhibits B and BI. The statement of the appellant recorded also by the PW4 woman Sergeant Philomena Imhanria was admitted as Exhibits D and E. The said Exhibits D and F were however disregarded by the learned trial judge.

The appellant on his part testified in his defence and denied the charge. In his evidence he stated that he was not with the deceased on the night that he (the deceased) died. Appellant said he slept at his maternal grand-mother's house in another village on the night of the incident.

The appellant was found guilty and sentenced to death by the trial court. His appeal before the Court of Appeal was also dismissed and hence the appeal now before the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *Where no issue is formulated from a ground(s) of appeal*
There are no issues formulated on behalf of the appellant from grounds of appeal No. 7 and 10. The grounds in the circumstance are hereby struck

out. (P 80 paras D–E)

2. *The onus on the prosecution in criminal cases*
The law is well settled that in criminal cases, the onus is placed always on the prosecution squarely to prove its case against an accused person: [Abirifon vs. State (2013) 9 SCM page 1 @ 5].
Where this court held that the onus of proof is always on the prosecution to prove the guilt of the accused person beyond reasonable doubt. It is also settled law that proof beyond reasonable doubt does not mean proof beyond every shadow of doubt, [Nwaturuocha vs. The State (2011) 12 SCM (Pt. 2) page 265 @ 269].
In a charge of murder for instance, the prosecution is required to establish the following three essential ingredients before it could secure the conviction of an accused person:
 - a) **there must be the proof that the deceased died;**
 - b) **that the death was in fact caused by the accused's act; and**
 - c) **that the accused person intended to either kill the victim or cause him grievous bodily harm. [Njokuwu V. The State (2013) 2 SCM page 177 @ 180]. (P 84 paras B–F)**
3. *Failure of prosecution to establish any of the ingredients of offence.*
It is also pertinent to restate that failure to establish any of the ingredients would result in an acquittal of the accused under the said charge.
On behalf of the appellant, his learned counsel rightly submitted that, for an accused person to be convicted of murder, the prosecution must prove each of the three ingredients listed above. The prosecution has the burden/duty to prove its case by evidence of such quality as to leave the court or no one in reasonable doubt as to the guilt of the accused person. It is also expected of the prosecution that all the ingredients of an offence must be proved or co-exist before a conviction could be secured, [Akpa vs. The State supra at page 87]. (P 84 paras H–I; F–H)
4. *Confessional statement and corroborative evidence*
As rightly submitted by the learned counsel for the appellant, there was no independent eye witness to the actual circumstances of the death of the deceased. The evidence given by PW1 was indeed circumstantial, However by the evidence of the said witness, the appellant was, to him, the

last person seen with the deceased. The circumstances of the statement will be relevant when taken together with what the appellant himself said in Exhibits B and B1 wherein he confessed to strangling the deceased to death while he (deceased) was sleeping on his mat.

It is pertinent to say further that Exhibit A, the medical report which was issued to the police in respect of the deceased's corpse shows that the deceased's death was due to respiratory failure as a result of strangulation. Exhibits B and B1 were extra judicial statements made by the appellant to the police, wherein he confessed to strangulating the deceased to death while he (deceased) was sleeping on his mat.

In my view, on a community reading of PWI's evidence and taken together with the statements of the appellant Exhibits B and B1, there is the strong proof that the appellant must have caused the death of the deceased in this case by strangling him.

By Exhibits B and B1, the detail is clear of the role the appellant played in the murder of the deceased which only the appellant himself could have narrated and no one else. The explanation as to how the deceased met his death has been stated in Exhibits B and B1. The absence of any direct eye witness will not affect in my view the circumstantial evidence already on ground. The learned counsel for the appellant was, I hold, in great error in his argument in that behalf.

(P 85 paras E – G; D – E, G – J)

5. *Confessional statement established the guilt of appellant*

As rightly submitted by the counsel for the respondent, the confessional statement having been admitted did satisfy the burden of proof placed on the prosecution. The two lower courts, I hold, were on the right footing when they held that the prosecution proved the second ingredient of murder against the appellant beyond reasonable doubt. In other words for all intents and purposes and taking together the entire circumstance surrounding the events of- this case, there is ample evidence of close link between the act of the appellant in causing the death of the deceased. [Patrick Oforlette vs. The State *supra* at 2104 – 2105]. (P 86 paras A – C)

6. *How to establish the guilt of an accused*

The saying is well established and also true that even the devil does not know the state of a man's heart. Rather he alone is the best person fully

possessed of his own intention. This restatement has confirmed the adage why a confessional statement made by an accused person is always rated as the best form of evidence. It is no wonder therefore that the law lays down the three ways to prove the guilt of an accused as follows:

1. through a confessional statement made by the accused.
2. by circumstantial evidence,
3. by evidence of an eye witness. (Pp 86–87 paras I–B)

7. *How to determine appellant's intention.*

In the appeal now before us, even in the absence of any direct eye witness, the documents Exhibits A, B and B1 taken together and in collaboration with the evidence of PW1 are very weighty and much revealing. While considering the appellant's intention, the reason offered for the act ought to be taken into account alongside all possible defences raised and which may accrue to him. [AI-Hassan Mai Yaki vs. The State (2008) All FWLR (Pt. 440) 618 at 647]. (P 87 paras B–D)

8. *When self defence avails the accused.*

It is clear from Exhibit B1 (supra) that the appellant had the intention of killing his father when he pressed his neck while he was sleeping.

Also from the said plea by the appellant supra, it would appear that he intends to raise the defence of self-defence which in law is a complete answer to a charge of murder. However, in order to avail himself of this defence the accused person must show:

- (i) that his life was so much endangered by the act of the deceased;
- (ii) that the only option left for him to save his own life was to kill the deceased; and
- (iii) that he did not want to fight and was prepared to withdraw. [Isaac Stephen vs. The State (1986) Vol.17 NSCC (Pt. 2) 1416 at 1421 and Oduak Daniel Jimmy vs. The State (2014) All FWLR (Pt. 714) 103 at 118]. (P 88 paras A–D)

9. *Self defence does not avail the appellant.*

On a community reading of the evidence on the record including Exhibit B1, there is nothing to show:

- (i) that the deceased acted in anyway thereby putting the life of the

- appellant in danger;**
- (ii) that the appellant did not want to fight and was prepared to withdraw; and**
- (iii) that the only option left for the appellant to save his own life was to kill the deceased.**

As a matter of fact it is clearly stated by the appellant himself in his statement Exhibit B1 that the deceased was sleeping when he pressed his neck and killed him. It is obvious that the defence of self-defence did not avail the appellant and same therefore rightly failed. (P 88 paras D – G)

10. *When provocation avails as a defence.*

The law is well pronounced on the character of the defence of provocation. In other words, where it succeeds, it has the effect of whittling down the punishment stipulated from the offence of murder to manslaughter. [Edoho vs. The State (2010) All FWLR (Pt. 530) 1262 at 1287 and Ihuebeka vs. The State (2000) FWLR (Pt. 11) 1827 at 1850.

However, for provocation to constitute a defence in murder cases, it must consist of three elements which must co-exist, namely:

- (a) That the act of provocation was done in the heat of passion.**
- (b) That the loss of self-control was both actual and reasonable, that is to say, the act was done before there was time for cooling down.**
- (c) That the retaliation is proportionate to the provocation.**

Again see the case of Edoho vs. The State (supra) at page 1286. (P 89 paras A – D)

11. *The defence of provocation does not avail the appellant.*

It is clear from Exhibit B1 that the annoyance of the accused person with the deceased did not start on the night that the accused killed the deceased. Rather it started when the deceased and the accused person's father in-law made jest of the accused person which was not on that particular night of the incident. This is because there is no evidence on the record that the accused person's father in-law came to their house on that night. Also, the statement in Exhibit "B1" that-

"since then he has been saying he would kill me", shows that the threat from the deceased to kill the accused person was not made just on

the night of the incident alone. Assuming for granted that the accused was provoked by the father as alleged, the fact that he waited and only killed him while he slept shows that the act of provocation was not done in the heat of passion while the accused lost his self control. The accused, I hold was in full control of himself and hence the defence of provocation did not avail him. (P 89 paras D – G)

12. *The definition of confession.*

The definitions assigned to the word/phrases, “confession” or “confessional statement” by the Evidence Act and the case law, refer to an admission made at any time by a person charged with a crime suggesting or stating that he committed the crime. [FRN vs. Iweka (2011) 12 SCM (Pt. 2) page 213 @ 218]. (P 91 paras C – D)

13. *When confessional statement alone is sufficient to convict.*

The law is well settled in plethora of cases that an accused person can be convicted on his confessional statement alone where same is direct, positive and proved. [Akpa vs. State under reference supra wherein the principle is affirmatively restated that what is admitted needs no further proof. At page 74 for instance, it was held that:

“a confession is an admission made by an accused person. The duty of the court is to decide the weight to be attached to it.” (P 91 paras D – F)

14. *Where confessional statement is tendered without objection*

With reference made to the record of appeal there was no objection to the admissibility of Exhibits “B” and “B1”, which were the statements of the appellant. The court placed reliance on the said Exhibits. I seek to add also that there was no objection of involuntariness at the time of tendering the Exhibits. As rightly submitted by the learned counsel for the respondent, the court was right in admitting the Exhibits and subsequently relying on same in its judgment. As rightly submitted also by the respondent's counsel, the retraction of the statement made by the appellant will not affect same adversely once the court is satisfied as to its truth. See again the case of Nwachukwu vs. State supra. (P 91 paras G – I)

15. *The relevance of confessional statement admitted in evidence.*

A confessional statement properly made by an accused person as in the case at hand is the best guide to the truth of the part played by him-see the case of [Salawu vs. State (2011) 10 SCM 76].

Once such statement is admitted therefore, it becomes part of the prosecution's case which the court must consider as done in the present case. Again, see the case of Nwachukwu vs State (supra) @ 455.

In the absence of any objection by the defence of involuntariness or any evidence suggesting that there was undue influence by the police at the time Exhibits “B” and “B1” were being tendered, the lower court was right in affirming the admission and reliance made on the statements by the learned trial judge.

**A confessional statement of this nature regardless of its retraction can ground a conviction.[FRN vs. Iweka (supra) @ 218].
(Pp 91 – 92 paras I – B)**

16. *Confessional statement was corroborated*

For purpose of corroborating the confession, there could be direct or circumstantial evidence. [Dogaya vs. The State (2006) 2 SCM page 33 at 67].

For all intents and purposes, the confessional statements Exhibits “B” and “B1” made by the appellant have been sufficiently corroborated by the strong circumstantial evidence of the PW1. This I say, because the evidence of the said witness at pages 19 to 22 of the record of appeal was that he was coming from Oja-Odan in the morning at about 730a.m when he met the appellant close to the deceased's house where the appellant and the deceased were living. The appellant informed the PWI that the deceased was dead; when the PWI got to the deceased's house, he saw him (deceased) on the mat with nail marks on his neck.

It is the witnesses evidence also that only the appellant and the deceased slept in the deceased's house the night the deceased died and that there was nobody else with them. PW1 gave evidence of facts within his knowledge and as such his evidence is not hearsay as argued by the appellant's counsel. (P 92 paras B – F)

17. *The nature of corroboration*

I seek to draw attention that the evidence of the PW1 and Exhibit “B1”

also corroborate each other that the PW1 met the appellant on the way when the appellant informed the PW1 of the deceased's death. It was held in the case of Musa vs. The State (2013) 3 SCM page 79 at page 85 that corroboration means confirmation or support by additional evidence; the corroboration need not consist of direct evidence that the accused person committed the offence nor need it amount to a confirmation of the whole account given by the witnesses, provided it corroborates the evidence in some respects material to the charge in issue. (P 92 paras G–I)

18. *The person last seen with the deceased*

It is pertinent also to draw attention that the circumstances of this case suggest that the appellant is the person last seen with the deceased. The law presumes that the person last seen with the deceased bears full responsibility of the death of the deceased. See the case of Archibong vs. State supra.

The appellant in the circumstance of the case at hand had the opportunity to commit the offence for which he was charged and only him was in the best position to narrate the role he played in the murder of the deceased which he unequivocally stated in Exhibits “B” and “B1”. The trial court found that the PW3 followed a proper procedure in recording the said Exhibit “B” in Yoruba language as volunteered by the appellant and later translated same into Exhibit 'B1’, the English version.

(Pp 92–93 paras I–B)

19. *The weighty nature of a confessional statement*

The extra judicial statements Exhibits “B” and “B1” are very weighty in the eyes of the law because they are confessional in nature. The lower court was on a firm ground when it held that the trial court was right in relying on the confessional statement of the appellant, Exhibits “B” and “B1 in convicting him. (P 93 para C)

20. *Duty on court to consider all defences*

The law is well settled that it-behooves a court of law to consider any defence available to an accused person which is disclosed in evidence before the court. This duty is laden on a court whether or not it is raised by an accused person or his legal practitioner.[Nse Udo Nuta vs. The State

(2008) All FWLR (Pt. 397)) 1 and Shalla vs. The State (2008) All FWLR (Pt. 397) 25]. (P 94 paras E – F)

21. *The import of defence of alibi*

The defence of *alibi* connotes the physical impossibility of a person or an accused to be somewhere else and at the same time at the scene of a crime. As rightly submitted by the learned counsel for the appellant, alibi is a complete defence, which if proved in favour of an accused person, absolves him of any criminal liability. (P 94 paras G – H)

22. *When to raise alibi as a defence*

The defence must be raised timeously at the earliest opportunity of contact with the investigating/security agencies. The appellant must furnish the agencies with sufficient particulars about his whereabouts on the day in question. Thereafter, the duty shifts to the prosecution to investigate the alibi and affirm or disprove same. The defence is destroyed by a contrary evidence fixing the accused at the place of crime, However, if successfully disproved the defence fails. [Ikemson vs. The State (1989) 3 NWLR (Pt. 110) P.455 @ 479 – 780].

In the instant case, contrary to the submission of the appellant's counsel, both trial court and Court of Appeal found that the appellant raised his alibi for the first time at the trial. He stated in evidence that he was not with the deceased the night he was murdered and that he (appellant) slept in his grandmother's house but that no one was aware he slept there.

For all intents and purposes, I hereby also firmly endorse the findings and conclusions arrived at by the two lower courts that the defence of alibi sought to rely upon by the appellant is belated and a mere afterthought. The whole concept in conceiving such a concocted story is ridiculous and also incredible as rightly held by the two lower courts respectively. (Pp 94 – 95; 96 paras H – B; B – C)

23. *The police should be informed of the defence of alibi at the earliest possible time*

I seek to state further that the appellant's alibi was not disclosed to the Police at the time the appellant volunteered his statement as same is not contained in the said statement to the police. The appellant therefore

failed to afford the police the opportunity to investigate the alibi as required by law. [Tango vs. C.O.P (2007) 9 SCM page 113].
(P 96 paras D–E)

24. *Duty on accused on the defence of alibi*

It is not only incumbent on the appellant to inform the police of his alibi but he should also furnish the police with detailed particulars of his whereabouts so that same could be properly investigated. [Okolo Ochemaje vs. State (2008) 10 SCM page 103 @ 107] where it was held that:

“the police in order to investigate a plea of alibi must have specific particulars of where the accused was at the material time ...

It is not the law that the police should be involved in a wild goose chase for the whereabouts of an accused at the time the crime was committed... the accused must give specific particulars of where he was at the material time to enable the police move straight to that place to carry out the investigation required by law. (P 96 paras F–I)

25. *The defence of alibi*

The appellant claimed that he was elsewhere, and *alibi* is Latin for “elsewhere”. The defence of alibi is based on the physical impossibility of an accused person being guilty by placing him in another location at the relevant time. It also means - “*the fact or state of having been elsewhere when an offence was committed* – [Black's Law Dictionary, 8th Ed., Shehu vs. State (2010) 8 NWLR (Pt. 1195) 112, Dagaya vs. State (2006) 7 NWLR (Pt. 980) 637 SC, Ochemaje vs. State (2008) 15 NWLR (Pt. 1109) 57]. Once the defence is properly raised by an accused during investigations, it is the duty of the police to investigate it and for the prosecution to disprove it.
(P 104 paras C–E)

26. *The details of alibi*

It is also settled that a defence of alibi, to be worthy of investigation, must be precise and specific in terms of the place that the accused was and the person or persons he was with and possibly what he was doing there at the

material time – [Shehu vs. State (*supra*) and Ochemaje vs. State (*supra*), where Tobi, JSC expatiated as follows:

It is not the law that the police should be involved in a wild goose chase for the whereabouts of the accused person at the time the crime was committed. No. That is not the function or role of the police. The accused must give specific particulars of where he was at the time of the material time to enable the police move straight to that place to carry out the investigation required by law. Investigation is not a necessity if the evidence unequivocally points to the guilt of the accused person, either in the evidence of the witnesses or under cross-examination of the accused or his witness. The learned trial judge relied on the evidence of PW1, PW2, PW3 and PW6. I am of the view that the defence of alibi is a mere farce and an afterthought. It fails. After all, a trial judge will not take seriously a defence of alibi which is porous and cosmetic. That is the way I see appellant s' defence of alibi. (P 105 paras B – G)

29. *The inconsistency rule does not apply*

The appellant's evidence in court at the trial is very much inconsistent with his earlier extra-judicial statement made to the police. It is trite to state that the inconsistency rule does not apply to an accused person. In other words, it does not cover a case where an accused person's extra-judicial statement is contrary to his testimony in court. [Ogudo vs. State. (2011) 12 SCM (Pt. 1) page 209 @ 223]. (P 96 paras C – D)

30. *No evidence to disturb the concurrent findings*

It is the findings of both the trial court and the Court of Appeal that the appellant did not raise any alibi at the earliest opportunity, which should have, been at the investigation stage. His alibi raised only at the trial stage was held as an afterthought and cannot be reckoned with. The lower court did not also waste time but rightly in my view also endorsed the trial-court's conclusion. This was based on sound legal principles in the absence of any evidence to disturb the concurrent findings. [Ochiba vs. State (2011) 12 SCM (Pt. 2) page 284 @ 289] where this court in reiterating the well settled principle of law said:

“Where the two courts below make concurrent findings of fact, as herein, this court will not interfere unless same is perverse or runs against current of evidence adduced or occasioned miscarriage of justice....” (P 97 paras A–D)

31. *Consideration of S.316 Criminal Code.*

For the prosecution to succeed under section 316 of the Criminal code the prosecution should prove beyond reasonable doubt that a person died (in this case Olaleye Kolade died) and that he died as a result of an act by the appellant. The act of the appellant which caused the death of Olaleye Kolade must be one of the six circumstances in Section 316 of the Criminal Code. If the act of the appellant which caused the death of Olaleye Kolade is not one of the six circumstances, the death of the deceased is no longer murder. The six circumstances are:

- 1. If the appellant intends to cause the death of Olaleye Kolade, or that of some other person;**
- 2. If the appellant intends to do to the deceased 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 the appellant 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;**

[Ilodigwe vs. State (2012) 5 - 7 SC (Pt. II) p.148]. (Pp 97–98 paras J–F)

32. *The meaning of proof beyond reasonable doubt*

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.[*Osuagwu vs. State (2013) 5 NWLR (Pt. 1347) p. 360*]. (*P 98 paras G – H*)

33. *The last seen doctrine*

The last seen doctrine indicates that any accused charged with murder, would be required to offer some explanation as to how the deceased met his death. It has no statutory foundation, and the doctrine is a development of case law – [Archibong vs. State (2006) 14 NWLR (Pt 1000) 349 SC, and Haruna vs. A.-G., Federation (2012) 9 NWLR (Pt. 1306) 419 SC,] where this court, per Adekeye, JSC, explained the law as follows:

'The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility' for his death. Thus, where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal.
(*Pp 103 – 104 paras H – B*)

34. *Failure to investigate alibi is not always fatal*

It is not in all cases that failure to investigate an alibi will be fatal to the case of the prosecution. This court made this point clear in Olaiya vs. State (2010,) 3 NWLR (Pt. 1181) 423, wherein it adopted its decision in HemyoNtam vs. State (1968) NWLR 86 as follows:

There are occasions on which a failure to check an alibi may cast doubt on the reliability of the case for the prosecution, but in a case such as this where the appellants were identified by three eye witnesses there was a straight issue of credibility and we are not able to say that the Judge's findings of facts were unreasonable or cannot be supported having regard to the evidence. If the alibi had been true it would have been open to the appellant to call witnesses in support on them and neither of them did so.

And also in **Hausa vs. State (1994,) 6NW1R (Pt. 350,) 281:**

Once the prosecution through its witnesses establish that they (the witnesses) saw the appellant committing the offence charged, a defence of alibi by the appellant raises the straight issues of credibility to wit; whether the evidence of the witnesses is believable and if believed, the *alibi* is logically demolished or fizzles into thin air and so doomed.
(Pp 104–105 paras F–B)

35. *The duty of assessment and appraisal of evidence.*

I wish to state clearly that assessment and/or appraisal of oral evidence and ascription of probative value to such evidence is the primary duty of the trial court. An appellate court has no jurisdiction to interfere with that duty unless there are special circumstances that warrant such interference. Learned counsel for the appellant has accused the lower court of failing to evaluate the evidence of the prosecution and the defence by the trial court. Has he shown any special circumstances that would warrant such interference? In *Eyo vs. Onuoha* (2011) 11 NWLR (Pt. 1257) 1 at 38 –39 paragraphs G -A, this court per Tabai JSC said:

“It is settled principle of law that the duty of evaluation of evidence is pre-eminently that of the trial court which alone has the benefit of seeing and hearing witnesses in the course of their testimonies; it is the trial court that has the singular benefit of watching the demeanour of witnesses in the course of their testimonies..... As a general rule therefore, an appellate court would not disturb the findings of a trial court unless it is proved that the findings are not supported by the evidence on record and therefore perverse. This is because of the appellate court's disadvantage of not having seen or heard the witnesses in the course of their testimonies.

[A. G Oyo State vs. Fairlakes Hotel (NO. 2) (1989) 5 NWLR (Pt. 121) 255. Are vs. Ipaye (1990) 2 NWLR (Pt. 132) 298; Onwuka vs. Ediala (1989) 1 NWLR (Pt. 96) 182; Anaeze vs. Anyaso (1993) 5 NWLR (Pt. 291) 1; Abisi vs. Ekwealor (1993) 6 NWLR (Pt. 302) 643]. *(P 110 paras C–I).*

36. *Duty on court in a murder charge*

However, I wish to start by clearly pointing out that the offence for which the appellant was charged and convicted carries the maximum sentence known to our criminal jurisprudence. Even at the risk of repetition, I wish to reiterate that the appellant was sentenced to death. It follows therefore that before a judge will reach such a verdict in which someone's life is at stake, he must be absolutely sure that the prosecution has proved beyond reasonable doubt the guilt of the accused person. For the law is settled that if the commission of a crime by a party to any proceeding is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt. The burden of proving that any person has been guilty of a crime or wrongful act is on the person who asserts it, whether the commission of such act is or is not directly in issue in the action. [Section 135(1)(2)(3) of the Evidence Act 2011 *Adamu vs. A.G Bendel State* (1986) 2 NWLR (Pt. 22) 284; *Akpan vs. The State* (1990) 7 NWLR (Pt. 160) 101; *Ayub-Khan vs. The State* (1991) 2 NWLR (Pt. 172) 127]. (Pp 110–111 paras I–C).

37. *Burden of proof in criminal cases*

Section 36(5) of the Constitution of the Federal Republic of Nigeria 1999 provides that every person who is charged with a criminal offence shall be presumed innocent until he is proved guilty. Flowing from above therefore, the burden of proof in criminal cases is on the prosecution who must prove its case beyond reasonable doubt, and a general duty to rebut the presumption of innocence constitutionally guaranteed to the accused person. This burden never shifts. [*Alabi vs. The State* (1993) 7 NWLR (Pt. 307) 511 at 531 paras A–C; *Solola vs. The State* (2005) 5 Sc (Pt. 1) 135].

***In Mufutau Bakare vs. The State* (1987) 3SC I at 32 *Opita JSC*, defined “proof beyond reasonable doubt” in the following words:**

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace this presumption, the evidence of the prosecution must prove beyond reasonable doubt not beyond the shadow of any doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure including the

administration of justice.” [Bolanle vs.The State (2005) INCC 342 at 359].

Where the prosecution fails to prove the case beyond reasonable doubt, the accused must be discharged and acquitted.*(P 111 paras D–I)*

38. *How to retract a confessional statement*

The next question is whether the appellant resiled from the confessional statement, Exhibits B and B1, which he volunteered at the police station and which was admitted without objection. During his evidence in Chief, the appellant was shown Exhibits B and B1, as well as Exhibits D and E, by his counsel, and the appellant in answer said:

“I do not know the documents now shown to me by my counsel”.

Could that mean that the appellant resiled from Exhibits B and B1. An accused person can resile from his statement to police in one of two ways, that is:

- 1. He can say that he never made the statement at all; or**
- 2. That he made the statement or signed it, but not voluntarily.**

See Nwangbomu vs. State (1994) 2 NWLR (Pt. 327) 380, where this court held that the mere denial by an accused of having made a statement confessing to the crime charged is a question of fact that the trial court must decide. It does not make the statement inadmissible. It must however, be considered along with the entire evidence and circumstance of the case for the weight to be attached to it.*(P 113 paras E–J)*

Nigerian Cases Cited in this Judgment

A. G Oyo State vs. Fairlakes Hotel (NO. 2) (1989) 5 NWLR (Pt. 121) 255.

Abirifon vs. State (2013) 9 SCM page 1

Abisi vs. Ekwealor (1993) 6 NWLR (Pt. 302) 643.

Adamu vs. A. G Bendel State (1986) 2 NWLR (Pt. 22) 284;

Al-Hassan Mai Yaki vs. The State (2008) All FWLR (Pt. 440) 618.

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Ayub-Khan vs. The State (1991) 2 NWLR (Pt. 172) 127.
Bolanle vs. The State (2005) INCC 342.
Dagaya vs. State (2006) 7 NWLR (Pt. 980) 637 SC,
Dogaya vs. The State (2006) 2 SCM page 33.
Edoho vs. The State (2010) All FWLR (Pt. 530) 1262
Eyo vs. Onuoha (2011) 11 NWLR (Pt. 1257) 1
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Hemyo Ntam vs. State (1968) NMLR 86
Ihuebeka vs. The State (2000) FWLR (Pt. 11) 1827.
Ikemson vs. The State (1989) 3 NWLR (Pt. 110) P.455.
Ilodigwe vs. State (2012) 5 - 7 SC (Pt. II) p.148
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Michael Hausa vs. State (1994,) 6 NWLR (Pt. 350,) 281
Mufutau Bakare vs. The State (1987) 3SC I
Musa vs. The State (2013) 3 SCM page 79
Njokwu vs. The State (2013) 2 SCM page 177.
Nse Udo Nuta vs. The State (2008) All FWLR (Pt. 397)) 1
Nwangbomu vs. State (1994) 2 NWLR (Pt. 327) 380,
Nwaturuocha vs. The State (2011) 12 SCM (Pt. 2) page 265.
Ochemaje vs. State (2008) 15 NWLR (Pt. 1109) 57.
Ochiba vs. State (2011) 12 SCM (Pt. 2) page 284
Oduak Daniel Jimmy vs. The State (2014) All FWLR (Pt. 714) 103.
Ogudo vs. State. (2011) 12 SCM (Pt. 1) page 209.
Okolo Ochemaje vs. State (2008) 10 SCM page 103
Olaiya vs. State (2010,) 3 NWLR (Pt. 1181) 423,
Onwuka vs. Ediala (1989) 1 NWLR (Pt. 96) 182;
Osuagwu vs. State (2013) 5 NWLR (Pt. 1347) p. 360
Patrick Oforlette vs. The State (supra).
Salawu vs. State (2011) 10
Shalla vs. The State (2008) All FWLR (Pt. 397) 25.
Shehu vs. State (2010) 8 NWLR (Pt. 1195) 112,

- A** *Solola vs. The State (2005) 5 Sc (Pt. 1) 135.*
Tango vs. C.O.P (2007) 9 SCM page 113.

Nigerian Statutes Cited

- B** *The Evidence Act 2011 – S. 135(1) (2) and (3)*
The Criminal Code – S. 316

Representations

- C** HENRY E. OMU for the **appellant**.
 DR. OLUMIDE AYENI (Attorney-General) Ogun State with:
 O. A. Sodeinde (Esq.), SSC, Otenghabun Ebose (Esq.), Special
 Assistant to the A-G, Adekolapo A. Ilori (Esq.), (Special Asst.
D II) to A-G for the **respondent**.

- OGUNBIYI, (JSC) (Delivering the Lead Judgment):** The appeal herein is
 against the Judgment of the Court of Appeal, Ibadan Division delivered on the 18
E day of May, 2015 wherein the court affirmed the conviction and sentence of the
 appellant to death by hanging. The High Court of Ogun State, Ilaro Division
 condemned the appellant therein for murder of his father Kolade Olaleye on
 3/12/11. The appellant was arraigned on a one count charge of murder. Being
F dissatisfied with the affirmation of the said conviction and sentence by the lower
 court the appellant has now appealed to this court.

. In the judgment appealed from, the facts show that the appellant, while his
 father slept, strangled him by holding him by the neck.

G

THE BRIEF STATEMENT OF THE FACTS

- The facts of this case as testified by the prosecution witnesses at the trial court are
 that on or about the 3rd day of December, 2011, the PW1 in this case was on his
H way to his father's (deceased) house when he saw the appellant (who is also the
 PW1's brother) on the deceased's motorcycle. The appellant informed the PW1
 that the deceased had died. When the PW1 got to where the deceased was, he
 noticed marks on the neck of the deceased. The PW1 then went to inform some
I others of the incident. The PW1 was later informed that the appellant had carried
 the deceased's corpse and that the appellant had been arrested by immigration
 officers.

- The appellant confessed to the murder of the deceased. The case was
J reported to the police and an autopsy was carried out on the deceased's corpse.

A The PW2 was the doctor who examined the corpse of the deceased of General hospital, Ilaro while PW3 name Corporal Oyelakin Segun was the Division I.P.O who recorded the statement of the appellant at the divisional police station and admitted in evidence as exhibits B and BI. The statement of the **B** appellant recorded also by the PW4 woman Sergeant Philomena Imhanria was admitted as exhibits D and E. The said exhibits D and F were however disregarded by the learned trial judge.

The appellant on his part testified in his defence and denied the charge. In **C** his evidence he stated that he was not with the deceased on the night that he (the deceased) died. Appellant said he slept at his maternal grand-mother's house in another village on the night of the incident.

The appellant was found guilty and sentenced to death by the trial court. **D** His appeal before the lower court was also dismissed and hence the appeal now before us.

In accordance with the rules C – F court briefs were exchanged between the parties. While the appellant's brief of argument was settled by Chief Henry **E** Eshijonam Omu and filed 25th August, 2015, that the respondent was settled by F. F. Fakolade, Esq and filed on the 23 November, 2015.

On the 8th December, 2016 the date the appeal was called up for hearing, both counsel adopted their respective brief of argument. The appellant's counsel **F** urged in favour of allowing the appeal while the respondents counsel submitted in favour of the dismissal as lacking in merit.

Before this court, the appellant has raised three issues for determination from the ten grounds of appeal filed and are. as specified at paragraphs 3.01, 3.02 **G** and 3.03 of the appellants brief of argument as follows:

- 3.01 Whether the prosecution proved its case beyond reasonable doubt against the appellant to the effect that**
H the appellant killed his father – Olaleye Kolade to justify the affirmation of the conviction and sentence of death by hanging of the appellant for murder by. the learned justices of the Court of Appeal Ibadan Division. (Grounds 1, 2, 4, 5 and 6)..
I
- 3.02 Whether the learned justices of the Court of Appeal, Ibadan Division were right to have affirmed and adopted the learned trial judge's admission of the**
J appellant's purported extra-judicial statements -

- A** exhibits “B” and “B1” as confessional statements in spite of the illiteracy of the appellant, the manner in which the said statements were obtained and the objection of the appellant to their admissibility by reason of the involuntariness of the process of their extraction and relied heavily upon same to affirm the conviction and sentence of the appellant for murder. (G rounds 3 and 8).
- B**
- 3.03** Whether the learned justices of the Court of Appeal, Ibadan Division were right to have affirmed the conviction and sentence of death by hanging of the appellant for murder when the prosecution failed to disprove the appellants alibi of being far from the crime scene (at his maternal grandmothers village) 'at the time of 'the incident. (G round 9).
- C**
- D**

E I wish to state quickly that there are no issues formulated on behalf of the appellant from grounds of appeal No. 7 and 10. The grounds in the circumstance are hereby struck out.

F On behalf of the respondent the three issues formulated are similar to those raised by the appellant's counsel. However and despite the similarity, I would seek to adopt the issues formulated by the respondent's counsel in view of the precision:

- G** 1. Whether the learned justices of the Court of Appeal were right to have affirmed the decision of the trial court that the prosecution proved the offence of murder against the appellant.
- H** 2. Whether the learned justices of the Court of Appeal were right to have held that the learned trial judge was right in relying on the confessional statement of the appellant in convicting him.
- I** 3. Whether the learned justices of the Court of Appeal were right to have held that the defence of Alibi raised by the appellant at the trial of this case cannot avail the appellant.

J

A 1ST ISSUE

Whether the Court of Appeal was right in affirming the conviction and sentence of the appellant by the trial court. In other words, whether the prosecution did prove the offence of murder against the appellant.

- B** In order to substantiate the issue raised, the appellant's counsel contends that the prosecution did not prove its case beyond reasonable doubt against the appellant to the effect that he killed his father – Olaleye Kolade. Thus, the learned counsel argues that there was therefore no justification why the lower court
- C** should have affirmed the conviction and sentence of death passed on the appellant by the trial court; that what the Justices of the lower did was to summarily accept, adopt and affirm the various findings and conclusions by the trial court that the appellant killed his deceased father and relied merely on the confessional
- D** statements exhibits “B’ and “B1”, Counsel submits this as having prejudiced the appellant seriously.

The counsel restated and outlined the three essential ingredients of the offence of murder which must be proved as follows:

- E**
- (1) **That the deceased died;**
 - (2) **That the death of the deceased was caused by the accused;**
and
 - (3) **That the act or omission of the accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable result.**
- F**

- G** The following authorities were cited by the learned counsel in support of his arguments. **Chukwu vs. The State (2013) All FWLR (Pt. 666) 425 at 437; Oshiba vs. The State (2011) 12 SCNJ 526; Uguru vs. The State (2002) FWLR (Pt. 103) 330 at 343 – 344 and Ogbu vs. The State (2007) 28 WRN 1 at 8.**

- H** While submitting vehemently against the conviction and sentence passed on the appellant, his learned counsel reiterates the absence of any reasonable ground whatsoever, warranting the learned justices of the lower court in affirming the trial courts conviction of the appellant for the murder of his father – Olaleye
- I** Kolade, considering the totality of the evidence elicited before the trial court. It is the submission of learned counsel further that the affirmation of conviction of the appellant is unsupportive in law as it is against the evidence adduced at the trial; that the said judgment is also a clear miscarriage of justice against the appellant.

- J** Counsel cites the authority in the case of **Nigerian Air Force vs. Obiosa**

- A (2003) 4 NWLR (Pt. 810) page 333** where the onus is placed on the prosecution always to prove its case beyond reasonable doubt. It is a further contention of the learned counsel that the prosecution at the lower court failed to prove its case as required by law; that the learned Justices of the lower court in their judgment
- B** never carried out any confirmatory review of evidence elicited by the prosecution for the defence to justify the affirmation of the conviction and sentence of the appellant. This, the learned counsel submits is in view of the absence of any eye witness to the purported murder; that the lower court placed far too much weight
- C** on the uncorroborated evidence of PW1.

The following authorities were relied upon by the learned counsel to support the defects in the evidence put forward by the prosecution. See **Benson Obiakor vs. The State (2002) FWLR (Pt. 113) 299 at 313; Onah vs. The State (1985) 3 NWLR (Pt. 12) 236; Oforlette vs. The State (2000) FWLR (Pt. 12) 2081 at 2097; Udosen vs. The State (2007) 1 NWLR (Pt. 1023) 125 at 162 and Joseph Idowu vs. The State (2000) FWLR (Pt. 16) 2672 at 2702 - 2703.**

- E** Submitting on the question of medical evidence, the learned counsel for the appellant argued vehemently that there was no such evidence whatsoever linking the death of the deceased to the appellant. The counsel wasted no time in re-emphasizing the absence of any evidence placed before the court as to how the deceased actually died.

- F** In view of the preceding arguments the counsel urges this court to hold that this appeal is meritorious and consequently same should be allowed on the 1st issue and the judgment of the trial court which was affirmed by the Court of Appeal, Ibadan Division should be set aside and be substituted with orders of
- G** discharge and acquittal of the appellant.

In response to the 1st issue raised on behalf of the appellant, the learned counsel for the respondent restates emphatically that the learned justices of the Court of Appeal rightly affirmed the decision of the trial court that the prosecution

H proved the charge of murder beyond reasonable doubt against the appellant; that from the evidence adduced by the PW1, PW2 and PW3, and also Exhibit A (medical report) as well as the evidence of the appellant himself or the trial court, the fact that the deceased person died is not in issue.

- I** In proof of the second ingredient, that death of the deceased was caused by the accused, the respondent's counsel made copious reference and relied solidly on the testimony of PW1 at the trial court. In addition to Exhibit A (supra), heavy reliance was also made on the appellant's statement Exhibit "B", "B1" and "B2"
- J** wherein he confessed to strangling the deceased to death while he (the deceased)

A was sleeping on his mat. Counsel relied on the decision in the case of *Akpavvs. State* (2008) 8 SCN page 77 at 87 and re-iterates that Exhibits B and Bi gave a clear detail of the role played by the appellant in the murder of the deceased which only the appellant himself could have narrated.

B The learned counsel urges the court to hold that the said confessional statement having been admitted satisfies the burden of proof placed on the prosecution; that the court should not therefore disturb the findings of the lower court that the trial court was right to have held that the prosecution proved the second ingredient of murder against the appellant beyond reasonable doubt.

C While urging this court to hold that the trial court was right to have relied on the medical report, Exhibit A, this, counsel submits, is, notwithstanding the absence from the court, the medical officer who performed the autopsy on the deceased. See the case of *Edoho vs. State* (2010) 6 SCM page 52 @ page 68; that the justices of the lower court were right by not disturbing the findings of the trial court in this regard.

D In further submission to establish that the appellant intended the death of the deceased, the learned counsel related copiously to the content of exhibits “B” and “B” to establish the third ingredient of murder against the appellant by the prosecution.

E On the defences of provocation and self defence, counsel submits that same do not avail the appellant in the circumstance of the case at hand. It is the contention of counsel further that even in the absence of any eye witness evidence to the murder of the deceased, the circumstantial evidence against the appellant is overwhelming. Cited in support of the argument is the case of *Nigeria Navy & Ors vs. Lambert* (2007) 12 SCM (Pt. 2) page 433 @ 434 – 435. Relying on the confessional statement made by the appellant, same, the learned counsel argues has rendered the evidence of an eye witness unnecessary because it is sufficiently corroborated by other pieces of evidence led by the prosecution at the trial court.

G In seeking to re-establish the evidence of PW1, the respondent's counsel argues that it is not hearsay evidence because he only gave evidence of what was within his knowledge during the trial; that the court should accord credibility to the witnesses' evidence which was rightly relied upon by the trial judge.

H In final submission on the first issue, the respondent's counsel urges the court not to disturb the concurrent findings of the two lower courts but affirm same as having been proved beyond reasonable doubt.

I The 1st issue raises the question thus:

A

Whether the learned justices of the Court of Appeal were right to have affirmed the decision of the trial court that the prosecution proved the offence of murder against the appellant.

B

As rightly submitted and conceded by both counsel, the law is well settled that in criminal trial cases the onus is placed always on the prosecution square to prove its case against an accused person: See the case of **Abirifon vs. State (2013) 9**

C SCM page 1 @ 5 where this court held that the onus of proof is always on the prosecution to prove the guilt of the accused person beyond reasonable doubt. It is also settled law that proof beyond reasonable doubt does not mean proof beyond every shadow of doubt. See also the case of **Nwaturuocha vs. The State (2011)**

D 12 SCM (Pt. 2) page 265 @ 269.

In a charge of murder for instance, the prosecution is required to establish the following three essential ingredients before it could secure the conviction of an accused person:

E

- a) there must be the proof that the deceased died;
- b) that the death was in fact caused by the accused's act; and
- c) that the accused person intended to either kill the victim or cause him grievous bodily harm. See the case of **Njoku vs. The State**

F

(2013) 2 SCM page 177 @ 180.

On behalf of the appellant, his learned counsel rightly submitted that, for an accused person to be convicted of murder, the prosecution must prove each of the

G three ingredients listed above. The prosecution has the burden/duty to prove its case by evidence of such quality as to leave the court or no one in reasonable doubt as to the guilt of the accused person. It is also expected of the prosecution that all the ingredients of an offence must be proved or co-exist before a conviction could

H be secured, See **Akpa vs. The State supra at page 87.**

The principle of all inclusive co-existence was also highlighted in the case of **Ogbu V. The State** under reference *supra*. It is also pertinent to restate that failure to establish any of the ingredients would result in an acquittal of the

I accused under the said charge.

On behalf of the appellant, it was submitted that the prosecution did not prove any of the necessary ingredients especially 2 and 3 - that the death of the deceased was caused by the appellant and also that the act or omission of the

J appellant which caused the death of the deceased was intentional with the

A knowledge that death or grievous bodily harm was its probable result.

Without having to belabor the point, I wish to state right away that the proof of the 1st ingredient is not in contention. This I hold in view of the evidence adduced by the PW1, PW2, PW3, Exhibit A (medical report) as well as the

B evidence of the appellant himself, at the trial court.

The areas of contention relate to the 2nd and 3rd ingredients.

While taking the 2nd ingredient, I seek to refer to the record wherein PW1's testimony was relevant. The witness was appellant's junior (younger) brother. In
C his evidence before the trial court he testified that when he saw the deceased's corpse, he noticed nail marks on the neck of the body; also to the best of his knowledge, only the appellant was with the deceased in the deceased's house. It was also the appellant who announced the deceased's death to the PW1.

D It is pertinent to say further that Exhibit A, the medical report which was issued to the police in respect of the deceased's corpse shows that the deceased's death was due to respiratory failure as a result of strangulation. Exhibits B and B1 were extra judicial statements made by the appellant to the police, wherein he
E confessed to strangulating the deceased to death while he (deceased) was sleeping on his mat.

As rightly submitted by the learned counsel for the appellant, there was no independent eye witness to the actual circumstances of the death of the deceased.

F The evidence given by PW1 was indeed circumstantial, However by the evidence of the said witness, the appellant was, to him, the last person seen with the deceased. The circumstances of the statement will be relevant when taken together with what the appellant himself said in Exhibits B and B1 wherein he
G confessed to strangling the deceased to death while he (deceased) was sleeping on his mat.

In my view, on a community reading of PW1's evidence and taken together with the statements of the appellant Exhibits B and B1, there is the strong
H proof that the appellant must have caused the death of the deceased in this case by strangling him.

By Exhibits B and B1, the detail is clear of the role the appellant played in the murder of the deceased which only the appellant himself could have narrated and no one else. The explanation as to how the deceased met his death has been
I stated in Exhibits B and B1. The absence of any direct eye witness will not affect in my view the circumstantial evidence already on ground. The learned counsel for the appellant was, I hold, in great error in his argument in that behalf.

J As rightly submitted by the counsel for the respondent, the confessional

- A** statement having been admitted did satisfy the burden of proof placed on the prosecution. The two lower courts, I hold, were on the right footing when they held that the prosecution proved the second ingredient of murder against the appellant beyond reasonable doubt. In other words for all intents and purposes
- B** and taking together the entire circumstance surrounding the events of- this case, there is ample evidence of close link between the act of the appellant in causing the death of the deceased. See the case of **Patrick Oforlette vs. The State supra at 2104 - 2105.**
- C** The 3rd and final ingredient required of the prosecution to prove is the guilt intention or grievous bodily harm as a probable result. See the cases of **Chukwu vs. The State, Oshiba vs. The State and Uguru vs. The State** all under reference supra.
- D** It is firmly submitted by the learned counsel for the appellant that the conviction of his client borders an mere suspicion which, no matter how strong, cannot constitute a crime or ground a conviction. Counsel submits further that the circumstantial evidence applied by the learned trial judge to convict the appellant
- E** was without any legal- basis, The learned counsel related copiously to the decision of this court in the case of *Alake vs. State* (1992) 9 NWLR (Pt. 265) 260 at 272.
- It is the counsel's submission therefore that there is no evidence elicited by
- F** the prosecution to justify the conclusion by the lower court that the prosecution has proved the third ingredient of the offence of murder beyond reasonable doubt; that the lower court relied mainly on the purported confessional statement of the appellant per Exhibit B1 in concluding and holding that the appellant had the
- G** intention of killing the deceased.
- As rightly submitted on behalf of the appellant, allegation of mere suspicion, no matter how strongly presented cannot displace the heavy duty placed on the prosecution to prove the accused's guilt.
- H** In his submission further, the learned counsel for the appellant faulted the lower court in finding the appellant guilty simply because PW1 testified that he was last seen with the deceased; that the doctrine which is centered on presumption is, by nature rebuttable.
- I** The saying is well established and also true that even the devil does not know the state of a man's heart. Rather he alone is the best person fully possessed of his own intention. This restatement has confirmed the adage-why-a-confessional statement made by an accused person is always rated as the best
- J** form of evidence. It is no wonder therefore that the law lays down the three ways

A to prove the guilt of an accused as follows:

- 1 through a confessional statement made by the accused.
- 2 by circumstantial evidence,
- 3 by evidence of an eye witness.

B

In the appeal now before us, even in the absence of any direct eye witness, the documents Exhibits A, B and B1 taken together and in collaboration with the evidence of PW1 are very weighty and much revealing.

C While considering the appellant's intention, the reason offered for the act ought to be taken into account alongside all possible defences raised and which may accrue to him. See the case of **AI-Hassan Mai Yaki vs. The State (2008) All FWLR (Pt. 440) 618 at 647.**

D Exhibit B1 is the extrajudicial statement made by the appellant to the Police. With reference made to same, this is what he had to say:

E “yesterday, 2nd December, 2011 at about 10.00pm, myself and my father were in our house at Bolankale village talking to each other in a harsh voice, so my father said he was going to kill me and I know he could do it that was how I hasten up in my own action and I strangled him to death pressing his neck while he was sleeping on his locally made bed. The bone of contention was because my wife father (sic) younger brother said it was my father who drove his wife away and he said his elder brother (sic) daughter will not stay in my house also. I inform my father so as to settle the matter amicably but rather than settling it my father and wife father were just making just of me, that was what prompt my annoyance with my father and since then he has been saying he would kill me.”

H With specific reference to the phrase:

I “my father said he was going to kill me and I know he could do it that was how I hasten up in my own action and I strangled him to death pressing his neck while he was sleeping on his locally made bed.....

J It is clear from Exhibit B1 (supra) that the appellant had the intention of killing his

A father when he pressed his neck while he was sleeping.

Also from the said phrase by the appellant supra, it would appear that he intends to raise the defence of self-defence which in law is a complete answer to a charge of murder. However, in order to avail himself of this defence the accused

B person must show:

- (i) that his life was so much endangered by the act of the deceased;
- (ii) that the only option left for him to save his own life was to kill the deceased; and

C (iii) that he did not want to fight and was prepared to withdraw.

See the cases of **Isaac Stephen vs. The State (1986) Vol.17 NSCC (Pt. 2) 1416 at 1421** and **Oduak Daniel Jimmy vs. The State (2014) All FWLR (Pt. 714) 103**

D at 118.

On a community reading of the evidence on the record including Exhibit B1, there is nothing to show:

- (i) that the deceased acted in anyway thereby putting the life of the appellant in danger;
- (ii) that the appellant did not want to fight and was prepared to withdraw; and
- (iii) that the only option left for the appellant to save his own life was to kill the deceased.

F

As a matter of fact it is clearly stated by the appellant himself in his statement exhibit BI that the deceased was sleeping when he pressed his neck and killed him. It is obvious that the defence of self-defence did not avail the appellant and same therefore rightly failed.

G

It is pertinent to state further that the appellant by his statement also sought to raise the defence of provocation when he said thus:

H

“The bone of contention was because my wife father younger brother said it was my father who drove his wife away and he said his elder brother daughter will riot stay in my house also. I informed my father so as to settle the matter amicably but rather than settling it my father and my wife father were just making jest of me, that was what prompt my annoyance with my father and since then he has been saying he would kill me.

I

J The law is well pronounced on the character of the defence of provocation. In

A other words, where it succeeds, it has the effect of whittling down the punishment stipulated from the offence of murder to manslaughter. See **Edoho V. The State (2010) All FWLR (Pt. 530) 1262 at 1287 and Ihuebeka vs. The State (2000) FWLR (Pt. 11) 1827 at 1850.**

B However, for provocation to constitute a defence in murder cases, it must consist of three elements which must co-exist, namely:

- (a) That the act of provocation was done in the heat of passion.
- (b) That the loss of self-control was both actual and reasonable, that is to say, the act was done before there was time for cooling down.-
- C** (c) That the retaliation is proportionate to the provocation.

Again see the case of **Edoho vs. The State (supra) at page 1286.**

D It is clear from Exhibit B1 that the annoyance of the accused person with the deceased did not start on the night that the accused killed the deceased. Rather it started when the deceased and the accused person's father-in-law made jest of the accused person which was not on that particular night of the incident. This is

E because there is no evidence on the record that the accused person's father-in-law came to their house on that night. Also, the statement in exhibit "B1" that: **"since then he has been saying he would kill me"**, shows that the threat from the deceased to kill the accused person was not made just on the night of the incident

F alone. Assuming for granted that the accused was provoked by the father as alleged, the fact that he waited and only killed him while he slept shows that the act of provocation was not done in the heat of passion while the accused lost his self control. The accused, I hold, was in full control of himself and hence the

G defence of provocation did not avail him.

I hold also that the defence of provocation like self defence did not avail the appellant but fails. The totality of the 1st issue in the circumstance is resolved against the appellant.

H

2ND ISSUE

I In summary it raises the question whether the learned justices of the Court of Appeal were in order when they endorsed as right the trial judge's finding in relying on exhibit "B" and "B1" as confessional statements of the appellant and thereby convicting him thereon.

J The learned counsel for the appellant submits that the lower court fell into error when it affirmed and adopted the trial judge's admission of the appellant's purported extra-judicial statements Exhibits "B" and "B1" as confessional

A statements. This, learned counsel argues is in spite of the illiteracy of the appellant, the manner in which the said statements were obtained and the objection of the appellant to their admissibility by reason of the involuntariness of the process of their extraction; that the court nevertheless relied heavily upon
B same to affirm the conviction and sentence of the appellant for murder. Counsel submits also that without Exhibits “B” and “B1”, there would not have been any evidence or material for the prosecution to anchor the conviction of the appellant thereon. Counsel cites the case of **The State vs. John Ogbubanjo (2001) FWLR (P.37) 1097 at 1123 – 1124** in support of his contention:
C

On the totality of the submission, the learned counsel for the appellant challenges vehemently, the heavy reliance made on exhibits “B” and “B1” which counsel characterizes was purportedly made by the appellant and whose
D tendering was objected to due to the involuntariness in the process of its extraction. The counsel cites numerous authorities in support of his contention and urges this court to set aside the affirmation or conviction and sentence of the appellant by the Justices of the court below.

E In response to the appellants counsel, an extensive reference was made to the record of proceeding by the counsel representing the respondent. Specific attention was drawn to Exhibits “B”, “B1”, “D” and “E”; that the court did discountenance Exhibits “D and “E” because same were not read to the appellant
F in the language he understands after it was recorded by the PW4 in English language; that Exhibits “B” and “B1” were admitted into evidence without objection; that although the appellant retracted from making the statements, the effect on same would not affect its admissibility. Counsel cites the case of
G **Nwachukwu vs. State (2007) 12 SCM part 2, page 447 @ 454**; that the learned trial judge appropriately dealt with the issue and properly admitted and acted on the confessional statement and corroborative evidence which gave support to the truth of the confession.

H On the absence of any eye witness to the actual murder of the deceased, the learned counsel re-iterates that the guilt of an accused person can be established by his confessional statement and circumstantial evidence; that there is sufficient corroboration of Exhibits B and B1 by the strong circumstantial evidence of
I PW1.

The learned counsel sought to rely on the principle of “last seen” and argues that it applies in this case where the appellant was the person last seen with the deceased. Counsel cites the case of **Archibong vs. State (2006) 8-9 SCM**
J **page 43 @ 50 - 51**; that the fact that the trial court disregarded Exhibits “D” and

A “E” does not necessarily mean that Exhibits “B1” and “B1” ought to have been disregarded also.

The learned counsel urges us to affirm that Exhibit “B” translated into “B1” is weighty in the eyes of the law and to affirm the decision of the lower court
B in this regard.

It is submitted on behalf of the appellant that the lower court erred when it relied on the appellants extra judicial statement to the police which was admitted as Exhibits “B” and “B1” to convict the appellant for murder; that this was in the
C absence of any independent, credible, cogent and good quality evidence.

The definitions assigned to the word/phrases, “confession” or “confessional statement” by the Evidence Act and the case law, refer to an admission made at any time by a person charged with a crime suggesting or
D stating that he committed the crime. See the case of **FRN vs. Iweka (2011) 12 SCM (Pt. 2) page 213 @ 218.**

The law is well settled in plethora of cases that an accused person can be convicted on his confessional statement alone where same is direct, positive and
E proved. Again see the case of **Akpa vs. State** under reference supra wherein the principle is affirmatively restated that what is admitted needs no further proof. At page 74 for instance, it was held that:

F **“a confession is an admission made by an accused person. The duty of the court is to decide the weight to be attached to it.”**

With reference made to the record of appeal there was no objection to the
G admissibility of Exhibits “B” and “B1”, which were the statements of the appellant. The court placed reliance on the said exhibits. I seek to add also that there was no objection of involuntariness at the time of tendering the exhibits. As rightly submitted by the learned counsel for the respondent, the court was right in
H admitting the exhibits and subsequently relying on same in its judgment. As rightly submitted also by the respondent's counsel, the retraction of the statement made by the appellant will not affect same adversely once the court is satisfied as to its truth, See again the case of **Nwachukwu vs. State supra.**

I It follows from the foregoing that a confessional statement properly made by an accused person as in the case at hand is the best guide to the truth of the part played by him – see the case of **Salawu vs. State (2011) 10 SCM 76.** Once such statement is admitted therefore, it becomes part of the prosecution's case which
J the court must consider as done in the present case. Again, see the case of

- A Nwachukwu vs. State (supra) @ 455.** In the absence of any objection by the defence of involuntariness or any evidence suggesting that there was undue influence by the police at the time Exhibits “B” and “B1” were being tendered, the lower court was right in affirming the admission and reliance made on the statements by the learned trial judge.

A confessional statement of this nature regardless of its retraction can ground a conviction. See the case of **FRN vs. Iweka (supra) @ 218**. For purpose of corroborating the confession, there could be direct or circumstantial evidence.

- C See Dogaya vs. The State (2006) 2 SCM page 33 at 67.**

For all intents and purposes, the confessional statements Exhibits “B” and “B1” made by the appellant have been sufficiently corroborated by the strong circumstantial evidence of the PW1. This I say, because the evidence of the said

- D** witness at pages 19 to 22 of the record of appeal was that he was coming from Oja-Odan in the morning at about 730a.m when he met the appellant close to the deceased's house where the appellant and the deceased were living. The appellant informed the PW1 that the deceased was dead; when the PW1 got to the deceased's house, he saw him (deceased) on the mat with nail marks on his neck.

It is the witnesses evidence also that only the appellant and the deceased slept in the deceased's house the night the deceased died and that there was nobody else with them. PW1 gave evidence of facts within his knowledge and as such his evidence is not hearsay as argued by the appellant's counsel.

- F** The foregoing piece of evidence is independent which serves as a corroborative fact to the confession of the appellant in exhibits “B” and “B1” wherein he said that he strangled the deceased by pressing his neck while he (deceased) was sleeping on his mat.

I seek to draw attention that the evidence of the PW1 and exhibit “B1” also corroborate each other that the PW1 met the appellant on the way when the appellant informed the PW1 of the deceased's death. It was held in the case of

- H Musa vs. The State (2013) 3 SCM page 79 at page 85** that corroboration means confirmation or support by additional evidence; the corroboration need not consist of direct evidence that the accused person committed the offence nor need it amount to a confirmation of the whole account given by the witnesses, provided it corroborates the evidence in some respects material to the charge in issue.

It is pertinent also to draw attention that the circumstances of this case suggest that the appellant is the person last seen with the deceased. The law presumes that the person last seen with the deceased bears full responsibility of the death of the deceased – See the case of **Archibong vs. State supra**.

- A** The appellant in the circumstance of the case at hand had the opportunity to commit the offence for which he was charged and only him was in the best position to narrate the role he played in the murder of the deceased which he unequivocally stated in exhibits “B” and “B1”. The trial court found that the PW3
- B** followed a proper procedure in recording the said exhibit “B” in Yoruba language as volunteered by the appellant and later translated same into exhibit 'B1”, the English version.

- C** The extra judicial statements exhibits “B” and “B1” are very weighty in the eyes of the law because they are confessional in nature. The lower court was on a firm ground when it held that the trial court judge was right in relying on the confessional statement of the appellant. Exhibits “B” and “B1 in convicting him. The said issue two is hereby resolved also against the appellant.

D

3RD ISSUE

- E** **Whether the learned justices of the Court of Appeal, Ibadan Division were right to have affirmed the conviction and sentence of death by hanging of the appellant for murder when the prosecution failed to disprove the appellant's alibi of being far from the crime scene (at his maternal grandmother's village) at the time of the incident.**

- F** The learned counsel for the appellant submits at great extent that it is wrong for the lower court to conclude that the appellant killed the deceased simply because PW1 in his evidence testified that he (appellant) was “**last seen**” with the deceased; that the doctrine is a mere presumption which, like all other
- G** presumptions, are rebuttable. it is the appellant's argument that he slept at his maternal grandmother's house on the day before the deceased was killed; that in this case, the appellant raised the issue in his statement to the police and also in his evidence at the trial but-counsel submits it was not investigated.

- H** It is the appellant's further contention that the lower court did not also consider the appellant's defence of alibi in its judgment. In support of his submission, the counsel cites the case of Patrick **Njovens & Ors vs. The State (1973) NMLR 331**. The learned counsel argued affirmatively that the lower court
- I** in its judgment at page 140 of the record erred and misdirected itself by affirming the view held by the trial court on the alibi raised; that the failure to consider the defence had greatly occasioned serious miscarriage of justice to the appellant's case. Numerous authorities were cited by counsel in support of his submission;
- J** that the prosecution failed to disprove the appellant's alibi of being far from the

A crime scene at the time of the incident.

On the totality, the appellant urges the court to hold that this appeal is meritorious and consequently, same should be allowed and the judgment of the trial court as affirmed by the Court of Appeal, Ibadan Division should be set aside

B and be substituted with orders of acquittal and discharge of the appellant.

In response to the appellant's submission on issue 3, the counsel for the respondent restates the position of the law regarding the defence of alibi. Learned counsel argues that for the defence to avail an accused person, it must be raised at the earliest opportunity which should be in the interrogation room. This counsel argues, is to enable the police to investigate the alibi. There can be no investigation of an *alibi* raised for the first time at the trial. Counsel cites the case of **Ndidi vs. The State (2007) 10 SCM page 101 @ 105.**

D The learned counsel opined emphatically therefore that the defence of alibi raised for the first time during the trial in this case cannot avail the appellant. The court is urged to affirm the concurrent judgments of the two lower courts and thereby dismiss this appeal as lacking in merit.

E

RESOLUTION OF ISSUE 3

The law is well settled that it behooves a court of law to consider any defence available to an accused person which is disclosed in evidence before the court.

F This duty is laden on a court whether or not it is raised by an accused person or his legal practitioner. See the cases of **Nse Udo Nuta vs. The State (2008) All FWLR (Pt. 397) 1** and **Shalla vs. The State (2008) All FWLR (Pt. 397) 25.**

G The defence of *alibi* connotes the physical impossibility of a person or an accused to be somewhere else and at the same time at the scene of a crime, As rightly submitted by the learned counsel for the appellant, alibi is a complete defence, which if proved in favour of an accused person, absolves him of any criminal liability.

H The defence must be raised timeously at the earliest opportunity of contact with the investigating security agencies. The appellant must furnish the agencies with sufficient particulars about his whereabouts on the day in question. Thereafter, the duty shifts to the prosecution to investigate the alibi and affirm or disprove same. The defence is destroyed by a contrary evidence fixing the accused at the place of crime, However, if successfully disproved the defence fails. See this court in **Ikemson vs. The State (1989) 3 NWLR (Pt. 110) P.455 @ 479 - 780.**

J In the instant case, contrary to the submission of the appellants counsel,

A both trial court and Court of Appeal found that the appellant raised his alibi for the first time at the trial. He stated in evidence that he was not with the deceased the night he was murdered and that he (appellant) slept in his grandmother's house but that no one was aware he slept there.

B On the question of alibi raised at the trial, this is what the trial court had to say at pages 61 and 62 of the record of appeal:

C **“It is ridiculous for the accused person to sleep in his maternal grandmother's village without anybody knowing that he slept there more so when it is not part of his case that there was no person at all in his maternal grandmother's house where he slept. What is more, his evidence in-chief reveals that his maternal grandmother is still alive. In the particular circumstances of this case, the accused person ought to, at lease call as a witness, Baba Folake, his mother's junior brother, whom he said saw him the following morning. I do not believe the evidence of the accused person that he did not sleep in the same house with his father on the night of the death of his father. The evidence is incredible and it is hereby rejected. I believe and accept the evidence of PW1 that the accused person slept in the same house with their father in the night of their father's death and with the rejection of the evidence of the accused person that he did not sleep in the same house with their father, I hereby draw the inference that the accused person was the one who killed their father, OlaleyeKolade.”**

G From the foregoing view held by the trial court, it is obvious that the court wasted no time in rejecting the defence of alibi raised by the appellant. Same was also endorsed by the lower court when their lordships held as follows at page 140 of the record:

I **“On the last issue of alibi of the appellant set up for the first time at the trial, I agree with the learned trial judge that it was an afterthought as it was not set up before the police to enable investigation at the trial and after the appellant had earlier made confessional statements as in Exhibits “B”, “B1” and “E”. It certainly was an afterthought also bothering on the ridiculous as the appellant had to use five year old girls as his**

A security escorts detailed by his maternal relatives. I consider the story in his alibi as not only absurd but incredible.”

B For all intents and purposes, I hereby also firmly endorse the findings and conclusions arrived at by the two lower courts that the defence of alibi sought to rely upon by the appellant is belated and a mere afterthought. The whole concept in conceiving such a concocted story is ridiculous and also incredible as rightly held by the two lower courts respectively.

C The appellant's evidence in court at the trial is very much inconsistent with his earlier extra-judicial statement made to the police. It is trite to state that the inconsistency rule does not apply to an accused person. In other words, it does not cover a case where an accused person's extra-judicial statement is contrary to his testimony in court. See the case of **Ogudo vs. State. (2011) 12 SCM (Pt. 1) page 209 @ 223.**

E I seek to state further that the appellant's alibi was not disclosed to the police at the time the appellant volunteered his statement as same is not contained in the said statement to the police. The appellant therefore failed to afford the police the opportunity to investigate the alibi as requested by law. See the case of **Tango vs. C.O.P (2007) 9 SCM page 113.**

F It is not only incumbent on the appellant to inform the police of his alibi but he should also furnish the police with detailed particulars of his whereabouts so that same could be properly investigated. See the case of **Okolo Ochemaje vs. State (2008) 10 SCM page 103 @ 107** where it was held that:

G “the police in order to investigate a plea of alibi must have specific particulars of where the accused was at the material time-----

H It is not the law that the police should be involved in a wild goose chase for the whereabouts of an accused at the time the crime was committed..... the accused must give specific particulars of where he was at the material time to enable the police move straight to that place to carry out the investigation required by law.

J It is the findings of both the trial court and the Court of Appeal that the appellant

A did not raise any alibi at the earliest opportunity, which should have, been at the investigation stage. His alibi raised only at the trial stage was held as an afterthought and cannot be reckoned with. The lower court did not also waste time but rightly in my view also endorsed the trial-court's conclusion. This was based
B on sound legal principles in the absence of any evidence to disturb the concurrent findings. See the case of **Ochiba vs. State (2011) 12 SCM (Pt. 2) page 284 @ 289** where this court in reiterating the well settled principle of law said:

C “where the two courts below make concurrent findings of fact, as herein, this court will not interfere unless same is perverse or runs against current of evidence adduced or occasioned miscarriage of justice....”

D Contrary to the submission and the view held by the learned counsel for the appellant, I hold the firm view that the learned justices of the Court of Appeal were right when they affirmed the decision of the trial court judge that the
E appellants alibi was not raised at the appropriate time and as such same cannot be recognized. The said issue three is also resolved against the appellant.

On the totality of all the three issues raised supra, same are resolved against the appellant and consequent upon which his appeal is hereby dismissed.

F The concurrent findings by the two lower courts are unassailable. The conviction and sentence of the appellant for murder by the lower court which affirmed the judgment of the trial High Court is hereby also endorsed by me.

G The appeal is hereby dismissed while the judgment of the lower court is affirmed.

The appellant was rightly convicted and sentenced to death by hanging for the murder of his father late Mr. OlaleyeKolade.

Appeal is dismissed while conviction and sentence are hereby affirmed.

H **Clara Bata Ogunbiyi**
Justice, Supreme Court

OLABODE RHODES-VIVOUR, (JSC): I have had the benefit of reading in
I draft the leading judgment of my learned brother Ogunbiyi (JSC), I agree that this appeal should be dismissed. I intend to comment on **Section 316 of the Criminal Code** on which the appellant was charged for the offence of Murder. I gratefully adopt the statement of facts in the leading judgment. For the prosecution to
J succeed under **Section 316 of the Criminal Code** the prosecution should prove

- A** beyond reasonable doubt that a person died (in this case Oialeye Kolade died) and that he died as a result of an act by the appellant. The act of the appellant which caused the death of Olaleye Kolade must be one of the six circumstances in **Section 316 of the Criminal Code**. If the act of the appellant which caused the
- B** death of OlaleyeKolade is not one of the six circumstances, the death of the deceased is no longer murder. The six circumstances are:
1. If the appellant intends to cause the death of Olaleye Kolade, or that of some other person;
 - C** 2. If the appellant intends to do to the deceased 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;
 - D** 4. If the appellant 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
 - E** 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
 - F** of such purposes;

See Ilodigwe vs. State (2012)5 - 7 SC (Pt. II) p.148; Chukwu vs. State (2012) 12SC (Pt. VII) p. 60

- G** 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

- H** consistent with a high degree of probability. See *Osuagwu vs. State (2013) 5 NWLR (Pt. 1347) p. 360*

The deceased died as a result of a deliberate act by the appellant that could be either 1, 2, 3, or 6 above. The appellant's confession of murder, i.e. exhibits B, B1 and B2 was free and voluntary and in itself fully consistent and probable and the inculpatory statements were corroborated by Exhibit A the autopsy report and testimony of PW1 and PW2 (the Medical Doctor). It shows that the confession was true, and the charge was proved beyond reasonable doubt as required by

- J** section 135 of the Evidence Act.

A It is for these brief reasons as well as those more fully given by my learned brother, Ogunbiyi JSC that I also dismiss the appeal.

Olabode Rhodes-vivour
Justice Supreme Court

B

AMIRU SANUSI, (JSC): I was opportune to read before now, the judgment prepared and read by my learned brother Ogunbiyi JSC. I agree with the reason and conclusion arrived thereat, that this appeal is bereft of merit. I also dismiss it even though I wish to add some comments below in support of the judgment.

C

The present appellant was tried at the Ogun State High Court of justice on a charge of murder of his own father Kolade Olaleye on 3rd of March, 2011. The Ogun state High Court (hereinafter referred to as “the trial court”), at the conclusion of the trial, found him guilty of the offence he faced trial on, convicted and sentenced him to death by hanging. The offence against which he was tried was contrary to **Section 316 of Criminal Code**.

D

E The facts of the case which gave rise to this instant appeal as could be gathered from the testimonies of the witnesses are follows:

The appellant herein, was the son of the deceased and was staying with the latter in the farm house. The appellant happened to be the last person to be seen with the deceased [his father) as at the 3rd of December 2011, when his dead body was recovered in the farm house. Evidence abound that on the 3/12/2011 when PW1, a brother of the appellant and also son of the deceased, while on his way to the deceased's farm house, he saw the appellant on the deceased's motor cycle and the appellant informed him that their father died. On reaching where the dead body of the deceased was laying, PW1 stated that he observed marks on the neck of their father.

F

G

The PW1 thereupon informed their other sibling about the incident. Later, the appellant was arrested by the police and during investigation he made a statement confessing that he was responsible in killing his father [the deceased]. The confessional statement of the appellant was recorded by a woman police which was tendered at the trial and admitted in evidence by the trial court and marked as Exhibit B & B1 PW2 was the medical doctor who examined the corpse of the deceased. Another statement made by the appellant was also recorded by PW4 a woman police sergeant which was also admitted at the trial and marked as Exhibits D and E. After the prosecution closed its case, the appellant testified for his defence denying the commission of the offence he was charged with. He also posed a defence of Alibi when he stated while testifying for his defence, that he

H

I

J

A was not with the deceased on the night of the incidence. He stated that on that fateful day, he slept in his maternal grandmother's house in another village. At the conclusion of the trial, the trial court found the appellant guilty as charged, convicted him and sentenced him to death.

B Aggrieved with the conviction and sentence by the trial court, the appellant appealed to the Court of Appeal (hereinafter called “the court below”) which dismissed his appeal and affirmed the conviction and sentence passed by the trial court. Naturally, the appellant became dissatisfied with the affirmation of his conviction and sentence by the court below hence, he further appealed to this court.

D In keeping with the practice and rules of this court, learned counsel to both parties filed and exchanged briefs of argument. On his part the appellant filed his brief of argument wherein, he raised three issues for determination out of the ten grounds of appeal contained in his notice of appeal, which said issues are reproduced hereunder:

- E** “(1) Whether the prosecution proved its case beyond reasonable doubt against the appellant to the effect that the appellant killed his father Olaleye Kolade to justify the affirmation of the conviction and sentence of death by hanging of the appellant for murder by the learned justices of the Court of Appeal Ibadan Division. (Grounds 1, 2, 4, 5 and 6)
- F**
- G** (2) Whether the learned justices of the Court of Appeal, Ibadan Division were right to have affirmed and adopted the learned trial Judge's admission of the appellant's purported extrajudicial statements - exhibits “B” and “B1” as confessional statements in spite of the illiteracy of the appellant, the manner in which the said statements were obtained and the objection of the appellant to their admissibility by reason of the involuntariness of the process of their extraction and relied heavily upon same to affirm the conviction and sentence of the appellant for murder. (Grounds 3 and 8).
- H**
- I** (3) Whether the learned justices of the Court of Appeal, Ibadan Division were right to have affirmed the conviction and sentence of death by hanging of the appellant for murder when the prosecution failed to disprove the appellant's alibi
- J**

- A** of being far from the crime scene (at his maternal grandmother's village) at the time of the incident. (Ground 9)'
- B** On its part, the respondent also formulated three issues for determination of the appeal in its brief of argument. The three issues read thus:
- C** (a) Whether the learned justices of the Court of Appeal were right to have affirmed the decision of the trial court that the prosecution proved the offence of murder against the appellant.
- D** (b) Whether the learned justice of the Court of Appeal were right to have held that the learned trial Judge was right in relying on the confessional statement of the appellant in convicting him.
- E** (c) Whether the learned justices of the Court of Appeal were right to have held that the defence of alibi raised by the appellant at the trial of his case can not avail the appellant.
- F** Carefully perusing the two sets of issues for determination set out above, the issues raised in the respondents brief appear to me to be more apt and elegantly couched compared to the verbose issues raised by the appellant.
- G** To utilise the issues raised in the respondents brief in determining in treating this appeal would be more convenient and useful.
- H** I will therefore chose to be guided by them and will also consider them together.
- H** For the prosecution to obtain conviction on charge of murder under Section 316 of Criminal code it is duty bound to prove beyond reasonable doubt the underlisted ingredients namely:
- I** (a) That the deceased is dead
(b) That act or omission of the accused which caused the death of the deceased was done intentional or with knowledge that death or grievous harm was probable.
- J** All the aforementioned ingredient must be proved beyond reasonable doubt. See

A Ogba vs. State[1992] 2 NWLR (pt.222) 164. In the instant case, there is no iota of doubt, that the deceased person died as a result of strangulation of his neck as confirmed by PW2, the medical doctor who performed autopsy on his dead body and tendered the medical report Exhibit A at the trial.

B The next question to ask is “Who was responsible in causing the death of the deceased?. There is no doubt that there was no eye witness account of anybody who witnessed the commission of the crime. However, the respondent led credible evidence to show that the appellant was the only person who used to live in the farm house with his father, the deceased. When he met PW1 he broke the news to him that their father was late and PW1 said he observed wound on his neck. The prosecution/respondent at the trial therefore relied on circumstantial evidence especially the doctrine of last seen. This doctrine simply means that the law always presumes that the person last seen with the deceased is presumed to be responsible for his death, provided the circumstantial evidence is overwhelming and leads to no other person or persons but him. As it has been confirmed by the available evidence that the deceased was with the appellant up to the time of his death then the doctrine of last seen obviously counts or applies against him. **E** Moreso, there is a confessional statement voluntarily made by the appellant which supported the presumption of his guilt by the application of doctrine of last seen, as well as the evidence of his own brother PW1 all of which corroborated **F** and supported his responsibility in causing the death of their deceased father.

See **Moses Jua vs. State (2010)4 NWLR (pt. 1184) 21; Archibong vs. State (2006) 14 NWLR (pt.1000) 249.**

G In his defence, the appellant while testifying for his defence raised Alibi defence when he testified that on the day of the incidence he did not sleep in his father's farm house with the father but rather he slept in his maternal grand mothers home in another village. It is settled law that any evidence of Alibi raised by an accused person can not be brushed aside unless the prosecution produced a **H** much stronger or greater and more convincing evidence to counter or neutralise it, The law is trite also, that where an accused person raises the defence of Alibi, the law requires him to state at the earliest opportunity and to give information as to his whereabouts at the time of the commission of the offence and with who or in **I** whose company he was with. In other words, he has to give detailed particulars of where he was other than at the scene of the crime. Such defence must also be raised at the earliest opportunity in order to give the police notice for them to investigate or verify the truth of his alibi defence. Failing to do this, such defence **J** if raised, will not avail him. See **Adisa Wale vs. The State (2013)14 NWLR**

- A (pt.1375)567; Esannegbedo vs. The State (1989)4 NWLR (pt. 113) 57.** In this instant case the defence of alibi raised by the appellant can not avail him as rightly affirmed by the court below because the appellant did not raise it at the earliest opportunity: He also did not call the person or persons in whose company he was
- B** on the day or at the time of the incidence. The trial court was therefore right in rejecting the defence of alibi raised by appellant and the court below was equally right in affirming such finding of the trial court which I regard as unassailable. The two issues raised by the respondent are therefore resolved against the
- C** appellant herein.

Apropos of the above discourse of mine and for the fuller and detailed reasons and conclusion arrived at in the lead judgment which I entirely agree with and adopt as mine, I also see no merit in this appeal. I accordingly dismiss it for

D being meritless. I affirm the conviction and sentence of the appellant by the two lower courts. Appeal is hereby dismissed.

Amiru Sanusi
Justice, Supreme Court

- E**
- AUGIE, (JSC):** I had a preview of the lead Judgment delivered by my learned brother Ogunbiyi, JSC, and I agree with him that the appeal lacks merit.

- He dealt extensively with the all issues raised in the Appeal and I will only
- F** say a few words on the issue of alibi and last seen doctrine.

- The Appellant's conviction for the murder of his father, hinged on the testimony of his brother, **PW1**, who said he saw the appellant on their father's motorcycle, as he was heading to their father's house. The appellant told **PW1**
- G** their father was dead. He got there and saw marks on the neck of their deceased father, and he informed others.

- The appellant confessed to the murder but in his defence at the trial court, he put up a defence of alibi. He claimed he was not with the deceased on the said
- H** night but slept at his grandmother's house.

- The picture painted by the prosecution is that the appellant was the person last seen with his deceased father. The last seen doctrine indicates that any accused charged with murder, would be required to offer some explanation as to how the deceased met his death. It has no statutory foundation, and the doctrine is a development of case law – see **Archibong vs. State (2006) 14 NWLR (Pt 1000) 349 SC, and Haruna vs. A.-G., Federation (2012) 9 NWLR (Pt. 1306) 419 SC**, where this court, per Adekeye, (JSC), explained the law as follows:

- J** **The doctrine of “last seen” means that the law presumes that**

- A** the person last seen with a deceased bears full responsibility' for his death. Thus, where an Accused Person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion,
- B** there is no room for acquittal.

In this case, there was more than enough evidence to establish that the appellant was the last person seen with his deceased father, and this includes his

C confessional statement, which forms part of the case for the prosecution. and corroborated the testimony of his brother, **PWI**.

But the appellant claimed that he was elsewhere, and *alibi* is Latin for “*elsewhere*”. The defence of alibi is based on the physical impossibility of an

D accused person being guilty by placing him in another location at the relevant time. It also means - “*the fact or state of having been elsewhere when an offence was committed*” see *Black's Law Dictionary, 8th Ed.*, **Shehu vs. State (2010) 8 NWLR (Pt. 1195) 112, Dagayavs. State (2006) 7 NWLR (Pt. 980) 637 SC,**

E **Ochemaje vs. State (2008) 15 NWLR (Pt. 1109) 57.** Once the defence is properly raised by an accused during investigations, it is the duty of the police to investigate it and for the prosecution to disprove it.

But it is not in all cases that failure to investigate an alibi will be fatal to the

F case of the Prosecution. This court made this point clear in **Olaiya vs. State (2010,) 3 NWL.R (Pt. 1181) 423**, wherein it adopted its decision in **Hemyo Ntam vs. State (1968) NWLR 86** as follows

- G** There are occasions on which a failure to check an alibi may cast doubt on the reliability of the case for the prosecution, but in a case such as this where the appellants were identified by three eye witnesses there was a straight issue of credibility anti
- H** we are not able to say that the judge's findings of facts were unreasonable or cannot be supported having, regard to the evidence. If the alibi had been true it would have been open to the appellant to call witnesses in support on them and neither of
- I** them did so.

And also in **Michael Hausa vs. State (1994,) 6NW1R (Pt. 350,) 281:**

- J** Once the Prosecution through its witnesses establish that they

- A** (the witnesses) saw the Appellant committing the offence charged, a defence of alibi by the Appellant raises the straight issues of credibility to wit; whether the evidence of the witnesses is believable and if believed, the *alibi* is logically demolished or
- B** fizzles into thin air and so doomed.

- It is also settled that a defence of alibi, to be worthy of investigation, must be precise and specific in terms of the place that the accused was and the person or persons he was with and possibly what he was doing there at the material time –
- C** see **Shehu vs. State** (*supra*) and **Ochemaje vs. State** (*supra*), where Tobi, JSC expatiated as follows:

- D** It is not the law that the police should be involved in a wild goose chase for the whereabouts of the accused person at the time the crime was committed. No. That is not the function or role of the police. The accused must give specific particulars of
- E** where he was at the material time to enable the police move straight to that place to carry out the investigation required by law.... Investigation is not a necessity if the evidence unequivocally points to the guilt of the accused person, either in
- F** the evidence of the witnesses or under cross-examination of the accused or his witness. The learned trial Judge relied on the evidence by the evidence of PW1, PW2, PW3 and PW6. -- I am of the view that the defence of alibi is a mere farce and clearly
- G** an afterthought. It fails. After all, a trial judge will not take seriously a defence of alibi which is porous and cosmetic. That is the way I see appellant's defence of alibi.

- H** In this case, the two lower courts found that the appellant raised his defence of alibi for the first time at the trial. It is settled that where there is sufficient evidence to support concurrent findings of fact by two lower courts, such findings will not be disturbed unless the findings are shown to be perverse, or some miscarriage of
- I** 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, and this court is, therefore, not in a
- J** position to intervene in any way.

A 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

B

GALINJE, (JSC): I have read in draft the judgment just delivered by my learned brother OGUNBIYI, JSC and I agree that the appeal lacks merit and should be dismissed.

C The appellant was arraigned before the High Court of Ogun State, holden at Ilaro on the 4th of December, 2013 on a one count charge of murder under Section 316 of the Criminal Code Law, revised Edition Laws of Ogun State and punishable under Section 319 of the same code. Appellant pleaded not guilty to the charge. In order to prove its case, the prosecution called four witnesses and tendered several exhibits in evidence. The appellant gave evidence in his own defence and called no further witnesses.

E Parties filed written addresses which were adopted before the trial judge. In a reserved and considered judgment, delivered on the 13th August, 2014, OKUNSOKAN J. found the appellant guilty as charged and sentenced him to death by hanging until he be dead. The appellants appeal to the Court of Appeal, Ibadan was dismissed on the 18 May, 2015.

F It is against the judgment of the Court of Appeal, Coram Obietombara Daniel Kalio, Mudashiru Nasiru Oniyangi, and Nonyerem Okoronkwo JJCA, that the appellant has brought this appeal. His notice of appeal at pages 147 - 152 of the record of this appeal contains ten grounds of appeal.

G Parties filed and exchanged briefs of argument. The appellants brief of argument, settled by Chief Henry Eshijonam Omu is dated 25th August, 2015 and filed the same day. At page 5 of the said brief of argument, three issues are submitted for the determination of this appeal. They read as follows:

H

1. Whether the prosecution proved its case beyond reasonable doubt against the appellant to the effect that the appellant killed his father— Olaleye Kolade to justify the affirmation on the conviction and sentence of death by hanging of the appellant for murder by the learned justices of the Court of Appeal, Ibadan Division.

I

2. Whether the learned justices of the Court of Appeal,

J

- A** **Ibadan Division were right to have affirmed and adopted**
- B** **the learned trial judge's admission of the appellant's**
- C** **purported extra-judicial statements Exhibits “B” and**
- D** **“B1” as confessional statements inspite of the illiteracy**
- E** **of the appellant, the manner in which the said statements**
- 3.** **were obtained and the objection of the appellant to their**
- Whether the learned justices of the Court of Appeal,**
- Ibadan Division were right to have affirmed the**
- conviction and sentence of death by hanging of the**
- appellant for murder when the prosecution failed to**
- disprove the appellant's alibi of being far from the crime**
- scene (at his maternal grandmother's village) at the time**
- of the incidence.**

Learned counsel for the appellant who did not tie the issues to the grounds of appeal, at the prompt of the court tied the 1st Issue to grounds 1,24,5 and 6, Issue 2 to grounds 3 and 8 while Issue 3 is tied to ground 9. Having failed to formulate issues from grounds 7 and 10, the said grounds 7 and 10 are deemed abandoned. They are accordingly struck out.

The respondent's brief of argument, settled by F. F FAKOLADE ESQ of counsel for the respondent s dated 2nd November, 2015 and filed on the 23rd November, 2015. At page 3, three issues are formulated for the determination of this appeal. They are reproduced hereunder as follows:

- H** **1. Whether the learned justices of the Court of Appeal were**
- I** **right to have affirmed the decision of the trial court that**
- J** **the prosecution proved the offence of murder against the**
- appellant.**
- 2. Whether the learned justices of the Court of Appeal were**
- right to have held that the learned trial Judge was right**
- in relying on the confessional statement of the appellant**
- in convicting him.**
- 3. Whether the learned justices of the Court of Appeal were**

- A** **right to have held that the defence of alibi raised by the appellant at the trial of this case cannot avail the appellant.**
- B** The prosecution's case is that the appellant who is the son of the deceased lived in a farm with his deceased father and was the last person seen with the deceased before his dead body was discovered in the farm house by PWI, **Olabisi Kolade**, the appellant's junior brother on the 3rd of December, 2011 with nail marks on his
- C** neck which suggested that the deceased might have been strangled to death. The appellant who was last seen with the deceased was subsequently arrested and during interrogation, he admitted killing his father in his statement which was admitted as **Exhibit B** and its translated version **Exhibit B1**.
- D** The issues formulated by parties are directed at the manner in which the lower court treated the reception of evidence at the trial court and ascription of probative value to such evidence. I am of the view that the issues as formulated by parties are similar. I have read through the appeal process and I am of the firm
- E** view that the only issue calling for determination of this appeal is whether the lower court is right to have affirmed the decision of the trial court on the ground that the prosecution had proved its case beyond reasonable doubt.
- In arguing the appeal, learned counsel for the appellant submitted that the
- F** prosecution did not prove its case beyond reasonable doubt as required by law at the trial court, and that the lower court did not carry out any evaluation of the evidence elicited by the prosecution and the defence before it reached its decision. Learned counsel enumerated the ingredients of the offence of murder
- G** which the prosecution must prove in order to succeed and contended that the prosecution did not connect the appellant with the offence with which the appellant was charged as no eye witness to the offence was called as a witness. In aid learned counsel cited **Chukwu vs. The State (2013) ALL FWLR (Pt 666,)**
- H** **425 at 437 Paras E-H, Oshiba vs. The State (2011) 12 SCNJ 526; Uguru vs. The State (2002) FWLR (Pt. 103) 330 at 343 -344 Paras H-B; Akpan vs. The State (2007) 2 NWLR (Pt. 1019) 500; Ogbu vs. The State (2007) 28 WRN I at 8; Nigeria Air Force vs. Obiosa (2003) 4 NWLR (Pt. 810) 333.**
- I** In a further argument, learned counsel submitted that since the prosecution did not call any eye witness, the evidence upon which the appellant was found guilty is hearsay which is not of high quality and credibility that could justify the affirmation of the conviction of the appellant who is charged with a serious
- J** offence such as murder that attracts a death penalty. In aid learned counsel cited

A Benson Obiakor vs. The State (2002) FWLR (Pt. 113) 299 at 313 paras E - F; Onah vs. The State (1985) 3 NWLR (Pt. 12) 236; OforLette vs. The State (2002) FWLR (Pt. 12) 2081 at 2097 Paras C - E.

Still in argument, learned counsel referred to the evidence of **PW1**, a police officer, who according to him, concluded that the appellant killed the deceased without exploring other angles in the investigation process that might have resulted in the killing of the deceased by a third party as there was evidence of unresolved mysterious death of late Baba Toyin which occurred earlier in the community and the murderer was not found. Learned counsel also submitted that the failure of the prosecution to tender the weapon used in killing the deceased is fatal to the prosecution's case and that the circumstantial evidence applied by the lower court to convict the appellant is not cogent, complete and unequivocal and does not lead to the irresistible conclusion that the appellant and no one else killed the deceased. Learned counsel urged this court not to believe the evidence of **PW1** on the issue of the doctrine of last seen with the deceased as there was no evidence that the appellant was the last person seen with the deceased.

Finally, learned counsel urged this court to allow the appeal.

Learned counsel for the Respondent submitted that the learned justices of the Court of Appeal rightly affirmed the decision of the trial court on the ground that the prosecution proved the charge of murder beyond reasonable doubt against the appellant.

Having analysed the evidence before him, the learned trial judge had this to say:

“Therefore head or tail, in other words, whether by confessional statement of the accused person (Exhibit B1) or circumstantial evidence, the prosecution has proved beyond reasonable doubt that the death of the deceased was caused by the accused person. As a result, I hold that the second ingredient of the offence has been proved by the prosecution.”

The learned trial Judge also held that the third ingredient of the offence of murder was proved beyond reasonable doubt and in the final analysis he held that the 'prosecutor had proved his case beyond reasonable doubt.

The lower court in its judgment upheld the decision of the trial court in the following words:

“As it is, it seems to me that all the four issues raised from

A **Grounds of Appeal in the appellants brief were carefully dealt with in the judgment of the trial Judge. Specifically, on the first issue raised, I hasten to agree with the trial judge that the**
B **prosecution proved its case beyond reasonable doubt having proved all the elements of the offence of murder against the appellant”.**

I wish to state clearly that assessment and/or appraisal of oral evidence and ascription of probative value to such evidence is the primary duty of the trial court. An appellate court has no jurisdiction to interfere with that duty unless there are special circumstances that warrant such interference. Learned counsel for the appellant has accused the lower court of failing to evaluate the evidence of the prosecution and the defence by the trial court. Has he shown any special circumstances that would warrant such interference? In **Eyo vs. Onuoha (2011) 11 NWLR (Pt. 1257) 1 at 38 – 39 paragraphs G - A**, this court per Tabai JSC said:

E **“It is settled principle of law that the duty of evaluation of evidence is pre-eminently that of the trial court which alone has the benefit of seeing and hearing witness in the course of the**
F **testimonies; it is the trial court that has the singular benefit of watching the demeanour of witnesses in the course of their testimonies..... As a general rule therefore, an appellate court would not disturb the findings of a trial court unless it is proved**
G **that the findings are not supported by the evidence on record and therefore perverse. This is because of the appellate court's disadvantage of not having seen or heard the witnesses”.**

H **See A. G Oyo State vs. Fairlakes Hotel (NO. 2) (1989) 5 NWLR (Pt. 121) 255. Are vs. Spaye (1990) 2 NWLR (Pt. 132) 298; Onwuka vs. Ediala (1989) 1 NWLR (Pt. 96) 182; Anaeze vs. Anyaso (1993) 5 NWLR (Pt. 291) 1; Abisi vs. Ekwealor (1993) 6 NWLR (Pt. 302) 643. In the course of this judgment, I will**
I **give reasons why there were no exceptional circumstances, where the lower court had to evaluate the evidence before the trial court. However, I wish to start by clearly pointing out that the offence for which the appellant was charged and convicted carries the maximum sentence known to our criminal jurisprudence.**
J **Even at the risk of repetition, I wish to reiterate that the appellant was sentenced to**

A death. It follows therefore that before a judge will reach such a verdict in which someone's life is at stake, he must be absolutely sure that the prosecution has proved beyond reasonable doubt the guilt of the accused person. For the law is settled that if the commission of a crime by a party to any proceeding is directly in
B issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt. The burden of proving that any person has been guilty of a crime or wrongful act is on the person who asserts it, whether the commission of such act is or is not directly in issue in the action. See **Section 135(1)(2)(3) of the Evidence Act 2011** **Adamu vs. A.G Bendel State (1986) 2 NWLR (Pt. 22) 284; Akpan vs. The State (1990) 7 NWLR (Pt. 160) 101; Ayub-Khan vs. The State (1991) 2 NWLR (Pt. 172) 127.**

Section 36(5) of the Constitution of the Federal Republic of Nigeria 1999
D provides that every person who is charged with a criminal offence shall be presumed innocent until he is proved guilty. Flowing from above therefore, the burden of proof in criminal cases is on the prosecution who must prove its case beyond reasonable doubt, and a general duty to rebut the presumption of
E innocence constitutionally guaranteed to the accused person. This burden never shifts. See *Alabi vs. The State (1993) 7 NWLR (Pt. 307) 511 at 531 pars A-C; Solola vs. The State (2005) 5 Sc (Pt. 1) 135. In Mufutau Bakare vs. The State (1987) 3SC I at 32 Oputa JSC*, defined “proof beyond reasonable doubt” in the
F following words:

“Proof beyond reasonable doubt stems out of a compelling presumption of innocence inherent in our adversary of criminal justice. To displace this presumption, the evidence of the prosecution must prove beyond reasonable doubt not beyond the shadow of any doubt the offence charged. Absolute certainty is impossible in any human adventure including the administration of justice.”

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See **Bolanle vs. The State (2005) INCC 342 at 359**. Where the prosecution fails to prove the case beyond reasonable doubt, the accused must be discharged and
I acquitted.

In a case of murder such as the one herein the prosecution must prove by credible evidence:

J (i) **That the death of a human being has actually taken place.**

- A (ii) That such death was caused by the accused person.**
(vii) That the act or omission of the accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable consequence.
B

See **Ogumo vs. The State (2011) NWLR (Pt. 1246) 314; Giwa vs. The State (1996) 4 NWLR (Pt. 443) 375; Chukwu vs. The State (2013) ALL FWLR (Pt.**

C 666) 425 at 437 paragraphs E- H.

- Both the appellant and the respondent have admitted that **Olaleye Kolade** is dead. They also agreed that the deceased died on or about the 3rd day of December, 2011. However, the learned trial Judge relied heavily on the evidence of **PWI** and **Exhibits B** and **B1** in holding that the death of the deceased was caused by the appellant and that such death was intentionally caused. Was the lower court right in affirming such conclusion? **PWI** is **Olabisi Kolade**, a junior brother of the appellant. He testified before the trial court that on the 3rd December, 2011 he left Oja Odan in the morning to see his father who was living in a farm house with the appellant. When he got close to the farm he met the appellant on his father's motorcycle. The appellant told him that their father had died. He could not believe the story. However, when he went into the house, he saw his father's corpse on the mat. He noticed some nail marks on the deceased neck and suspected that his father did not die a natural death. Under cross examination, **PW1** admitted that it was only the appellant and the deceased that slept in the farm house that night and there was nobody else with them when the deceased died. In **Exhibits B** and **B1**, appellant confessed to the crime and even took the police to the scene of the crime and demonstrated how he strangled his father to death, **Exhibits B** and **B1** were admitted in evidence without any objection. In his evidence in chief, the appellant set up a defence of alibi, by testifying that he was in Baba Abiola's house to buy cigarette after which he went to his maternal grand-mother's village to sleep. The defence of alibi was rightly in my view rejected by the trial court and the Court of Appeal was right in affirming the decision of the trial court on that score. Whenever an accused person intends to set up a defence of alibi, he should do so at the earliest opportunity during the investigation to enable the investigation police officer to investigate the allegation of being elsewhere when the offence was committed. Where it is done for the first time in court, as in this case, the defence does not avail the accused person. This is so because at that stage the investigation had been concluded and

- A** there is no way the truth of the defence could be tested. See **Ikemson vs. The State (1989) 3 NWLR (Pt. 110) 455; Idiok vs. State (2006) 12 NWLR (Pt. 993) 1; Dagayya vs. State (2006) 7 NWLR (Pt. 980) 637**. The appellant was therefore the last person seen with the deceased and this he admitted in his statement when
- B** he said:

C **“Many of us were living in my father's house but we were going to Oja-Odan and coming back into the village. Some of us that were living with my father from time to time include my father's wife, PWI and PWI 'wife'.**

- D** At the early hours when **PW1** met the appellant on their father's motorcycle, the appellant couldn't have been coming elsewhere other than his father's house where he slept. For this reason, he had the duty of explaining what happened to his father.

E The next question is whether the appellant resiled from the confessional statement, **Exhibits B** and **B1**, which he volunteered at the police station and which was admitted without objection. During his evidence in chief, the appellant was shown **Exhibits B** and **B1**, as well as **Exhibits D** and **E**, by his counsel, and the appellant in answer said:

F **“I do not know the documents now shown to me by my counsel”.**

- G** Could that mean that the appellant resiled from Exhibits B and **B1**. An accused person can resile from his statement to police in one of two ways, that is:

- H** 1. **He can say that he never made the statement at all; or**
 2. **That he made the statement or signed it, but not voluntarily.**

- I** See **Nwangbomu vs. State (1994) 2 NWLR (Pt. 327) 380**, where this court held that the mere denial by an accused of having made a statement confessing to the crime charged is a question of fact that the trial court must decide. It does not make the statement inadmissible. It must however, be considered along with the entire evidence and circumstance of the case for the weight to be attached to it.
- J** Even if the statement by the appellant that he did not know the document shown to

- A** him by his counsel amounted to resiling from Exhibits B and B1, it will appear that the resiling from the said exhibits is negated by the evidence that he was the person last seen with the deceased; something outside the confessional statement which shows that the confession is true. Indeed the confessional statement of the
- B** appellant is consistent with the facts established at the trial. To this extent, the lower court was on a strong wicket when it upheld the judgment of the trial court.

- In the instant appeal even though there was no eye witness to the killing of the deceased. **Exhibits B and B1**, being the confessional statement of the
- C** appellant, freely and voluntarily made is sufficient to ground the conviction and sentence passed on the appellant. For the law is settled that an accused person can be convicted solely on his confessional statement if same is made voluntarily. See **Ntaha vs. State (1972) 4 SC1; Ikemson vs. State (1989) 3 NWLR (Pt. 110) D 455; Saidu vs. State (1982) 3 SC 41.**

- The last ingredients to be established by the prosecution is whether the act or omission of the accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable
- E** consequence.

- In his confessional statement, which was admitted and marked **Exhibit 'B'**, the appellant admitted that he strangled his father (the deceased) to death by pressing his neck while the deceased was sleeping on his locally made bed. The
- F** appellant further admitted in his second confessional statement, **Exhibit D** that his father had participated in the conspiracy that sent his wife out of his house and had metaphysically killed two of his children. This is what he said:

- G** “My wife had divorced me last month being November, 2011 and it was my father now deceased that conspired together with some of the family members to drive my wife. My deceased
- H** father also conspired with my in-laws and killed my two children in a spiritual way.”

- From the appellant's admission, it is very clear he had formed intention to kill the deceased. By pressing the deceased neck, a vital part of the body, the appellant
- I** knew that his act would lead to the death of the deceased. For the law presumes that a man intends the natural consequences of his acts. See **DPP vs. Smith (1960) 3 ALL ER 161; Akinkumi & Ors vs. The State (1987) 3 SC 152.** There is therefore no doubt in my mind that the Act of the appellant and his intention
- J** before the act have so correlated as to lead to the guilt of the appellant.

A For the reasons I have set out in this judgment and the more elaborate reasons in the lead judgment of my learned brother, the sole issue formulated by me is resolved against the appellant. In the result I find this appeal lacking in merit and same is dismissed by me. I abide by all the consequential orders made in the

B lead judgment.

Paul Adamu Galinje
Justice, Supreme Court

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1. **PEOPLES DEMOCRATIC PARTY (PDP)**
 2. **THE NATIONAL CHAIRMAN (PDP)**
 3. **THE NATIONAL SECRETARY (PDP)**
 4. **THE NATIONAL WORKING COMMITTEE (PDP)**
 5. **INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)**
- } **1ST SET OF RESPONDENTS**

AND

1. **BARRISTER ORJI CHINENYE GODWIN**
 2. **CHIEF C.C. AKALUSI**
 3. **CHIEF ORJI C. ORJI**
(Suing for themselves and on behalf of delegates
elected on the 1st November, 2014 at the Ward
Congress held for Enugu State)
- } **2ND SET OF RESPONDENTS**

IN RE: APPLICATION OF:

1. **EJIOFOR APEH**
 2. **UDE CELESTINE**
 3. **OSSAI MOSES**
(On behalf of other unnamed parties on record)
- } **APPLICANTS/
PROPOSED
APPELLANTS**

SC. 428/2015

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

FRIDAY 10TH FEBRUARY, 2017

BEFORE THEIR LORDSHIPS

**IBRAHIM TANKO MUHAMMAD
MARY UKAEGO PETER-ODILI
OLUKAYODE ARIWOOLA
AMINA ADAMU AUGIE
EJEMBI EKO**

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

*ACTION Application to substitute persons acting as representatives – Applicants
failed to establish necessity for substitution – Applicants merely seeking to*

remove the representatives and to “implant theirs” – Consideration thereof.

*ACTION: Application to the Supreme Court – Applicants substituting new title – New title does not reflect the title used at the trial court – **Order 2 Rule 8 of Supreme Court Rules** – Extent and application.*

ACTION: Representative action – Essence of – Relevant principles.

ACTION: Representative action – General authority of persons suing in a representative capacity Dominus litis – Extent of their powers.

ACTION: Representative action – Named representatives discontinued proceedings – Whether unnamed representatives are bound by decision.

ACTION: Representative action – Where persons applying to represent a group in an action do not have majority support of members of the group – Implication.

ACTION: Representative action – Whether only the named representatives can initiate process – The only persons to sue or be sued until the suit is determined.

ACTION: Representative action – Whether persons represented are deemed bound by decision made by their representatives – Considerations thereof.

ACTION: Where persons who sued in a representative capacity wrote a letter compromising right of appeal – Whether some others represented can validly bring an application to exercise the same right of appeal already compromised – Extent of authority of representatives in a representative action.

APPEAL: Substitution of parties on appeal – Party at the lower court displaced and replaced by a stranger to the proceedings – No order of appellate court authorizing replacement – Whether appellate court has jurisdiction to entertain appeal.

EQUITY: Estoppel by conduct – S. 169, Evidence Act 2011 – Import.

JUDGMENT AND ORDERS: Application struck out – Whether distinct from dismissal – Incidents of a dismissed application.

PARTIES: Substitution – Applicants apply to substitute named parties – There is no commonality of interest between applicants and persons to be substituted – Effect.

PRACTICE AND PROCEDURE: Alteration of title of suit – Parties not permitted to alter constitution of suit as indicated in the trial court except as may be ordered by court.

PRACTICE AND PROCEDURE: Application for substitution of parties – Applicant unilaterally deleted the names of parties to be substituted – Whether there can be a valid substitution of parties whose names have already been deleted from the processes of court.

PRACTICE AND PROCEDURE: Substitution of parties – Applicant unilaterally changed the order of parties as constituted in the trial court – Applicant re-organised and deleted some named parties in his application to the Supreme Court – No order of court for the substitution – Implication.

PRACTICE AND PROCEDURE: Substitution of parties – When parties may be substituted – Relevant considerations.

PRACTICE AND PROCEDURE: Substitution of parties on appeal – Proper procedure thereof.

WORDS AND PHRASES: “Appeal” – Meaning

WORDS AND PHRASES: “Substitute” – Meaning.

Issue for Determination

Whether the applicants have placed necessary materials before this honourable court that will entitle them to the reliefs sought?

Facts of the Matter

This is a motion on notice brought pursuant to **Section 6(6) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)**; Order 2 Rules 28 (1 & 2) and Order 3 Rule 15 of the Supreme Court's Rules, 1985 (as amended)

The reliefs set out in this motion on notice, are as follows:

1. **“AN ORDER granting leave to substitute the names of EJIOFOR APEH, UDE CELESTINE and OSSAI MOSES for the names of BAR. ORJI CHINENYE GODWIN, CHIEF C.C. AKALUSI AND CHIEF ORJI C. ORJI who were the 1st – 3rd respondents at the lower court with the names of the present applicants.**
2. **AN ORDER granting leave to the applicants to present, maintain and or prosecute this appeal in a representative capacity that is: for themselves and other delegates elected at the 1st November, 2014 Ward Congress Election of Peoples Democratic Party (PDP) held in Enugu State and who had given letter of authority by subscribing their names and signatures on Exhibit 1 annexed to this application.**
3. **AN ORDER of this honourable court extending the time within which the applicants may seek leave to appeal against the judgment of the Court of Appeal, Abuja Division delivered on 30th day of April, 2015 in Appeal No. CA/A/28/2015 CORAM: ABUBAKAR JEGA ABDULKADIR, TANI YUSUF HASSAN and MUHAMMED MUSTAPHAJJCA, as parties interested.**
4. **LEAVE to appeal against the said judgment**
5. **Extension of time within which to appeal.**
6. **AND FOR SUCH FURTHER (ORDERS) as the Hon. Court may deem fit to make in the circumstances of this case.”**

The applicants were ward delegates elected for Enugu State at the Ward Congress Election for the Peoples Democratic Party (PDP) on 1st November, 2014. They were among the delegates represented by Barrister Orji Chinenye Godwin, Chief C. C. Akalusi and Chief Orji C. Orji at the Federal High Court and Court of Appeal, Abuja in suit No. **FHC/ABJ/CS/816/2014** and appeal No. **CA/A/28/2015**. The court below gave judgment against the said respondents.

The applicants herein, and the 1st – 3rd respondents at the court below, have the same interest in the case but the later (1st – 3rd respondents at the court below) are no longer interested in pursuing the appeal on behalf of the ward delegates. The applicants are, however, desirous of further pursuing this appeal in a representative capacity to the Supreme Court and have been authorised by other delegates whose names are contained in Exhibit 1 as deposed to in paragraph 14 of the affidavit in support.

The applicants earlier sought for leave to substitute the names of the 1st – 3rd respondents with their own names before this honourable court after the applicants have filed a notice of appeal and a brief of argument in their names. In a considered ruling, delivered on the 22nd January, 2016, the said application for substitution was struck out on the ground that the order for substitution had to be granted first before filing other processes including notice and grounds of appeal.

The applicants are out of time within which to appeal against the decision of the lower court.

The applicants for themselves and on behalf of other delegates have the mandate of other ward delegates elected for Enugu State on 1st November, 2014, whose names are contained in Exhibit 1, as deposed to in paragraph 14 of the affidavit in support, to pursue this appeal on their behalf, since they are all aggrieved by the decision of the Court of Appeal. And, leave of this court is required to file an appeal.

There was an appeal to the Supreme Court against the decision of the Court of Appeal in which it affirmed the tribunal's judgment which upheld the result of the general election wherein the candidate of the 1st set of respondents won and was declared elected. The applicants herein, purportedly lodged that appeal to the Supreme Court as appellants when they were never named parties in the Federal High Court or at the Court of Appeal. They filed grounds of appeal, transmitted record of appeal and filed appellants' brief of argument.

The 2nd set of respondents (i.e. Barrister Orji Chinenye Godwin; Chief C. C Akalusi; Chief Orji C. Orji (suing for themselves and on behalf of the delegates elected on the 1st November, 2014 at the Ward Congress held for Enugu State), filed a respondents' brief of argument which embodied a preliminary objection in which they prayed the Supreme Court to strike out the appeal on the ground that the named parties to the appeal bore no relationship with suit No. **FHC/ABJ/816/2014** and appeal No. **CA/A/28/2015**. Rather than proceed to argue the appeal, the applicants initiated an application seeking to remove the named parties representing the delegates and to implant theirs. This application was opposed and the Supreme Court in its ruling of 22/1/2016, (Exh. 2) as deposed to in paragraph 16 of the affidavit in support, struck out the application on the ground, inter alia, that the applicants cannot

unilaterally alter the parties to the proceedings in both courts below, hence this application was filed.

Held: (*Unanimously dismissing the application*)

1. *Where an application is struck out rather than dismissed.*

For the purpose of a reminder, I think I should re-state the well settled principle of the law and permanent feature of the practice of the courts that when action is struck out, it is still alive and could be resuscitated by the plaintiff/appellant. It is not so when a matter is dismissed. The matter comes to a final bus-stop and the particular claim or relief suffers the vicissitude of death and it can hardly be revived. Thus, where a suit/case/application/ appeal has been considered on its merit to finality and found to be worthless, it is subject to a dismissal order.

Equally, where a matter is dismissed on ground of abuse of court process it is subject to be dismissed and it cannot be relisted. Where a matter is withdrawn with the consent of parties, it is to be dismissed and it cannot be relisted. See: **Jimoh vs. Sterw Nig. Ltd. (1998) 7 NWLR (Pt. 558) 523; Harriman vs. Harriman (1989) 5 NWLR (Pt. 119) 6; Jadesimi vs. Okotie Eboh (1986) 1 NWLR (Pt. 16) 264.**

On the other hand, where a matter is simply struck out for a reason: non-compliance with a provision of law, rule and or practice, where a point of objection is raised (which point can be complied with, thereafter), where a process is technically bad for a reason (which can later be rectified), the originator/initiator of that process is at liberty to re-file that process after same has been brought in compliance with the correct position of the law, rule or practice as may thereof be required. (*P 141 paras E – I*).

2. *When a party may be substituted*

The law may permit a person to substitute another in a law suit (including appeal) where there is a genuine case of death, bankruptcy, assignment, transmission or devolution of interest or liability of a party to the suit or appeal, where the need to substitute is obvious in fact and in law.

Where a party is dead, he cannot physically take part any more in the proceedings. His position must necessarily be taken over by the beneficiary who inherits him and who, subsequently, inherits the litigation. Otherwise, the action for or against the deceased will abate unless appropriate steps are taken to substitute a living person for the deceased. See: **Eyesan vs. Sanusi**

(1984) 4 SC 115 at p. 137.

Bankruptcy of one of the parties to a suit while the suit is pending, may also abate except where a trustee(s) takes over. Comprehensive rules are made by the various (now unified) High Court Rules which take care of such circumstances. (*P 153 paras E–H*).

3. *The essence of a representative action*
Per I. T. Muhammad (JSC):

“Barrister Orji Chinenye Godwin, Chief C.C. Akalusi and Chief Orji C. Orji who prosecuted the suit at the trial court as plaintiffs/applicants and as respondents at the Court of Appeal, claimed, unequivocally, that they were suing or responding on the matter “for themselves and on behalf of all delegates elected on the 1st November, 2014 at the Ward Congress held for Enugu State.” This fact has not been denied or controverted at any stage of the proceedings. The law is very certain that where a common factor unites some individuals or communities who have equal claim in a thing/subject matter, every member of that individuals, community, group, association, club etc, is entitled to join a litigation where it arises. The situation is even more eloquently typified in the case of Duke of Bedford vs. Ellis (1901) AC 1, that all persons who have a common right which is invaded by a common enemy are entitled to join in attacking the common enemy in respect of that common right. Where such individuals, community, groups are so many that all of them cannot conveniently sue in the suit involving that right, the rules of court permit one or more of them to sue or be sued as representatives of the others. This is known as a representative action. The few persons by or against whom the action is brought are the representatives of the others and they prosecute or defend not in their personal capacities but in their representative capacity.”
(*Pp 157–158 paras G–B*).

4. *Only the named parties can initiate processes in a representative action*
It is to be noted again that in a representative action both the named plaintiff and/or defendant, as the case may be, and those they represent are parties to the action. However, the law permits only the named representatives as plaintiffs or defendants who are the *DOMINUS LITIS* the masters of the suit) to sue or be sued in a representative capacity until when the suit is determined. And, for the purposes of initiating any process in representative action, such process MUST be by and in the name of the *DOMINUS LITIS* i.e the named plaintiffs or defendants so long as their mandate from those they represent remains acceptable and uncountermanded. (*P 158 paras C–E*).

5. *Decision in a representative action*
Those represented, such as the applicants in this matter, are deemed bound by whatever decision the court would give for or against their representatives. See: **Tesi Opebiyi vs. Shittu Oshobojo & Anor (1976) 9 – 12 SC 195 at p. 200; Oketie vs. Olughor (1995) 5 SCNJ 217 at 226; Atanda vs. Olarewaju (1988) 4 NWLR (Pt. 89) 394; Ede vs. Nwidenyi, In Re Ugade (1988) 5 NWLR (Pt. 93) 161 at p; 169; Ekennia vs. Npakara (1997) 5 SCNJ 70 at p. 88.**
To clarify the matter further, any decision given for or against the representatives is a decision for or against those other persons, individuals, groups etc, they represent. See: **Otapo vs. Sunmonu (1987) 2 NWLR (Pt. 58) 587.**
By way of further elucidation, it was held in **Panoekun & Ors vs. Ajayi (1961) 1 All NLR 197** that the members of the group represented are so bound by the outcome of the proceedings that when a court makes an order for a defendant to defend on his family's behalf and judgment is given against the family, a member of that family who did not join the resolution that the defendant should represent the family cannot say that the judgment does not bind him and claim family property in his possession taken in execution of that judgment. (*P 158 paras E–I*).

6. *Death of named representatives*
If all the named parties in a representative action die, the action, provided it is still maintainable, subsists on behalf of and/or against those they represent and who have not been mentioned in the proceedings *NOMINE*. But such action may not be prosecuted or continued until a living person(s) has been substituted for the named deceased party to carry on the representative action

both on trial and also when the matter is on appeal. See: **Attah & Ors vs. Nacho & Ors (1965) NMLR, 28; Okeke vs. Olughor (supra).** (*Pp 158–159 paras I–A*)

7. *The representatives were not legally substituted at the trial or Court of Appeal*
In the application on hand, it is never shown, anywhere, that those who represented the applicants, or anyone of them died which would necessitate substitution. Further, none of the names of the representatives of the applicants has got his name legally removed or replaced from the proceedings as in situations (A) and (B) above. I agree with the learned SAN for the 1st set of respondents in his submission that the applicants initiated an application “seeking to remove the named parties representing the delegates and to implant theirs”. (*P 159 paras A–C*).
10. *It is not permissible to alter the constitution of a suit without court's order*
The law, rules of court and practice would not permit that. It is settled law that individuals are not allowed to unilaterally alter a case as constituted from the trial court and the names of parties in that character must be maintained except as may otherwise be ordered by a court of law. Our Order 2 Rule 8 of this court's rules, 1985 (as amended) provides:

“Notices of appeal, applications for leave to appeal, briefs and other documents whatsoever in pursuance of the appellate jurisdiction of the court for filing in accordance with the provisions of these rules, shall reflect the same title as that which (sic: are) contained in the court of trial.”
(underlining for emphasis)

This was what this court harped on to strike out a similar application filed earlier by the applicants. See: **PPA vs. INEC (2012) 12 NWLR (Pt. 1317) 215.** (*P 159 paras C–G*).

9. *Applicants are bound by decision of their named representatives*
Exhibit CA2 speaks eloquently for itself. Need I say anything more? What I may add, perhaps, is that the reasons put forward by the applicants in reply to Exhibit CA2 may appear contrary to the earlier position held out as per their depositions in their affidavit in support that the said set of respondents represented them at the trial court and the court below. Whatever the

applicants may say to convince this court that they are not bound by a decision that bound their representatives (2nd set of respondents) will certainly run counter to the earlier representation of all the delegates elected from the Ward Congress in Enugu State, where at the delegates, including the applicants, stated that they had accepted the decision of the court below on the issues in dispute and as a matter of fact, did not have any reason to proceed further on appeal to this court. I thus, have no reason to disbelieve that the applicants were part of the decision in Exhibit CA2. I already referred earlier to paragraph 8 of the applicants supporting affidavit which confirms that the 2nd set of respondents are not interested in pursuing the matter to this court. That decision as I said earlier, still binds the applicants and they cannot resile. See: **A-G Nasarawa State vs. A-G. Plateau State (2012) 10 NWLR (Pt. 1309) 419 at p. 450. (Pp 161 – 162 paras H – B).**

10. *There cannot be a valid application to substitute a party where his name is deleted from the process*

Even as the matter is now, and from the proposed notice of appeal, there is apparently no appellant(s). The persons designed as appellants are the applicants in this application. They can only succeed as appellants if their applications for substitution scales through. Even then, whom are they going to substitute as there are visibly no appellants now on the proposed notice of appeal. The proper thing to do, usually, is to maintain the names of the parties on record. If, on appeal, the appeal is properly entered, and if for any reason, there arises need to substitute any of the named parties, or, where a person who has a real, genuine and cognate interest, applies to join the litigation (at any stage), the court may exercise its discretion in favour of such applicant. It is not open for a party to unilaterally effect a change in the names of parties who are on record of proceedings of any court. (*P 162 paras C – E*).

11. *Applicants not authorized by majority*

Further, the interest of the applicants cannot in any way be higher than the interest of all the delegates (780) elected for the 260 Wards in Enugu State (Exh. CA 4). The claim of the applicants is that 113 delegates authorized them to appeal to this court. Even if that is correct, majority of the elected delegates for Enugu State (667 of them), still remain bound by the decision taken in Exhibit CA2. There is, therefore, no commonality of interest between the applicants and the vast majority (667) of the delegates in pursuit of the

application on hand as divergent interests set in between the applicants, the 2nd set of respondents and the majority of the Ward delegates.
(*P 162 paras F – H.*).

12. *Commonality of interest*

In a substitution, commonality of interests between persons to substitute and those to be substituted is paramount. See: **Ejiofor Apeh & Ors vs. PDP SC. 428/2015 of 22/12/2016.**

Per Peter-Odili (JSC)

“I align with the submission of the 2nd set of respondents who are being sought to be substituted and with the intention of presenting this application on behalf of other unnamed parties on record. Definitely the situation evokes the following conclusions:

- 1. The interest of the 2nd set of respondents as disclosed in the action at the Federal High Court of trial, appealed to the Court of Appeal is different from what the applicants are seeking to substitute them for.**
- 2. There is therefore no commonality of interest on which the applicants can seek to step into the shoes of the 2nd set of respondents.**
- 3. The present application shows that the named applicants do not have an interest as those of the unnamed parties on record.**
- 4. Seeing that only a party with interest in a suit can institute a representative action, one wonders under which head the unnamed parties would be substituted.**

What seems clear from the submissions, documents including the affidavits and counters thereof is that the 2nd set of respondents are strongly maintaining that the persons who present themselves as appellants/applicants in this appeal do not have the authority of all the delegates to initiate this appeal. One cannot explain the nomenclature of named and unnamed applicants particularly where some of those the applicants claim to represent are not interested in the appeal the applicants seek.

Per Eko (JSC):

“The other point of interest, in this application, is the fact that the applicants and the 2nd set of respondents all belong to the class of delegates elected at the 1st November, 2014 Ward Congress Elections of Peoples Democratic Party (PDP) held in Enugu State. They should be seen to have commonality of interest. The applicants were among the unnamed delegates represented by the 2nd set of respondents to initiate the suit No. FHC/AB/CS/816/2014 and defend appeal No. CA/A/28/2015. It is a settled principle of law that persons who join up as plaintiffs in an action can not set up conflicting claims between themselves. In other words, in the same suit the plaintiffs must act together. See EJEZIE & ANOR. vs. CHRISTOPHER ANUWU & ORS. (2008) 4-5 SC (Pt. 1) 31. It is therefore, strange to see in this case that the “*plaintiffs*” who are seeking leave to appeal are, at the same time, among the respondents in the application and the proposed appeal. The applicants herein were among the unnamed delegates elected at the 1st November, 2014 Ward Congress Elections of the Peoples Democratic Party (PDP) held in Enugu who were represented by the 2nd set of respondents in the suit No. FHC/ABJ/CS/816/2014 and the appeal No. CA/A/28/2015. They have split from the 2nd set of respondents. They have now risen against the 2nd set of respondents on one hand in the mutiny. They are also, on the other hand, proceeding against the persons sued originally by the 2nd set of respondents. The principle of law that no person can in the same suit be both plaintiff and defendant at the same time even in different capacities was re-stated by this Court in EJEZIE vs. ANUWU (supra).

The factual situation in this case is that the essentials of representative action are not very much present in this case. The intra party conflict between the applicants and the 2nd set of respondents is a clear evidence that between them there is no commonality of interest nor a common grievance. If the applicants

were seeking to appeal as interested parties; that application will be governed by different considerations.

This application cannot be granted in the circumstances. It is accordingly refused. (*Pp 162'171–172; 179–180 paras H; E–B; E–C*).

13. *Principles of application for leave to appeal as party interested*

- a. **Are the applicants/appellants parties interested in this case whose interest need be protected?**
- b. **Do applicants have good reasons for not appealing within time?**
- c. **Is the proposed notice and grounds of appeal substantial and arguable grounds of appeal?**
- d. **Are the applicants not entitled to exercise this constitutionally guaranteed right of appeal?**

The principles above set out cannot however exist in vacuo as the competence of the application must be present. That is to say that there must be a foundation on which those principles would stand for the consideration of whether or not the application should be favourably looked at. (*P 168 paras I–C*).

14. *The import of Order 2 Rule 8 Supreme Court rules*

In view of the titling above, a poser arises as to what happens with Order 2 Rule 8 of the Supreme Court Rules 1985 (as amended) which has prescribed the way to go in an application such as the present which is one of leave to appeal. For clarity, I shall quote the said relevant Rule of Court which is thus:-
“Order 2 Rule 8:

Notice of appeal, application for leave to appeal briefs and all other documents whatsoever prepared in pursuance of the appellate jurisdiction of the court for filing in accordance with the provisions of these rules, shall reflect the same title as that which obtained in the court of trial”.

The hurdle that has presented is not one that can be wished off and treated lightly, as this court has made pronouncements on similar occurrences and there is no way out of the obstacle that has reared its head. An example of what

this court has stated should obtain is well captured in **PPA vs. INEC (2012) 13 NWLR (Pt. 1317) 215** at which Order 2 Rule 8 of the Supreme Court Rules 1985 was in focus in relation to the competence of the application. (*Pp 170–171 paras F–B*).

15. *Where parties to be substituted did not appeal*
Per Peter-Odili (JSC):

“Indeed, this application has strange facets in that the 2nd set of respondents have not filed a notice of appeal and so there is no valid appeal and as a follow up no appellant or appellants to be substituted after the Court of Appeal decision the 2nd set of respondents rested at the lower court where the represented others including the applicants herein. The implication therefore is that there is no existing appellant whom the applicants can substitute. This brings to memory the matter of not putting something on nothing and expecting it to stand. See *Macfoy vs. UAC (1962) AC. 152.*

It seems to me that this application is a non-starter having not scaled the fundamental hurdle which is the proper parties before court especially where the applicants intend to carry along unwilling partners.

This is not a simple matter of a party having good reasons for not appealing within time or the proposed Notice And Grounds Of Appeal being substantial and arguable grounds of law or the guaranteeing of the applicants' constitutional right of appeal and whose interest have to be protected. This situation is beyond the factors above as what is available show some willing and unwilling proposed appellants and the interests having no common round and as this court has held in ***Ngere vs. Okuruket 'XIV' (2014) 11 NWLR (Pt. 1417) 147 at 175-176*** as follows:

“The grant of an application for extension of time to appeal is a matter within the discretion of the court. That discretion is properly exercised if the judge considers the rules governing the particular application before granting it”.

In concluding, I see no basis upon which a favourable consideration can be accorded the present application and from the foregoing and the better reasoning in the lead ruling, I dismiss the application.
(Pp 173–174 para I–F).

16. *Meaning of “Substitute”*

'Substitute' means “a person or thing that you use or have instead of the one you normally use or have” – see **Peretu & Ors vs. Gariga & Ors (2012) LPELR- 15534 (SC)**, where Ngwuta, (JSC), added:

***Black's Law Dictionary, 9th Ed.*, defines the word, substitution, a derivative of the word, substitute, as “a designation of a person or thing to take the place of another person or thing; the process by which one person or thing takes the place of another person or thing.
(Pp 175–176 paras H–A.)**

17. *Meaning of appeal*

This court considered the said **rule 8** in this case of **P.P.A. vs. INEC (supra)**, and held as follows [per Ngwuta, JSC]:

An appeal is “an invitation to a higher court to review the decision of a lower court to find out whether on a proper consideration of the facts placed before it and the applicable law, the court arrived at a correct decision”. See *Oredoyin vs. Arowolo (1989) 4 NWLR (Pt. 114) 172 at 211 per Oputa, JSC*. The facts, the appellate court will review in an appeal are facts presented by or elicited from parties at the trial court. If any party is displaced and a stranger to the proceedings at the trial court has usurped his place, the appeal will be incompetent and the appellate court will lack jurisdiction to hear it. This applies equally to an application for leave to appeal.

In this case, the applicants, who were not parties at the trial Court, are not just substituting names of the extant parties therein; they are seeking to delete their names from the suit and judgments of the lower courts, which as the 1st to 4th

respondents submitted, goes beyond amending the capacity in which the said suit was filed since the said judgments had already attached to the persons in the capacity in which the suit was filed, and the judgments delivered.
(*P 177 paras A–F*).

18. *A representative in an action has power to bind others who are represented*
When the 2nd set of respondents were empowered by the other unnamed parties, and subsequently granted leave by court, to maintain the action for themselves and on behalf of other delegates elected on 1st November, 2014 (including the applicants herein) the general authority inherent in them to discontinue, compromise and even submit to dismissal of the same suit was not expressly curtailed. There is no evidence of such curtailment. The compromise, in Exhibit CA2, binds the applicants herein. See **OTAPO vs. SUNMONU (supra)**.

I accept the proposition that the *dominus litis* is like the counsel in relation to the conduct of the case he has been instructed. Counsel in conducting a civil case is, as a matter of law, practice and civil procedure, in complete control of the case. He is a master of his own house. Whatever his decisions there are in relation to the conduct of the proceedings in the action, the decisions are binding on the client. See **ELIKE vs. NWANKWOALA (1984) ANLR 505**. (*Pp 178–179 paras H–B*).

19. *The unnamed parties are estopped to deny whatever the named parties did*
The effect of Exhibit CA2, in my view, is that it operates as estoppel by conduct, the type of estoppel contemplated by, That is; a party who has, either by his declaration or act, caused or permitted another to believe a thing to be true and to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceeding between himself and such person or such person's representative in interest, to deny the truth of that thing. He must accept the new legal relationship as modified by his own words or action, whether or not it is supported by any point of law, or by any consideration but only by his word or conduct. See **A.G. RIVERS STATE vs. A.G. AKWA-IBOM STATE (2011) 8 NWLR (pt. 1248) 31 SC**. These applicants herein, represented by the 2nd set of respondents, in view of Exhibit CA2, can not be allowed to approbate and reprobate at the same time. They are estopped by operation of Exhibit CA2. (*P 179 paras B–E*).

Nigerian Cases Cited

A.G. Rivers State vs. A.G. Akwa-Ibom State (2011) 8 NWLR (pt. 1248) 31 SC
A-G Nasarawa State vs. A-G. Plateau State (2012) 10 NWLR (Pt. 1309) 419.
Atande vs. Olanrewaju (1988) 4 NWLR (Pt. 89) 394;
Attah & Ors vs. Nacho & Ors (1965) NMLR, 28
Duke of Bedford vs. Ellis (1901) AC 1,
Ede vs. Nwidenyi, In Re Ugade (1988) 5 NWLR (Pt. 93) 161;
Ejezie & Anor. vs. Christopher Anuwu & ORS. (2008) 4-5 SC (Pt. 1) 31
Ejiofor Apeh & Ors vs. PDP – SC. 428/2015 of 22/12/2016.
Ekennia vs. Npakara (1997) 5 SCNJ 70.
Elike vs. Nwankwoala (1984) ANLR 505.
Eyesan vs. Sanusi (1984) 4 SC 115.
Harriman vs. Harriman (1989) 5 NWLR (Pt. 119) 6;
Jadesimi vs. Okotie Eboh (1986) 1 NWLR (Pt. 16) 276.
Jimoh vs. Sterw Nig. Ltd. (1998) 7 NWLR (Pt. 558) 523;
Ngere vs. Okwuket 'XIV' (2014) 11 NWLR (Pt. 1417) 147
Oketie vs. Olughor (1995) 5 SCNJ 217;
Otapo vs. Sunmonu (1987) 2 NWLR (Pt. 58) 587.
Panoekun & Ors vs. Ajayi (1961) 1 All NLR 197
Peretu & Ors vs. Gariga & Ors (2012) LPELR- 15534 (SC)
PPA vs. INEC (2012) 12 NWLR (Pt. 1317) 215.
PPA vs. INEC (2012) 13 NWLR (Pt. 1317) 215
Tesi Opebiyi v. Shittu Oshobojo & Anor (1976) 9 12 SC 195;

Foreign Cases Cited

Macfoy vs. U.A.C. (1962) AC 152

Nigerian Statutes Cited

Constitution of Federal Republic of Nigeria, 1999 (as amended) l- S.6(6)
Supreme Court Rules – Or. 2 Rule 18 (1-2), Or. 3 Rule 15.

Representations

Dr. Onyechi Ikepeazu (SAN) representing 1st-4th respondents
Mr. Inuwa – representing 5th respondent
Chief Olanipekun (SAN) – representing 2nd set of respondents
Yusuf Ali (SAN) – representing applicants

A I.T. MUHAMMAD, (JSC) (Delivering the Lead Judgment): This is a motion on notice brought pursuant to section 6(6) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended); Order 2 Rules 28 (1 & 2) and Order 3 Rule 15 of this court's rules, 1985 (as amended)

B The reliefs set out in this motion on notice, are as follows:

- C** 7. **“AN ORDER granting leave to substitute the names of EJIOFOR APEH, UDE CELESTINE and OSSAI MOSES for the names of BAR. ORJI CHINENYE GODWIN, CHIEF C.C. AKALUSI AND CHIEF ORJI C. ORJI who were the 1st – 3rd respondents at the lower court with the names of the present applicants.**
- D** 8. **AN ORDER granting leave to the applicants to present, maintain and or prosecute this appeal in a representative capacity that is: for themselves and other delegates elected at the 1st November, 2014 Ward Congress Election of Peoples Democratic Party (PDP) held in**
- E** **Enugu State and who had given letter of authority by subscribing their names and signatures on Exhibit 1 annexed to this application.**
- F** 9. **AN ORDER of this honourable court extending the time within which the applicants may seek leave to appeal against the judgment of the Court of Appeal, Abuja Division delivered on 30th day of April, 2015 in Appeal No. CA/A/28/2015 CORAM: ABUBAKAR JEGA ABDULKADIR, TANI YUSUF HASSAN and**
- G** **MUHAMMED MUSTAPHA JJCA, as parties interested.**
- H** 10. **LEAVE to appeal against the said judgment**
11. **Extension of time within which to appeal.**
12. **AND FOR SUCH FURTHER (ORDERS) as the honourable court may deem fit to make in the circumstances of this case.”**

I Moving the motion on notice, learned senior counsel for the applicants, Mr. Yusuf Ali, stated that the motion on notice was supported by grounds for the application, an affidavit (in support), further and better affidavit, replies to counter affidavits

J filed by the respondents and a written address. He adopted the written address

A and relied on the affidavits; the replies and the written address. He urged the court to grant the reliefs as prayed in the motion on notice.

Dr. Ikpeazu, (SAN), for the 1st to 4th respondents stated that he filed a counter-affidavit on 10/11/16 along with written address. He adopted the written
B address; relied on the counter affidavit and urged this court to dismiss the application as an abuse of process and having regard to the parties in Appeal No. SC. 428/2015 in which briefs have already been exchanged. MR. Inuwa, who is for the 5th respondent said that he filed a counter affidavit on 7/11/16 which is
C accompanied with a written address. He adopted the written address; relied on the counter affidavit and urged this court to dismiss the application.

Chief Olanipekun, (SAN); who appeared for the 2nd set of respondents said that he filed a counter affidavit on 14/11/16. It was accompanied by some
D exhibits and a written address. He also filed additional list of authorities. He adopted the written address; relied on the counter-affidavit and urged this court to dismiss the application.

Learned SAN for the applicants submitted that the applicants have placed
E necessary materials before this court for the grant of the application. He stated further that the grant thereof is purely discretionary and urges the court to exercise its discretion in favour of the applicants. He cited among others, the cases of **Anachebe Esq. vs. Kingsley Ijeoma & 2 Ors (2014) 14 NWLR (Pt. 1426) 168 at 184 D-F; ANPP vs. Albashir (2010) 9 NWLR (Pt. 1198) 118 at 145 D-E.** In
F relying on the principle that a party should never be denied the right to appeal if he satisfies the conditions for appeal, the learned SAN cited and relied on the case of **Ngere vs. Okuruket 'xiv' (2014) 11 NWLR (Pt. 1417) 147 at 177-178 A-B.** He
G submitted further that it has been deposed to in the affidavit in support (paras 2, 3, 4, 5, 7, 9 – 12 and 18) that the applicants are interested parties whose interest need to be protected.

Learned SAN for the 1st – 4th respondents, Dr. Ikpeazu, (SAN), filed his
H counter affidavit. He annexed his written address in respect thereof. He annexed some exhibits as well. He adopted and relied on all the depositions in the Counter affidavit, the exhibits and the written address. He urged this court to dismiss the application as an abuse of process having regard to the appeal on hand as parties
I have already filed and exchanged briefs of argument. Learned SAN, made further submissions that the application is not competent on multiple grounds. He mentioned that when the motion is called, it will be under SC. 428/2015. The parties in SC. 428/2015 are different from the ones on the motion on notice. The
J law and practice do not permit that. He supported his submission by citing and

- A** relying on the Supreme Court Rules as per Order 2 Rule 8 1985 (as amended) and the case of **P. P. A. vs. INEC (2012) 13 NWLR (Pt. 1317) 215**. The applicants, learned SAN argued, have no pending appeal and they cannot bring the application within the precinct of SC. 428/2015, which, he said further, is
- B** incompetent and non-existent. The application is incurably defective and it cannot be foisted on a defective appeal which was initiated in total disregard of the named parties in **FHC/ABJ/CS/816/2014** and **CA/A/28/2015**.

C Learned senior counsel for the 2nd set of respondents, Chief Olanipekun, (SAN), made his submission in his written address, which I summarise, hereinbelow, as follows:

- D**
 - i.** he filed and relied upon a counter affidavit of 30 paragraphs sworn to by O. C. Godwin, accompanied by some exhibits and a written address.
 - ii.** that this is the second time this same motion is brought before this court by the same applicants while similar applications to present the same set of persons contained in applicants' Exhibit 1 have also been brought forward, with the previous application for substitution of 2nd October, 2015 struck out by this court on 22nd January, 2016.
- E**
- F**
 - iii.** the ruling of this court striking out the said motion of 2/10/15 is attached to applicants' application as Exhibit 2.
- G**
 - iv.** that the appeal number of the application of 2/10/15 was SC. 428/2015 and the said application and the suit No. ceased to exist after being struck out.
 - v.** that the applicants resurrected the said No. SC. 428/15 which ceased to exist by reason of this court's ruling of 22/1/16.
- H**
- I**
 - vi.** that from the result of actions/appeals before the trial court, the court below and including the current application under consideration in this court, the interest of the 2nd set of respondents is not the same as that of the applicants herein. There is, thus, no commonality of interest between the 2nd set of respondents and the applicants.
- J**

- A** **vii.** **that the present application as constituted shows that the named applicants do not have an interest in the case as they have described their capacity as 'on behalf of other unnamed parties on record' and by law only a party with interest in a suit can institute a representative action. Cited the case of Ejiofor Apeh & Ors vs. Peoples Democratic Party SC.428/2015 of January, 22nd, 2016.**
- B**
- C** **viii.** **that the above ruling of 22/01/2016 aptly covers the scenario in the instant application. The two capacities in the applicants and the 2nd set of respondents are poles apart and that the applicants are not seeking to represent the same set of persons the 2nd set of respondents represented at the two lower courts, no commonality of interest between the two.**
- D**
- E** **ix.** **that in reference to relief No. 1 sought by the applicants in their motion on notice, other reliefs contained therein, cannot be grantable by this court. This is because same (i.e relief 1) relates to the status of the respondents herein who were also respondents before the court below, meaning that applicants are not respondents before this court. It is trite that a court can only make orders in respect of persons who are parties before it.**
- F**
- G** **x.** **that earlier representation of the delegates elected from the ward congresses in Enugu State, including the applicants herein, stated that they had accepted the decision of the court below on the issues in dispute and did not have any reason to proceed further to this court with the matter.**
- H** **xi.** **that this application is an abuse of process of court which should be dismissed.**

I Learned counsel for the 5th respondent, Mr. Inuwa, filed a counter affidavit of 7 paragraphs. He supported it with a written address. He relied on the depositions thereof sworn to by one Ibrahim S. Mohammed, Esq. The gist of learned counsel's address is as follows:

- J** **i.** **the application is grossly unmeritorious and deserves to be dismissed for a number of reasons:**

- A** a) the 2nd set of respondents herein were the respondents at the court below who are not interested in appealing against the judgment of the court below;
- B** b) the applicants herein, are not competent to file a notice of appeal as they were not parties to the appeal at the court below. Thus, there is no existing appellant whom the applicants can substitute. He relied on *Macfoy vs. UAC* (1962) A C 152.
- C** ii. He cited and relied on the case of *Agbaje vs. INEC* (2016) 4 NWLR (Pt. 1501) 151 at 161 – G-H and argued that the applicants have not shown any fact in their supporting affidavit why this court should depart from the decision in *Agbaje's* case (*supra*).
- D** iii. That the 2nd set of respondents by their act are satisfied with the judgment of the Court of Appeal and have decided not to appeal to this court against same, the applicants are bound by that decision and the rights of the applicants have been conclusively determined in the judgment of the Court of Appeal in Appeal No. CA/A/28/2015 between PDP & ORS vs. Orji Chinenye Godwin & Ors delivered on 30th April, 2015.
- E** iv. that the application is incompetent as the applicants failed to state how the judgment of the Court of Appeal prejudicially affects their interests. He cited and relied on the case of *Nwaogu vs. Atuma* No. 1 (2013) 9 NWLR (Pt. 1358) 182.
- F**
- G**
- H** Learned counsel urged this court to dismiss the application as it is devoid of merit. A reply brief was filed by the learned SAN for the applicants in answer to new issues and competency of the application as raised by the learned SAN for the 1st – 4th respondents. Learned SAN replied that the suit that gave birth to this
- I** appeal (application, I believe) both at the trial court and Court of Appeal were fought in a representative capacity and the present application belongs to the group represented, the withdrawal of some members from the representative action notwithstanding. They have individual interest to protect. Cases of *Ejezie*
- J** vs. *Anuwu* (2008) 12 NWLR (Pt. 1101) 446; *Sapo vs. Sunmonu* (2010) 11

A NWLR (Pt. 1205) 374 were cited. Learned SAN replied further that the argument that SC. 428/2015 has no viable basis of existence not having any relationship in terms of parties with the proceedings which gave rise to the appeal cannot hold water. He replied that representation and authority of the 2nd set of respondents came to an end at the end of the case after which judgment was delivered. He replied further that the plaintiffs in representative capacity cannot deprive other persons of the same class of the benefits of the judgment, if they think fit to prosecute it. **Atanda vs. Olanrewaju (1988) 4 NWLR (Pt. 89) 39 at 402** was cited. Order 2 rule 8 of the Supreme Court rules is not applicable in this instance as the applicants are representing part of the ward delegates elected for Enugu State on 1/11/2014. Learned SAN responded further:

- D** **i. that applicants' application is in line with the ruling of this court in Exh. 2 and the title of the case as it is in the proceedings leading to the appeal and the application has been reflected and all parties had been duly served.**
- E** **ii. that the application in Exh. 2 was not dismissed but struck out and applicants were at liberty to bring their application over and over again.**
- F** **iii. issue of appeal number is entirely the duty of the Registry of the court. Parties have no role to play in fixing or giving appeal number.**
- G** **iv. that the case of Appeh vs. PDP cited by the respondents, did not say that individual(s) interest cannot be pursued in the absence of the rest of member(s) of the group. Respondents can only challenge the applicants' locus to sue on behalf of the 2nd set of respondents but cannot deny the applicant(s) and those they represent (as contained in Exhibit 1) the authority to appeal on behalf of others who have common benefits or interest in the appeal.**
- H** **v. that the withdrawal of the 2nd set of respondents will not change the representative nature of the appeal as long as there are other group who are interested in pursuing the appeal. Ejezie vs. Anuwu (supra) and Sapo vs. Sunmonu (supra), cited.**
- I** **vi. that Exhibit 1 is authentic and it remains unchallenged by 1st set of respondents.**
- J**

- A** vii. **that there is a commonality of interest amongst the applicants and the other unnamed parties in Exh.1 whose interest were mortgaged by the 2nd set of respondents by refusing to proceed on appeal against the wish of the applicant(s) and other unnamed parties and all the authorities cited by the 2nd set of respondents relating to this issues are not relevant and are inapplicable.**
- B**
- C** viii. **that in a representative action, there is nothing like the right of majority or minority. All the rights are equal individually, the action was fought on representative capacity for convenience and the individual's right as delegated has not been taken away.**
- D**
- ix. **that Exhibits CA3 and CA4 are of dubious origin and cannot be relied upon.**
- x. **that the applicants' Constitutional right of appeal is legal.**
- E**

As observed above, My lords, and from the record placed before this court for the determination of this application, there are five main reliefs prayed by the applicants. I consider relief No. 1 to be fundamental and decisive of other reliefs. I will consider this issue first and foremost.

Before I do that, however, permit me to summarise the facts giving rise to this application as collected from the applicants side. The applicants were ward delegates elected for Enugu State at the Ward Congress Election for the Peoples Democratic Party (PDP) on 1st November, 2014. They were among the delegates represented by Barrister Orji Chinenye Godwin, Chief C. C. Akalusi and Chief Orji C. Orji at the Federal High Court and Court of Appeal, Abuja in suit No. **FHC/ABJ/CS/816/2014** and appeal No. **CA/A/28/2015**. The court below gave judgment against the said respondents.

The applicants herein, and the 1st – 3rd respondents at the court below, have the same interest in the case but the later (1st – 3rd respondents at the court below) are no longer interested in pursuing the appeal on behalf of the ward delegates. The applicants are, however, desirous of further pursuing this appeal in a representative capacity to the Supreme Court and have been authorised by other delegates whose names are contained in Exhibit 1 as deposed to in paragraph 14 of the affidavit in support.

A The applicants earlier sought for leave to substitute the names of the 1st – 3rd respondents with their own names before this Honourable court after the applicants have filed a notice of appeal and a brief of argument in their names. In a considered ruling, delivered on the 2nd January, 2016, the said application for
B substitution was struck out on the ground that the order for substitution had to be granted first before filing other processes including notice and grounds of Appeal.

The applicants are out of time within which to appeal against the decision of the lower court.

C The applicants for themselves and on behalf of other delegates have the mandate of other ward delegates elected for Enugu State on 1st November, 2014, whose names are contained in Exhibit 1, as deposed to in paragraph 14 of the affidavit in support, to pursue this appeal on their behalf, since they are all
D aggrieved by the decision of the Court of Appeal. And, leave of this court is required to file an appeal.

An addition made on the facts by the learned SAN for the 1st – 4th respondents (1st set of respondents) is that there was an appeal to this court against the decision of the court below in which it affirmed the Tribunal's judgment which upheld the result of the general election wherein the candidate of the 1st set of respondents won and was declared elected. The applicants herein, purportedly
E lodged that appeal to this court as appellants when they were never named parties in the Federal High Court or at the Court of Appeal. They filed grounds of appeal, transmitted record of appeal and filed appellants' brief of argument.
F

The 2nd set of respondents (i.e. Barrister Orji Chinenye Godwin; Chief C. C Akalusi; Chief Orji C. Orji (suing for themselves and on behalf of the delegates elected on the 1st November, 2014 at the Ward Congress held for Enugu State), filed a respondents' brief of argument which embodied a preliminary objection in which they prayed this court to strike out the appeal on the ground that the named parties to the appeal bore no relationship with suit No. **FHC/ABJ/816/2014** and appeal No. **CA/A/28/2015**. Rather than proceed to argue the appeal, the applicants initiated an application seeking to remove the named parties representing the delegates and to implant theirs. This application was opposed and this court in its Ruling of 22/1/2016, (Exh. 2) as deposed to in paragraph 16 of the affidavit in support, struck out the application on the ground, inter alia, that the applicants cannot unilaterally alter the parties to the proceedings in both courts below, hence this application was filed.
G
H
I

J My noble lordships, my first reaction to this application, looking from my

- A** own vantage point was to simply dismiss the application *IN Limine* in view of the submissions of learned senior counsel for the 1st set of respondents that a similar application was earlier placed before this court and same was **DISMISSED**. Learned senior counsel for the 2nd set of respondents as well submitted that this is
- B** the second time this same application is brought before this court by same applicants which brings to bear the acute abusive nature of the application revealing its unsustainability. In the latters' case, he conceded that that same motion earlier filed was struck out by this court. when I had a terse look at the
- C** Ruling of this court on 22/1/2016, attached to applicants' motion as Exh. 2, I observe that the motion, though treated elaborately, was only **STRUCK** out and not **DISMISSED**. Thus, as the said motion was not dismissed by this court, I find myself in agreement with the submission of learned counsel for the applicants in
- D** his reply brief that the applicants are at liberty to bring the application over and over again. Unfortunately, the law has not set any time limit for presentation or representation of a process ordinarily struck out.

- For the purpose of a reminder, I think I should re-state the well settled
- E** principle of the law and permanent feature of the practice of the courts that when action is struck out, it is still alive and could be resuscitated by the plaintiff/appellant. It is not so when a matter is dismissed. The matter comes to a final bus-stop and the particular claim or relief suffers the vicissitude of death and
- F** it can hardly be revived. Thus, where a suit/case/application/appeal has been considered on its merit to finality and found to be worthless, it is subject to a dismissal order. Equally, where a matter is dismissed on ground of abuse of court process it is subject to be dismissed and it cannot be relisted. Where a matter is
- G** withdrawn with the consent of parties, it is to be dismissed and it cannot be relisted. See: **Jimoh vs. Sterw Nig. Ltd. (1998) 7 NWLR (Pt. 558) 523; Harriman vs. Harriman (1989) 5 NWLR (Pt. 119) 6; Jadesimi vs. Okotie Eboh (1986) 1 NWLR (Pt. 16) 276**. On the other hand, where a matter is simply
- H** struck out for a reason: non-compliance with a provision of law, rule and or practice, where a point of objection is raised (which point can be complied with, thereafter), where a process is technically bad for a reason (which can later be rectified), the originator/initiator of that process is at liberty to re-file that process
- I** after same has been brought in compliance with the correct position of the law, rule or practice as may thereof be required.

- In the motion on hand, the fundamental relief, as I said earlier, is that of **SUBSTITUTION** of some named parties i.e. 1st – 3rd respondents (at the court
- J** below) and 2nd set of respondents herein; with the applicants. The essence of

A substitution, generally, is the putting/placing a thing, in place of another for a purpose. Permit me my noble lordships, to call in aid the affidavit evidence before this court, starting with the applicants' affidavit in support of the application sworn to by Mr. Ejiofor Apeh (1st applicant). He swore to the following facts, B amongst others:

- C **“4. That I know as a fact that the three plaintiffs in the suit at the Federal High Court and the respondents at the Court of Appeal acted in a representative capacity for themselves and on behalf of the delegates elected on the 1st November, 2014 at the Ward Congress for the Peoples Democratic Party held for Enugu State.**
- D **5. That the 2nd set of respondents were dissatisfied with the judgment of the Federal High Court in suit No. *FHC/ABJ/CS/816/2014* and appealed to the Court of Appeal, Abuja in Appeal No. *CA/A/28/2015*.**
- E **6. That the Court of Appeal in its judgment of 30th day of April, 2015 in Appeal No. *CA/A/28/2015* allowed the appeal and set aside the decision of the Federal High Court, Abuja of 24th day of November, 2014 in suit No. *FHC/ABJ/CS/816/2014*.**
- F **7. That I know as a fact that the people that represented the applicants at the Federal High Court and Court of Appeal are BAR. ORJI CHINENYE GODWIN, CHIEF C. C. AKALUSI and CHIEF ORJI C. ORJI.**
- G **8. That I know as a fact that the said representatives who were plaintiffs are no longer interested in prosecuting an appeal to the Supreme Court, against the decision of the Court of Appeal of 30th April, 2015.**
- H **9. That when the original set of representatives were no longer interested in pursuing the appeal to Supreme Court, the applicants then instituted an appeal before this Honourable court and appeal was entered as SC.428/2015.**
- I **10. That an application was brought before this Hon. Court for EJIOFOR APEH, UDE CELESTINE and OSSAI MOSES to appeal against the judgment of the Court of**
- J

- A** **Appeal delivered 30th April, 2015.**
- B** **11. That this Hon. Court in a well considered ruling delivered on 22nd January, 2015 struck out the said application one of the reasons was that the names of the case has been unilaterally changed.**
- C** **12. That I know as a fact that consequent upon the reason stated above, there is need for the applicants to seek leave to appeal against the said judgment to the Supreme Court as parties interested.**
- D** **13. That I know as a fact that the applicants are desirous to further prosecute this appeal in a representative capacity on behalf of those whose names are contained in Exhibit 1 who are also aggrieved with the decision of the Court of Appeal aforesaid and have mandated the applicants to appeal against same.**
- E** **14. That I know as a fact that we the applicants have the mandate of other Ward Delegates elected at the 1st November, 2014 Ward Congress Election of the Peoples Democratic Party held in Enugu State as contained in Exhibit 1 to pursue this Appeal on their behalf.**
- F** **15. That I know as a fact that the applicants are among the Delegates elected on 1st November, 2014 and have common interest as they are all aggrieved with the Court of Appeal judgment.**
- G** **16. That an earlier application for substitution via Appeal No. SC. 428/2015 was struck out on 22nd January, 2016 on the ground that leave for substitution ought to have been had and obtained before the Notice and Grounds of Appeal could be filed. The ruling of this Hon. Court is hereby attached and marked as Exh. 2.**
- H** **19. That the refusal of the 1st set of respondents to prosecute this appeal is without the consent of the applicants and the vast majority of others they represented.**
- I** **20. That the 1st set of respondents and unnamed delegates/parties in the case whom the said respondents represented are the same.**
- J** **21. That there are no principal parties in this case as all the**

- A** delegates including 1st set of respondents unnamed are parties on record have the same right.
- B** 22. That this application was filed as a result of the induced refusal of the 1st set of respondents to further prosecute this case on appeal.
- C** 24. That I was informed by K. K. Eleja, SAN in the course of discussing this case on 3rd October, 2016 at No. 4 Sakono Street, Wuses 2, Abuja at about 3.00pm and readily believe him as follows:
- D** i. That our right to challenge the decision of the Court of Appeal is constitutional and cannot be taken away.
- ii. That parties on record representing a group of people cannot compromise the interest of people they purport to represent.”

E In the counter affidavit filed by the 1st – 4th (1st set of) respondents, sworn to by Chief Ikeje Asogwa, the following depositions inter alia, were made:

- F** “5. While paragraphs 4, 6 and 7 of the affidavit in support are not disputed, paragraph 5 is not correct as the 2nd set of respondents did not appeal to the Court of Appeal in CA/A/28/2015.
- G** 6. Paragraphs 8, 9, 10, 11, 12, 13, 14 and 15 of the affidavit in support are not entirely correct. The correct position is as follows:
- H** i. Appeal No. SC. 428/2015 was instituted by the applicants purporting themselves to be appellants when the record at both the Court of Appeal and the Federal High Court did not reflect their names as parties to the proceeding.
- I** ii. The 1st, 2nd, 3rd and 4th respondents in the 1st set of respondents herein in their brief of argument raised a preliminary objection in that regard, contending that the appeal was incompetent and should be struck out as by the Rules of the Supreme Court the appeal shall reflect the same parties from the inception of the case at the High Court.
- J**

- A** **iii.** **The applicants then brought an application for leave to substitute the names of the 2nd set of respondents being the original plaintiffs at the Federal High Court and respondents at the Court of Appeal whose names the applicants unilaterally extracted from the proceedings.**
- B**
- iv.** **The Supreme Court in a ruling delivered on 22nd January, 2016 and exhibited to the applicants' affidavit in support as Exhibit 2 dismissed the Motion on the grounds, inter alia, that the applicants cannot unilaterally alter the parties and appeal in that stead.**
- C**
- D** **v.** **The applicants sponsored another application for the substitution of the 2nd set of the respondents who were not parties to SC. 428/2015 as constituted with completely new individuals namely, ELOKA KINGSLEY, UGWU FIDELLIA, AMALLUNWEZE ISAAC, OKEKE MATHIAS, IHEDIKE EZE CHRISTIAN and UGWU SHEDRACK. This said application still brought within the context of SC. 428/2015, is hereto delivered as *Exhibit Ca1*.**
- E**
- F** **vi.** **In Exhibit CA1 the said individuals were purportedly authorised to represent the faceless delegates who are interested in pursuing the appeal, which the proposed representatives are different from the applicants herein, equally claiming right of representation.**
- G**
- H** **vii.** **With the foregoing in perspective, suit No. *FHC/ABJ/CS/816/2014; CHIEF ORJI CHINENYE GODWIN & 3 ORS V. PEOPLES DEMOCRATIC PARTY & 4 ORS* was instituted at the Federal High Court, Abuja Division, in the capacity disclosed on the Originating Summons which was filed on 5th November, 2014, that is to say”..... on behalf of all delegates elected on the 1st November, 2014, at the Ward Congress held for Enugu State.**
- I**
- J**

146

- A** **xii.** **Applicants claim to represent 113 delegates of the three man per ward delegates elected at the Ward Congresses which took place in Enugu on 1st November, 2014. It is not in this capacity that the**
- B** **Originating Summons was incepted.**
- C** **xvii.** **If the 113 delegates whom the applicants claim to represent are removed from the votes scored by Hon. Ifeanyi Ugwuanyi and credited to either his closest rival or any other person, the outcome of the primary election remains unaffected.**
- D** **xviii.** **This application thus serves no utilitarian purpose and is indeed not only academic but constitutes an abuse of the process of the court.**
- E** **xx.** **The applicants do not have the authority of all the delegates who initiated the action to initiate this appeal. Additionally, the applicants do not have common interest with all the three man delegates who duly participated at the 1st, 2nd, 3rd and 4th respondents in the 1st respondent's primary election and the reliefs sought by the applicants are not beneficial to the others.**
- F** **xxi.** **The applicants are by this application effectively seeking an amendment of the capacity in which the suit was initiated and all Orders of both courts below made.**
- G** **xxiii.** **Appeal No. SC. 428/2015 is an appeal instituted by the applicants/proposed appellants herein as “appellant”. The parties in the said appeal have again been reconfigured in this application by introducing the 2nd set of respondents herein who are not parties in the appeal and by describing the appellants in that appeal as “applicants/proposed appellants” herein.**
- H**
- I** **9.** **Paragraphs 19, 20, 21, 22, 23, 24, 25, 29, 30, 31 and 32 of the affidavit in support are not correct and I aver as follows:**
- J** **i.** **It is misleading to allege as the applicants did that**

- A** “the refusal of the 1st set of respondents to prosecute this appeal is without the consent of the applicants and the vast majority of others they represented”.
B The 1st set of respondents herein never appealed to this court and did not refuse to prosecute any appeal.
C ii. The 1st, 2nd, 3rd and 4th respondents in the 1st set of respondents herein and the unnamed delegates/ parties in the case at the trial court are not the same.
D iii. The delegates were and have always been represented by those who were plaintiffs at the lower court and the decision to accept the outcome of the decision of the Court of Appeal was duly conveyed on behalf of all the said delegates as can be seen in Exhibit CA2 attached to this affidavit.
E iv. The 1st, 2nd, 3rd and 4th respondents in the 1st set of respondents were not induced by anybody and there was no compromise of any sort. Those who commenced the case as plaintiffs before the primary election of the Party decided not to pursue any appeal to this court being satisfied that the primary election eventually took care of their grievance which propelled the action at the trial court.
F
G v. As presently informed by DR. ONYECHI IKPEAZU OON, SAN, learned counsel for the 1st, 2nd, 3rd and 4th respondents in the 1st set of respondents on 18th September, 2016 at Plot 10, Block IX David Dodo Street, at 7:30pm and I verily believe him, this application as well as the record which the applicants seek to rely on is incurably defective and ought to be struck out. The application is equally of no tangible legal value and is thus an abuse of process of this court.”
H The 2nd set of respondents (1st – 3rd), in their counter affidavit sworn to by Orji
I
J

A Chinenye Godwin, the following facts, inter alia, were deposed to:

- B 4. That at the Federal High Court in Suit No. *FHC/ABJ/CS/816/2014*. I and the 2nd and 3rd respondents sued as plaintiffs, for ourselves and on behalf of delegates elected on the 1st of November, 2014 at the Ward Congress of the PDP held for Enugu State. The originating process in suit No. *FHC/ABJ/CS/816/2014* is hereby attached and marked as Exhibit 1.
- C 5. That it was also in this capacity we prosecuted the appeal at the Court of Appeal.
- D 6. That we have, to the knowledge of the 1st – 3rd applicants, and with the consent of the vast majority of the delegates we represent, stated in clear terms that we shall not be prosecuting this appeal any longer at the Supreme Court.
- E 13. That paragraphs 3, 4, 5, 6, 7 and 23 are true, while paragraphs 12, 13, 14, 15, 19, 21, 22, 24(vi), 25, 29, 30, 31, 32 and 33 are false and are hereby denied.
- F 14. That further to paragraph 12 and 13 of the supporting affidavit, I know as a fact that the 1st, 2nd and 3rd respondents herein were not just the plaintiffs in the action at the Federal High Court, but also the principal parties to the action.
- G 15. The 1st – 3rd applicants herein have not discussed this application with the respondents.
- H 16. Further to paragraph (15) supra, the respondents do not support and do not consent to the filing of this application.
- I 17. Applicants' earlier application referred to in paragraph (17) of the supporting affidavit was struck out on the ground that the consent of the respondents was not sought, amongst other reasons.
- J 18. I have read through the 113 names of the delegates who purportedly instructed the 1st – 3rd applicants to file this application as stated in Exhibit 1 attached to the motion, and I know as a fact that:
- (i). The said people do not represent the delegates who authorised the respondents to initiate this action at

- A** the Federal High Court in the first instance.
- (ii).** The said delegates do not represent the delegates on behalf of whom the respondents sued for themselves and represented in the first instance.
- B** **(iii).** 893 delegates referred to in (i) supra, instructed and authorised the respondents to initiate this action at the court of first instance.
- C** **(iv).** It was the consensus of those delegates that the respondents herein withdraw the prosecution of the appeal earlier on.
- (v).** It is not in the interest of the delegates and the people of Enugu State to continue the prosecution of this application/appeal.
- D**
- 19.** Further to paragraph (18) supra, I know as a fact that:
- v.** This present application is meant to destabilize the smooth running of the governance of the state.
- E** **vi.** Further to (v) supra, respondents do not support the application and distance themselves therefrom.
- vii.** There is no common interest between the 1st 3rd applicants on one hand, and the respondents as well as the majority of the delegates they represent on the other hand in this application.
- F**
- 20.** I know as a fact that:
- (i).** While 113 delegates purportedly instructed applicants to file his application, 424 delegates have appended their names and signatures in opposition to this applications/appeal. Now shown to me, attached hereto and marked as Exhibit 2 is a list of the said delegates.
- G**
- H** **(ii).** On 15th May, 2015, respondents wrote a letter for themselves and on behalf of all the delegates elected on the 1st November, 2014 at the Ward Congress held for Enugu State to the State Chairman of the PDP informing him/the party that they were no longer aggrieved with the decision of the party in respect of the primary election and that the need for their going to court in the first instance did no
- I**
- J**

- A** longer arise. Attached hereto and marked as Exhibit 3 is a copy of the said letter.
- B** (iii). Exhibits 3 was written by the respondents on behalf of all the delegates elected on the 1st November, 2014, including the 1st – 3rd applicants herein.
- C** 22. That the respondents and the delegates they represent agree with the Court of Appeal judgment of 1st November, 2014 and also believe that this matter should not be a do or die affair.
- D** 23. That I have seen the notice of appeal exhibited to the application, as well as the grounds of appeal.
- E** 24. That the proposed grounds 1, 2, 3 and 4 refer to me and the 2nd and 3rd respondents to this application.
- F** 25. That we have not authorized the said grounds of appeal to be filed on our behalf, and that we do not wish to ventilate them.
- G** 26. I have also seen the proposed reliefs sought from the Supreme Court, including the restoration of the judgment of the trial Federal High Court.
- H** 27. That the judgment of the trial Federal High Court was in my favour as well as the 2nd and 3rd respondents.
- I** 28. That the respondents are not interested in the restoration of the said judgment in their favour any longer.
- J** 29. That it is in the interest of justice to dismiss this application.”

From the affidavit evidence available, I make the following findings:

- H** i. The 1st set of respondents herein held primary election for the election three (3) delegates per ward for the election of candidates to represent the party at the 2015 governorship election for Enugu State.
- I** ii. At the end of general election the candidate of the 1st set of respondents won and was declared duly elected. Both the tribunal and court below affirmed the election.
- J** iii. Some persons were disgruntled and lodged an action at the Federal High Court with suit No. *FHC/ABJ/CS/816/2014*.

- A** **iv. Most of the reliefs were dismissed by the Federal High Court (trial court).**
- B** **v. The first set of respondents (i.e. 1st, 2nd, 3rd and 4th respondents) herein appealed to the court below in Appeal No. *CA/A/28/2015* with that court allowing the appeal by setting aside the decision of the trial court and striking out the originating summons.**
- C** **vi. The 1st respondent received a correspondence (Exh. CA2) from the 2nd set of respondents that they resolved at a meeting held on 15/05/15, to accept the verdict of the Court of Appeal of 30/04/15 and no need to proceed with the matter on further appeal.**
- D** **vii. The applicants herein, lodged an appeal to this court as appellants. They transmitted record of appeal and filed appellants brief of argument.**
- E** **viii. The 2nd set of respondents filed a respondents' brief in which they embedded a preliminary objection on the ground that the named parties to the appeal bore no relationship with suit No. *FHC/ABJ/CS/816/2014* and Appeal No. *CA/A/28/2015*.**
- F** **ix. Before hearing of the appeal, the applicants initiated an application seeking to remove/substitute the named parties representing the delegates and implant their names.**
- G** **x. This court, after hearing the said application, struck out same on the ground that the applicants cannot unilaterally alter the parties to the proceedings at both the trial court and the court below.**
- H** **xi. The application on hand is brought under Appeal No. *SC. 428/2015*.**
- I** **xii. The proposed notice of appeal, Exhibit 5 (paragraph 18 of the affidavit in support) bore only the names of the first set of respondents as respondents (to the proposed appeal) and the applicants (as appellants in the proposed appeal). The second set of respondents (who sued for themselves and on behalf of other delegates both at the trial court and the court below) did not feature in any capacity/status in the proposed appeal.**
- J**

- A** **xiii. There is alteration of parties from the trial court, Court of Appeal, to this court. Applicants were not parties at the trial court and the Court of Appeal.**
- B** **xiv. From their application on hand, applicants have no pending appeal as they prayed, inter alia, for extension of time to seek leave to appeal, etc. That is the import of applicants' reliefs 3 -5 of the application on hand.**
- C** **xv. There is no appeal to this court by the 2nd set of respondents.**
- xvi. There is no commonality of interest between the applicants and the parties they seek to substitute which is the foundation upon which representation is based.**

D I think it is apt for me at this stage, to remind my noble lords, in a concise manner the general principles of the law relating to substitution. When one puts something by way of replacement or change of another, whether a person or a thing, that would amount to substitution.

E The law may permit a person to substitute another in a law suit (including appeal) where there is a genuine case of death, bankruptcy, assignment, transmission or devolution of interest or liability of a party to the suit or appeal, where the need to substitute is obvious in fact and in law. Where a party is dead, he cannot physically take part any more in the proceedings. His position must necessarily be taken over by the beneficiary who inherits him and who, subsequently, inherits the litigation. Otherwise, the action for or against the deceased will abate unless appropriate steps are taken to substitute a living person for the deceased. See: **Eyesan vs. Sanusi (1984) 4 SC 115 at p. 137**. Bankruptcy of one of the parties to a suit while the suit is pending, may also abate except where a trustee(s) takes over. Comprehensive rules are made by the various (now unified) High Court Rules which take care of such circumstances.

H **Status of the applicants visa-a-vis Suit No. FHC/ABJ/CS/816/2014 at the trial court; Appeal No. CA/A/28/2015 at the court below AND the application under consideration in this court**

I Permit me to restate (at the risk of repetition), my lords, that the applicants were some of the ward delegates elected for Enugu State at the Ward Congress Election for PDP held on the 1st of November, 2014. The applicants were among the delegates represented by the 2nd set of respondents at the trial court in suit No. **J FHC/ABJ/CS/816/2014** which was determined by that court on 24th November,

- A** 2014 and in Appeal No. **CA/A/28/2015** which the court below determined on 30th of April, 2015. In this court, the applicants prayed for three fundamental reliefs (i) leave to substitute the names of the applicants for the names of the 2nd set of respondents (who were 1st, 2nd and 3rd respondents at court below for themselves
- B** and on behalf of delegates elected on the 1st of November, 2014 at ward congress held for Enugu State, including the applicants) (ii) the 2nd relief is the tripod prayer, i.e. for extension of time to seek leave to appeal, leave to appeal and extension of time within which to appeal; (iii) (Third relief) is for leave to the
- C** applicants to present, maintain and or prosecute the appeal in a representative capacity i.e. presumably for themselves and other delegates elected at the 1st November, 2014, Ward Congress Election of PDP held in Enugu State (as per Exhibit 1 annexed to the application). So, in cases at the trial court and the court
- D** below, the applicants were unnamed parties who were fully represented by the 2nd set of respondents.

E Applicants' Reasons for the Substitution sought

- E** It is to be noted that there was no substitution or attempt to substitute any of the parties at the trial court or at the court below. The issue of substitution became apparent after the delivery of judgment by the court below. It is in evidence by the
- F** applicants that 2nd set of respondents are no longer interested in prosecuting an appeal to the Supreme Court against the decision of the court below of 30th April, 2015. As a result, the applicants instituted an appeal before this court with Appeal
- G** No. **SC. 428/2015** which was followed by an application by the applicants to appeal against the said judgment of the court below. The said application was struck out by this court as the names of the parties in the case were unilaterally
- H** changed by the applicants. That the applicants yet found there was need to seek leave to appeal against the judgment of the court below. Applicants stated that they are desirous to prosecute the appeal in a representative capacity on behalf of
- I** those names as in Exh. 1 whose mandate the applicants deposed to have. Applicants deposed further that their right to challenge the court below's decision is constitutional and parties on record representing a group of people cannot compromise the interest of people they represent.

Is substitution at the level possible?

- J** The proposed record of appeal, the affidavit evidence and the exhibits available

A before this court clearly reveal that:

A – At the trial court, the parties were as follows:

“

B

Suit No. FHC/ABJ/CS/816/2014

BETWEEN:

BARRISTER ORJI CHINENYE GODWIN

CHIEF C.C. AKALUSI

C *CHIEF ORJI C. ORJI*

*(Suing for themselves and on behalf
of all delegates elected on the 1st
November, 2014 as the Ward Congress
held for Enugu State.*

D

AND

Plaintiffs/Applicants

E PEOPLES DEMOCRATIC PARTY (PDP)

NATIONAL CHAIRMAN (PDP)

NATIONAL SECRETARY (PDP)

NATIONAL WORKING COMMITTEE (PDP)

F INDEPENDENT NATIONAL ELECTORAL
COMMISSION (INEC)

Defendants/Respondents

B – The parties at the Court of Appeal were as follows:

G

“Appeal No. CA/A/28/2015

BETWEEN:

H

PEOPLES DEMOCRATIC PARTY (PDP)

NATIONAL CHAIRMAN (PDP)

NATIONAL SECRETARY (PDP)

I NATIONAL WORKING COMMITTEE (PDP)

AND

APPELLANTS

J BARRISTER ORJI CHINENYE GODWIN

A CHIEF C. C. AKALUSI
CHIEF ORJI C. ORJI

(Suing for themselves and on behalf of all delegates elected on the November, 2014 as the Ward Congress held for Enugu State.

B INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)

C – The parties in the Application Before this court are as follows:

C

“Appeal No. SC. 428/2016

(i) **BETWEEN:**

1. PEOPLES DEMOCRATIC PARTY (PDP)

D 2. THE NATIONAL CHAIRMAN (PDP)

3. THE NATIONAL SECRETARY (PDP)

4. THE NATIONAL WORKING COMMITTEE (PDP)

5. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)

E

AND

1. *BAR. ORJI CHINENYE GODWIN*

2. *CHIEF C. C. AKALUSI*

F 3. *CHIEF ORJI C. ORJI (suing for themselves and on behalf of delegates elected on the 1st of November, 2014 At Ward Congress held for Enugu State)*

G **IN RE: APPLICATION OF:**

1. *EJIOFORAPEH*

2. *UDE CELESTINE*

3. *OSSAI MOSES*

H *(On behalf of Other Unnamed parties on record)*

APPLICANTS/PROPOSED APPELLANTS

(ii) Parties on the proposed Notice of Appeal (Exh.5, paragraph 18 of applicant's affidavit in support are shown as follows:

I

“APPEAL NO

BETWEEN

1. *EJIOFORAPEH*

J

RESPONDENTS

1st SET OF
RESPONDENTS

2nd SET OF
RESPONDENTS

A 2. <i>UDE CELESTINE</i> 3. <i>OSSAI MOSES</i> <i>(On behalf of other unnamed Parties on record)</i> B AND	}	<i>APPELLANTS</i>
1. <i>PEOPLES DEMOCRATIC PARTY (PDP)</i> C 2. <i>THE NATIONAL CHAIRMAN (PDP)</i> 3. <i>THE NATIONAL SECRETARY (PDP)</i> 4. <i>THE NATIONAL WORKING COMMITTEE (PDP)</i> 5. <i>INDEPENDENT NATIONAL ELECTORAL</i> D <i>COMMISSION (INEC)</i>	}	RESPONDENTS

My lords, it is quite clear from the situations in 'A' and 'B' above that the applicants were part of those represented by the “plaintiffs/applicants” at the trial court and by the “respondents” at the court below. As seen above also, the proposed appellants in the proposed notice of appeal did not feature anywhere as named parties in either the trial court or at the court below. This, to say least, is incredible and unprecedented! My lords, there is ample affidavit evidence why the applicants took such steps in presenting their application. In my humble view, the law of representation, comes into the scene here. Barrister Orji Chinenye Godwin, Chief C.C. Akalusi and Chief Orji C. Orji who prosecuted the suit at the trial court as plaintiff/applicants and as respondents at the Court of Appeal, claimed, unequivocally, that they were suing or responding on the matter “for themselves and on behalf of **all delegates** elected on the 1st November, 2014 at the Ward Congress held for Enugu State.” This fact has not been denied or controverted at any stage of the proceedings. The law is very certain that where a common factor unites some individuals or communities who have equal claim in a thing/subject matter, every member of that individuals, community, group, association, club etc, is entitled to join a litigation where it arises. The situation is even more eloquently typified in the case of Duke of Bedford vs. Ellis (1901) AC 1, that all persons who have a common right which is invaded by a common enemy are entitled to join in attacking the common enemy in respect of that common right. Where such individuals, community, groups are so many that all of them cannot conveniently sue in the suit involving that right, the rules of court permit one or more of them to sue or be sued as representatives of the others. This

A is known as a representative action. The few persons by or against whom the action is brought are the representatives of the others and they prosecute or defend not in their personal capacities but in their representative capacity.

B Consequence of a Representative Action

It is to be noted again that in a representative action both the named plaintiff and/or defendant, as the case may be, and those they represent are parties to the action. However, the law permits only the named representatives as plaintiffs or

C defendants who are the ***DOMINUS LITIS*** (the masters of the suit) to sue or be sued in a representative capacity until when the suit is determined. And, for the purposes of initiating any process in representative action, such process **MUST** be by and in the name of the ***DOMINUS LITIS*** i.e the named plaintiffs or defendants

D so long as their mandate from those they represent remains acceptable and uncountermanded. Those represented, such as the applicants in this matter, are deemed bound by whatever decision the court would give for or against their representatives. See: **Tesi Opebiyi vs. Shittu Oshobojo & Anor (1976) 9 12**

E SC 195 at p. 200; Oketie vs. Olughor (1995) 5 SCNJ 217 at 226; Atande vs. Olanrewaju (1988) 4 NWLR (Pt. 89) 394; Ede vs. Nwidenyi, In Re Ugade (1988) 5 NWLR (Pt. 93) 161 at p; 169; Ekennia vs. Npakara (1997) 5 SCNJ 70 at p. 88.

F To clarify the matter further, any decision given for or against the representative is a decision for or against those other persons, individuals, groups etc, they represent. See: **Otapo vs. Sunmonu (1987) 2 NWLR (Pt. 58) 587**. By way of further elucidation, it was held in **Panoekun & Ors vs. Ajayi (1961) 1 All NLR**

G 197 that the members of the group represented are so bound by the outcome of the proceedings that when a court makes an order for a defendant to defend on his family's behalf and judgment is given against the family, a member of that family who did not join the resolution that the defendant should represent the family

H cannot say that the judgment does not bind him and claim family property in his possession taken in execution of that judgment. If all the named parties in a representative action die, the action, provided it is still maintainable, subsists on behalf of and/or against those they represent and who have not been mentioned in

I the proceedings ***NOMINE***. But such action may not be prosecuted or continued until a living person(s) has been substituted for the named deceased party to carry on the representative action both on trial and also when the matter is on appeal.

See: **Attah & Ors vs. Nacho & Ors (1965) NMLR, 28; Okeke vs. Olughor**

J (supra).

A In the application on hand, it is never shown, anywhere, that those who represented the applicants, or anyone of them died which would necessitate substitution. Further, none of the names of the representatives of the applicants has got his name legally removed or replaced from the proceedings as in **B** situations (A) and (B) above. I agree with the learned SAN for the 1st set of respondents in his submission that the applicants initiated an application “seeking to remove the named parties representing the delegates and to implant theirs”. The law, rules of court and practice would not permit that. It is settled law that **C** individuals are not allowed to unilaterally alter a case as constituted from the trial court and the names of parties in that character must be maintained except as may otherwise be ordered by a court of law. Our Order 2 Rule 8 of this court's rules, 1985 (as amended) provides:

D **“Notices of appeal, applications for leave to appeal, briefs and other documents whatsoever in pursuance of the appellate jurisdiction of the court for filing in accordance with the provisions of these Rules, shall reflect the same title as that which (sic: are) contained in the court of trial.”**
E (underlining for emphasis)

F This was what this court harped on to strike out a similar application filed earlier by the applicants. See: **PPA vs. INEC (2012) 12 NWLR (Pt. 1317) 215.**

Secondly, after the judgment of the court below, a letter was said to have been written, addressed and delivered to the state secretary, PDP, Enugu State **G** which was acknowledged by the said secretary on 15/05/2015 (paragraph 6(x) of 1st to 4th respondents' counter affidavit filed on 10/11/2016; paragraphs 20(ii), (iii) and 22 of the 2nd set of respondents' counter affidavit filed on 14/11/16; 5th respondent's (among the 1st set of respondents) counter affidavit (paragraph 4(f)) **H** filed on 7/11/16. The referred letter, Exhibit CA2, reads as follows:

I *“BARRISTER ORJI CHINENYE GODWIN
 CHIEF C. C. AKALUSI,
 CHIEF ORJI C. ORJI*

J

A *For ourselves and on behalf of all
the delegates elected on the
1st November, 2014 at the Ward
Congress held for Enugu State,
15th May, 2015*

B *The State Secretary,
Peoples Democratic Party (PDP),
State Secretariat,
C Enugu.*

Dear Sir,

D *1. SUIT NO: FHC/ABJ/CS/816/2014: BARRISTER ORJI CHINENYE
GODWIN & ORS V. PDP & ORS
2. APPEAL NO: CA/A/28/2015: PDP vs. BARRISTER ORJI CHINENYE
GODWIN*

E *REF: NOTICE OF ACCEPTANCE OF VERDICT OF THE COURT OF
APPEAL*

F *We write on behalf of ourselves and all the delegates who authorized us to initiate
the above mentioned proceeding at the Federal High Court, Abuja Division which
eventually culminated in the decision of the Court of Appeal rendered on 30th
April, 2015. We notify you that for the reason that primary election was
eventually conducted with the elected 3 man delegates participating, we are not
G aggrieved with the actions of the party nor is there a need for us to further proceed
with the matters.*

*It is hoped that you will appreciate that our decision to go to court in the
first instance was based on our apprehension that the proper thing was not going
H to be done. We thank you for your understating and assure you of our loyalty on all
affairs of our great party.*

*Thank you for your co-operation.
I Yours faithfully,
Signd.
BARRISTER ORJI CHINENYE GODWIN*

J *Signd.*

A *CHIEF C. C. AKALUSI*

Signd
CHIEF ORJI C. ORJI

B

For ourselves and on behalf of all the delegates elected on the 1st November, 2014 at the Ward Congress held for Enugu State. ”

C In a sharp reply, the applicants, in a further and better further affidavit filed on 14/11/16 by the 1st – 4th respondents, deposed to by one Ejiofor Apeh (1st applicant herein) stated as follows:

D **“15. That I know as a fact that Exhibit CA2 to the counter affidavit does not exist but was merely concocted in furtherance of the illegality intended by the respondents and in the unlikely event it exists, they did not have our authority and those of the other persons they represented to write the letters. They wrote the letter in their personal capacity alone and cannot bind us without our consent.**

E **16. That the author of Exhibit CA2 did not inform me about the appeal which culminated in this present appeal before the Court of Appeal neither did they report to us about the outcome of the appeal before the Court of Appeal.”**

F

G My lords, Exhibit CA2 speaks eloquently for itself. Need I say anything more? What I may add, perhaps, is that the reasons put forward by the applicants in reply to Exhibit CA2 may appear contrary to the earlier position held out as per their depositions in their affidavit in support that the said set of respondents represented them at the trial court and the court below. Whatever the applicants may say to convince this court that they are not bound by a decision that bound their representatives (2nd set of respondents) will certainly run counter to the earlier representation of all the delegates elected from the Ward Congress in Enugu State, where at the delegates, including the applicants, stated that they had accepted the decision of the court below on the issues in dispute and as a matter of fact, did not have any reason to proceed further on appeal to this court. I thus, have no reason to disbelieve that the applicants were part of the decision in Exhibit CA2. I already referred earlier to paragraph 8 of the applicants supporting affidavit which

A conforms that the 2nd set of respondents are not interested in pursuing the matter to this court. That decision as I said earlier, still binds the applicants and they cannot resile. See: **A-G Nasarawa State vs. A-G. Plateau State (2012) 10 NWLR (Pt. 1309) 419 at p. 450.**

B Thirdly, even as the matter is now, and from the proposed notice of appeal, there is apparently no appellant(s). The persons designed as appellants are the applicants in this application. They can only succeed as appellants if their applications for substitution scales through. Even then, whom are they going to substitute as there are visibly no appellants now on the proposed notice of appeal. The proper thing to do, usually, is to maintain the names of the parties on record. If, on appeal, the appeal is properly entered, and if for any reason, there arises need to substitute any of the named parties, or, where a person who has a real, genuine and cognate interest, applies to join the litigation (at any stage), the court may exercise its discretion in favour of such applicant. It is not open for a party to unilaterally effect a change in the names of parties who are on record of proceedings of any court.

E Further, the interest of the applicants cannot in any way be higher than the interest of all the delegates (780) elected for the 260 Wards in Enugu State (Exh. CA 4). The claim of the applicants is that 113 delegates authorized them to appeal to this court. even if that is correct, majority of the elected delegates for Enugu State (667 of them), still remains bound by the decision taken in Exhibit CA2. There is, therefore, no commonality of interest between the applicants and the vast majority (667) of the delegates in pursuit of the application on hand as divergent interests set in between the applicants, the 2nd set of respondents and the majority of the Ward delegates. In a substitution, commonality of interests between persons to substitute and those to be substituted is paramount. See: **Ejiofor Apeh & Ors vs. PDP – SC. 428/2015 of 22/12/2016.**

H The claim of exercise of Constitutional right by the applicants, my lords, is not just a mere imagination of the phrase. It has to be founded on solid, substantial and valid legal claims.

I find no merit in this relief which is bound to fail.

I In relation to other reliefs where there is no legal person, who is competent to file an appeal, an aspirant wishing to join the proposed appeal, must flatly fail as one cannot build something on nothing and expect it to stand, it will collapse. **UAC v. Macfoy (1961) 3 All ER 1169.** There is no foundation for reliefs 3, 4, 5 which are hereby struck out. Reliefs 1 and 2 for leave to substitute 2nd set of respondents (in this application) and for leave to present, maintain and prosecute

A (this appeal) or, better, an appeal in a representative capacity (on behalf of other unnamed parties on record) have no scintilla of merit. They are hereby dismissed along with the application. In the interest of justice, I shall allow each party to this application to bear its own costs.

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

PETER-ODILI, (JSC): I agree with the ruling just delivered by my learned brother, Ibrahim Tanko Muhammad (JSC) and to register my support for the reasonings, I shall make some remarks.

C The motion filed on the 21st day of October, 2016 brought by Ejiofor Apeh, Ude Celestine, Ossai Moses (on behalf of other unnamed parties on record),
D praying for the following reliefs, viz:

1. **AN ORDER granting leave to substitute the names of EJIOFOR APEH, UDE CELESTINE and OSSAI MOSES for the names of BARRISTER ORJI CHINENYE GODWIN, CHIEF C.C. AKALUSI AND CHIEF ORJI C. ORJI who were the 1st – 3rd respondents at the lower court with the names of the present applicants.**
E
2. **AN ORDER granting leave to the applicants to present, maintain, and or prosecute this appeal in a representative capacity that is: for themselves and other delegates elected at the 1st November, 2014 Ward Congress Election of Peoples Democratic Party (PDP) held in Enugu State and who had given letter of authority by subscribing their names and signatures on Exhibit 1 annexed to this application.**
F
G
3. **AN ORDER of this court extending the time within which the applicant may seek leave to appeal against the judgment of the Court of Appeal, Abuja Division delivered on 30th day of April, 2015 in Appeal No. CA/A/28/2015 CORAM ABUBAKAR JEGA ABUDULKADIR, TANI YUSUF HASSAN and MUHAMMED MUSTAPHA JJCA as parties interested.**
H
4. **LEAVE to appeal against the said judgment.**
I
5. **EXTENSION of time within which to appeal.**
6. **AND FOR SUCH FURTHER (ORDERS) as the court may deem fit to make in the circumstances of this case.**
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A

GROUND FOR THE APPLICATION

- i. The applicants were ward delegates elected for Enugu State at the Ward Congress Election for the Peoples Democratic Party (PDP) on 1st November, 2014.**
- ii. The appellants were among the Delegates represented by Barrister Orji Chinenye Godwin, Chief C.C. Akalusi, Chief Orji C. Orji at Federal High Court and Court of Appeal, Abuja in Suit No. FHT/ABJ/CS/816/2014 and CA/A/28/2015. The Court below gave judgment against the said respondents.**
- iii. The said Barrister Orji Chinenye Godwin, Chief C.C. Akalusi, Chief Orji C. Orji who were the 1st to 3rd respondents at the lower court are no longer interested pursuing the case to the Supreme Court.**
- iv. The appellants and Barrister Orji Chinenye Godwin, Chief C.C. Akalusi and Chief Orji C. Orji have the same interest in the case but the latter are no longer interested in pursuing the appeal on behalf of the ward delegates.**
- v. The applicants are desirous of further pursuing this appeal in a representative capacity to the Supreme Court and have been authorized by other delegates whose names are contained in Exhibit 1.**
- vi. The applicants earlier sought for leave to substitute the names of the 1st to 3rd respondents with their own names before this court after the applicants have filed notice of appeal and brief of argument in their names.**
- vii. That in a considered ruling of this court delivered on the 22nd January, 2016, the said application for substitution was struck out on the ground that the order for substitution had to be granted first before filing other processes including notice of grounds of appeal.**
- viii. The applicants are out of time within which to appeal against the decision of the lower court.**
- ix. The applicants for themselves and on behalf of other delegates have the mandate of other ward delegates elected for Enugu State on 1st November 2014 whose names are contained in Exhibit 1 to pursue this appeal on their behalf, since they are all aggrieved by the decision of the Court of Appeal.**

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A x. Leave of this court is required to file an appeal.

Learned counsel for the applicants, Yusuf Ali SAN adopted the written address filed along the motion and the supporting affidavit of thirty-three (33) paragraphs.

B He also relied on a Further and Better Affidavit filed on 14/11/2016.

Dr. Onyechi Ikpeazu SAN of counsel for the respondents 1st – 4th also set about moving their own motion filed on 29/4/2016 for the following order thus:

C Dr. Ikpeazu SAN referred to the supporting affidavit of seven (7) paragraphs. Also a counter affidavit filed on 10/11/2016 in which was attached a written address in contention of the application of 21/10/2016 which learned Senior Counsel adopted and relied on.

D Mr. T. M. Inuwa of counsel for the 5th respondent adopted their written address filed on the 7th November 2016. Chief Wole Olanipekun SAN for the second set of respondents adopted their counter affidavit filed on 30/9/2016 and in it the written address.

E In the written address pushing for the granting of the reliefs in the motion of 21/10/2016, Yusuf Ali SAN raised a single issue which is thus:

**F Whether the applicants have placed necessary materials before
this honourable court that will entitle them to the reliefs
sought?**

G Dr. Onyechi Ikpeazu SAN for 1st – 4th respondents in his written address in opposition to the application on ground identified two issues for determination which are as follows:

- 1. Whether this application is competent having regard to
the nature of SC.428/2015?**
- H 2. Whether the applicants are entitled to be substituted
having regard to the facts before the Supreme Court as
disclosed in the depositions of the parties?**

I T. M. Inuwa Esq. for the 5th respondent in his written address adopted the sole issue as crafted by the applicant though he urged the court to dismiss the application as lacking in merit.

J This single issue of the applicant I see as good enough for me in the determination of this application and I shall make use of it.

A

SINGLE ISSUE:

Whether the applicants have placed necessary materials before this honourable court that will entitle them to the reliefs sought?

B

Learned Senior Advocate, Yusuf Ali urged the court to exercise its discretion in favour of the applicants as what they had set forth in supporting affidavit and the Further and Better Affidavit show that prima facie there is good cause why the

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appeal should be heard. That what is in issue at this stage is not whether the appeal would succeed. He cited numerous judicial authorities such as **Anaechebe vs. Kingsley Ijeoma & Ors (2014) 14 NWLR (Pt. 1426) 168 at 184; Chukwu vs. Omehia (2013) 7 NWLR (Pt. 1354) 463 at 479; Ngere vs. Okuruket 'XIV'**

D

(2014) 11 NWLR (Pt. 1417) 147 at 174.

He stated further that the proposed notice and grounds of appeal attached to the application as Exhibit 5 are arguable, substantial and has prima facie shown good cause why the appeal should be heard. That by paragraphs 2, 3, 4, 5, 7, 9, 10,

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11, 12 and 18 of the affidavit in support of the application, the applicants are interested parties whose interest need to be protected and subsequently gave rise to this application. That an action in a representative capacity binds both the parties whose names appear in the case and those on whose behalf the case was

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instituted. That the decision of the Court of Appeal is binding on the present applicants and persons whom they are representing notwithstanding the fact that the respondents in persons of Barr. Orji Chinenye Godwin, Chief C. O. Akalusi and Chief Orji C. Orji decided not to pursue the case to the Supreme Court.

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Mr. Yusuf Ali, Senior Counsel concluded by stating that the applicants being interested parties whose interest is at stake in this case, they ought to be brought in, in the interest of justice.

In response, learned counsel for 1st to 4th respondents, Dr. Ikpeazu Senior

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Advocate contended that the application is not competent on two major grounds. Viz:

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(i) **SC. 428/2015 has no viable basis of existence, not having any relationship in terms of parties with the proceeding which gave rise to the appeal.**

(ii) **This application cannot exist under a heading different from that on which SC. 428/2015 was brought.**

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- A That in respect to the first condition, no person is allowed to unilaterally alter a case as constituted from the High Court, as the character of the case from inception has to be maintained and if there is to be a change, it must be with leave of court which leave has not been sought for or obtained from the Supreme Court.
- B He referred to **Order 2 Rule 8 of the Rules of this Court: P.P.A. vs. INEC (2012) 13 NWLR (Pt. 1317) 215 at 236-237.**

Learned senior counsel submitted that the Supreme Court in Exhibit 2 to the applicants' application gave a decision on what should be the appropriate procedure by way of guidance on what should be done. That Exhibit 5, the proposed notice of appeal shows the deficiency in this application.

- C
- On the second condition, Dr. Ikpeazu stated that the heading of the application does not have the same parties in Sc.428/2015. He cited Exhibits 2, 3, 4 and said the applicants are seeking to "substitute" the individuals in the earlier appeal in a different capacity, "on behalf of other unnamed parties on record". He stated that the effect if application is granted, the judgment of the Court of Appeal cannot be enforced against the named individuals, as they would have been renamed from the incidents of the matter.

Learned Senior Counsel contended that the applicants have not established that they were properly authorized to represent the other delegates whose names are not stated. That the cause of action has become spent and ceased to exist. He cited **Badejo vs. Fed Ministry of Education** 1996) 8 NWLR (Pt. 464) 15 at 40 41; **Adepoju vs. Yinka** (2012) 3 NWLR (Pt. 1288) 567 at 584.

- Mr. T.M. Inuwa of counsel for the 5th respondent submitted that this application lacks merit as applicants are seeking to substitute the 2nd set of respondents who were respondents at the Court of Appeal and who are not interested in appealing against the judgment of the Court of Appeal, subject matter of this application and so they have not filed an appeal. That there is really no existing appellant who the applicant can substitute. He cited **Macfoy vs. U.A.C.** (1962) AC 152; **Agbaje vs. INEC** (2016) 4 NWLR (Pt. 1501) 151 at 161.

That the applicants have not shown how the judgment in the Court below has prejudicially affected their interest. He cited **Nwaogu vs. Atuma No. 1** (2013) 9 NWLR (Pt. 1358) 182.

- I Learned counsel for the 2nd set of respondents submitted that the applicants have not shown which interest they want to protect. Also that the applicants cannot step in to act in a representative capacity for persons who have no link with them or want them to be so represented. That the synergy between the representative and the represented is absent. He cited **Idise vs. Williams Intl. Ltd** (1995) 1
- J

A NWLR (Pt. 370) 142 at 152-153; **Ukatta vs. Ndinaeze** (1997) 4 NWLR (Pt. 499) 251 at 275.

That the applicants have not established why the discretion they seek should be granted in their favour. He relied on **Williams vs. Hope Rising** (1982)

B 1 All NLR (Pt. 1) 1 at 5.

The lone issue set out by the applicant is sufficient for use in the determination of this application and it is as follows:-

C SOLE ISSUE:

Whether the applicants have placed necessary materials before this Honourable Court that will entitle them to the relief sought.

D The stand of the applicants in a nutshell is that they being interested parties whose interest is at stake in this case, the court's discretion should be exercised in their favour and the application granted in the interest of justice.

The 1st – 4th respondents are of an opposing view contending that there is no competent appeal before the Supreme Court on which this application can be hinged as the applicants are not properly before the Supreme Court not having initiated their process duly. Also that the reliefs they seek are anchored on the right which is stale and spent. For the 5th respondent, its angle is that the application is devoid of merit and liable to be dismissed.

F The 2nd set of respondents contend that the application has no leg on which the discretion should be exercised in their favour.

The general principles upon which the court is enjoined to take into consideration for the grant of an application such as the present one are well set out by learned counsel for the applicants, Yusuf Ali SAN and in reiteration they are thus:

H a) **Are the applicants/appellants parties interested in this case whose interest need be protected?**

b) **Do applicants have good reasons for not appealing within time?**

I c) **Is the proposed notice and grounds of appeal substantial and arguable grounds of appeal?**

d) **Are the applicants not entitled to exercise this constitutionally guaranteed right of appeal?**

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A The principle above set out cannot however exist in vacuo as the competence of the application must be present. That is to say that there must be a foundation on which those principles would stand for the consideration of whether or not the application should be favourably looked at.

B For a starter this motion has been brought under the number, SC. 428/2015 which has the following parties, viz:-

- 1. EJIOFORAPEH**
C 2. UDE CELESTINE
3. OSSAI MOSES
For themselves and on behalf of
Other Delegates elected for Enugu
D State on 1st November, 2014.

AND

- E**
- } **APPLICANTS**
- 1. PEOPLE DEMOCRATIC PARTY (PDP)**
2. THE NATIONAL CHAIRMAN (PDP)
F 3. THE NATIONAL SECRETARY (PDP)
4. THE NATIONAL WORKING COMMITTEE (PDP)
5. INDEPENDENT NATIONAL ELECTORAL
COMMISSION (INEC)

G In this application the title of the parties are as follows:

- H**
- } **RESPONDENTS**
- 1. PEOPLES DEMOCRATIC PARTY (PDP)**
2. THE NATIONAL CHAIRMAN (PDP)
I 3. THE NATIONAL SECRETARY (PDP)
4. THE NATIONAL WORKING COMMITTEE (PDP)
5. INDEPENDENT NATIONAL ELECTORAL
COMMISSION (INEC)

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A AND

1. **BARRISTER ORJI CHINENYE GODWIN**
2. **CHIEF C.C. AKALUSI**
- B 3. CHIEF ORJI C. ORJI**
(Suing for themselves and on behalf of the delegates elected on the 1st November, 2014 at the Ward Congress held for Enugu State

}
1ST SET OF
RESPONDENTS

C

IN RE: APPLICATION OF:

1. **EJIOFORAPEH**
2. **UDE CELESTINE**
- D 3. OSSAI MOSES**
(On behalf of other unnamed parties on record)

}
2ND SET OF
RESPONDENTS

E In view of the titling above, a poser arises as to what happens with Order 2 Rule 8 of the Supreme Court Rules 1985 (as amended) which has prescribed the way to go in an application such as the present which is one of the cases to appeal. For clarity, I shall quote the said relevant rule of court which is this:

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“Order 2 Rule 8:

Notice of appeal, application for leave to appeal briefs and all other documents whatsoever prepared in pursuance of the appellate jurisdiction of the court for filing in accordance with the provisions of these Rules, shall reflect the same title as that which obtained in the court of trial”.

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I The hurdle that has presented is not one that can be wished off and treated lightly, as this court has made pronouncements on similar occurrences and there is no way out of the obstacle that has reared its head. An example of what this court has stated should obtain is well captured in **PPA vs. INEC (2012) 13 NWLR (Pt. 1317) 215** at which Order 2 Rule 8 of the Supreme Court Rules 1985 was in focus in relation to the competence of the application.

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At the Federal High Court where the matter before us now incepted, the

A parties are thus in Suit No. FHC/ABJ/CS/816/2014 as follows:

“Barrister Orji Chinenye Godwin

Chief C.C. Akalusi

B

Chief Orji C. Orji

(Suing for themselves and behalf of all

Delegates elected on the 1st November, 2014

At the Ward Congress held for Enugu State)”

C

I align with the submission of the 2nd set of respondents who are being sought to be substituted and with the intention of presenting this application on behalf of other unnamed parties on record. Definitely the situation evokes the following

D conclusions:

**Plaintiffs/
Applicants**

5. **The interest of the 2nd set of respondents as disclosed in the action at the Federal High Court of trial, appealed to the Court of Appeal is different from what the applicants are seeking to substitute them for.**

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6. **There is therefore no commonality of interest on which the applicants can seek to step into the shoes of the 2nd set of respondents.**

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7. **The present application shows that the named applicants do not have an interest as those of the unnamed parties on record.**

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8. **Seeing that only a party with interest in a suit can institute a representative action, one wonders under which head the unnamed parties would be situated.**

H What seems clear from the submissions, documents including the affidavits and counters thereof is that the 2nd set of respondents are strongly maintaining that the persons who present themselves as appellants/applicants in this appeal do not have the authority of all the delegates to initiate this appeal. One cannot explain the nomenclature of named and unnamed applicants particularly where some of those the applicants claim to represent are not interested in the appeal the applicants seek. A situation akin to shaving a “man's hair” in his absence. This court in the Exhibit 2 of the applicants which is the decision of this court in **APEH vs. PDP (2016) 7 NWLR (Pt. 1510) 153 at 175-176 stated thus:**

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1. **Ejiofor Apeh**
2. **Ude Celestine**
3. **Ossai Moses**

B

(On behalf (sic) of other unnamed parties on record) as appellants.

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As if that was not enough, in the application that yielded this ruling, the same persons were expressed as suing “for themselves and on behalf of other ward delegates elected for Enugu State on 1st November, 2014”. In effect, the applicants have not succeeded in demonstrating a commonality of interest as required by the authorities ...”

D

“Turning to the issue of commonality of interest, it cannot even be gainsaid that the applicants, woefully, failed to bring themselves within the embrace of the requirements of the representatives' suits genre. From the capacity expressed on pages 323-327 of the record, that is, on the “Notice of Appeal”, it is not in doubt that their application fell short of the fundamental requirement of representatives' suits principle.

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What crystallizes from the earlier exposition on the point is that the jurisprudential postulate underlying suits in representative capacity is that the person or persons suing or defending in a representative capacity must have the same interest in the proceeding, OGAMIOBA AND ORS vs. CHIEF OGENE AND ORS (1961) All NLR 59 at 62; (1991) 1 SCNLR 115; This means that the parties on record (and those they represent) must have common interest.

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Put differently, the subject matter must evince a common interest as opposed to diverse interests, Ukpon and Anor vs. Commissioner for Finance and Economic Development (2006) LPELR 334 (SC)”.

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The Supreme Court at pages 176 177 in the same Apeh vs. PDP (supra) stated thus:

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“Even then, the burden is on the plaintiff (and with respect to this application, the applicants here) to establish a commonality of interest, Atane vs. Amu (supra); Ogamioba vs. Oghebe (1961) 1 All NLR 59, 60. In all the applicants have a duty to satisfy this court of the commonality of their interests. This must be evidenced in the following twin prerequisites, common grievance and a relief or reliefs beneficial to all of them, Ayinde and Ors vs. Akanji and Ors (1988) 1 NSCC 43, approvingly, adopting Ogamioba and Ors vs. Oghene and Ors (1961) 1 All NLR 59, 60.

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As shown above, at the trial court, the named plaintiffs (who were the named respondents at the lower court) were shown as “suing for themselves and on behalf of all the delegates elected on the 1st November, 2014 at the Ward Congress held in Enugu State”.

On the other hand, the applicants, at pages 323-327 of the record, that is, in the process titled “Notice of Appeal”, were:

F

- 1. Ejiofor Apeh**
- 2. Ude Celestine**
- 3. Ossai Moses**

(Unbehalf (sic) of the Unnamed Parties on record) as appellants”.

G

H Indeed, this application has strange facets in that the 2nd set of respondents have not filed a notice of appeal and so there is no valid appeal and as a follow up no appellant or appellants to be substituted after the Court of Appeal decision, the 2nd set of respondents rested at the lower court where they represented others including the applicants herein. The implication therefore is that there is no existing appellant who the applicants can substitute. This brings to memory the matter of not putting something on nothing and expecting it to stand. See **Macfoy vs. UAC (1962) AC. 152.**

I

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It seems to me that this application is a non-starter having not scaled the fundamental hurdle which is the proper parties before court especially where the applicants intend to carry along unwilling partners.

A This is not a simple matter of a party having good reasons for not appealing within time or the proposed notice and grounds of appeal being substantial and arguable grounds of law or the guaranteeing of the applicants' constitutional right of appeal and whose interest have to be protected. This situation is beyond the

B factors above as what is available shows some wiling and unwilling proposed appellants and the interests having no common round and as this court has held in **Ngere vs. Okwuket 'XIV' (2014) 11 NWLR (Pt. 1417) 147 at 175-176** as follows:

C **“The grant of an application for extension of time to appeal is a matter within the discretion of the court. That discretion is properly exercised if the judge considers the rules governing the**

D **particular application before granting it”.**

In concluding, I see no basis upon which a favourable consideration can be accorded the present application and from the foregoing and the better reasoning

E in the lead ruling, I dismiss the application. I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court.

F **OLU ARIWOOLA, (JSC):** I was obliged before now with a copy of the lead ruling of my learned brother, **Tanko Muhammad, (JSC)** just delivered. I am in complete agreement with the reasoning and conclusion that the application lacks

G merit and should be dismissed. It is accordingly dismissed by me.

I abide by the consequential orders in the said lead ruling.

Olu Ariwoola, JSC
Justice, Supreme Court.

H

AUGIE, (JSC):

I have had a preview of the lead Ruling just delivered by my learned brother I.T. Muhammad, (JSC), and I agree with his reasoning and conclusion that reliefs sought by the Applicants cannot be granted.

The applicants were not parties in the Suit filed by the 2nd set of Respondents at the Federal High Court and the court below.

J They were ward delegates elected on **1/11/2014** at the Ward Congresses

A held for Enugu State by **PDP** and were represented by the 2nd set of respondents in **Suit No. FHT/ABJ/CS/816/2014** at the trial court and **Appeal No. CA/A/29/2915**, at the court below.

The 2nd set of respondents are not interested in pursuing the appeal to this
B court, and the applicants filed this application for:

C **An ORDER granting leave to substitute the names of Ejiofoh Apeh, Ude Celestine and Ossai Moses for the names of Barrister Orji Chinenye Godwin, Chief C.C. Akalusi and Chief Orji C. Orji, who were the 1st – 3rd respondents at the lower court with the names of the present applicants.**

D They also pray for an Order [**Relief No. 2**] granting them leave to:

E **Present maintains and/or prosecute this appeal in a representative capacity that is: for themselves and other delegates elected at the 1/11/2014 Ward Congress.**

The other prayers are for extension of time to seek leave to appeal [**Relief No. 3**], leave to appeal [**Relief No. 4**], and extension of time within which to appeal
F [**Relief No. 5**]. As my learned brother said, the first relief is fundamental, and decisive of other reliefs sought.

Substitute means “a person or thing that you use or have instead of the one you normally use or have” – see **Peretu & Ors vs. Gariga & Ors (2012)**
G **LPELR- 15534 (SC)**, where Ngwuta, JSC, added:

H ***Black's Law Dictionary, 9th Ed.*, defines the word, substitution, a derivative of the word, substitute, as - - “a designation of a person or thing to take the place of another person or thing; the process by which one person or thing takes the place of another person or thing.**

I Order 2, rule 8 of the rules of this court 1995 (as amended) reads:

J **Notices of appeal, applications for leave to appeal, Briefs (etc.) ... prepared in pursuance of the appellate jurisdiction of the court - - shall reflect the same title as that which obtained in the**

A court of trial.

In this case, the Suit filed at the **Federal High Court** had the 2nd set of respondents, “*suing for themselves and on behalf of all delegates elected on 1/11/2014 at Ward Congresses held for Enugu State*”, which includes the applicants herein, as plaintiffs, and the 1st set of respondents as the defendants. On appeal to the Court of Appeal, the 1st set of respondents, excluding **INEC** were the appellants and the 2nd set of respondents [and **INEC**] were respondents therein.

C The point of departure came when the 2nd set of respondents, satisfied with the decision of the court below, refused to pursue an appeal to this court against the said decision. The applicants then took it upon themselves to file a Notice of Appeal in this court as *applicants on behalf of other unnamed parties on record*”.

D They have filed this application to regularize their position as self-appointed appellants, taking the matter up from where the 2nd set of respondents that represented them up to this point, stopped.

E The 1st to 4th respondents submitted that there are two major problems with presenting this application under this appeal no.

- F** (i) This **Appeal No. SC. 428/2015** has no viable basis of existence, not having any relationship in terms of Parties with the proceeding, which gave rise to the appeal.
- (ii) This application cannot exist under a heading different from that on which **Appeal No. SC. 428/2015**, was brought.

G They further argued, citing Order 2, rule 8 of the rules of this court and **P.P.A. vs. INEC (2012)**, 12 NWLR (Pt. 1317) 215, that individuals are not allowed to unilaterally alter a case as constituted from the High Court, and are mandated to maintain the same character of the case as incepted or seek leave of court to effect an alteration.

H The 5th respondent [INEC] and the 2nd set of respondents, argued along the same lines, and I agree with the respondents that from whatever angle this application is considered; it lacks merit. Order 2, rule 8 of the rules of this court leaves no room for any other conclusion. This court considered the said **rule 8** in this case of **P.P.A. vs. INEC (supra)**, and held as follows [per Ngwuta, JSC]:

I **An appeal is “an invitation to a higher court to review the decision of a lower court to find out whether on a proper consideration of the facts placed before it and the applicable**

J

A law, the court arrived at a correct decision”. See *Oredoyin v. Arowolo* (1989) 4 NWLR (Pt. 114) 172 at 211 per Oputa, (JSC).
B The facts, the appellate court will review in an appeal are facts presented by or elicited from parties at the trial court. If any party is displaced and a stranger to the proceedings at the trial court has usurped his place, the appeal will be incompetent and the appellate court will lack jurisdiction to hear it. This applies equally to an application for leave to appeal.

C In this case, the applicants, who were not parties at the trial court, are not just substituting names of the extant parties therein; they are seeking to delete their names from the suit and judgments of the lower courts, which as the 1st to 4th respondents submitted, goes beyond amending the capacity in which the said Suit was filed since the said judgments had already attached to the persons in the capacity in which the suit was filed, and the judgments delivered.

E It is for this and the other detailed reasons in the leading ruling that I also dismiss the application. Each party to bear its own costs.

Amina Adamu Augie,
Justice, Supreme Court

F EJEMBI EKO, (JSC): I read in draft the ruling just delivered by my learned brother, IBRAHIM TANKO MUHAMMAD, (JSC). It represents my view and stance in the application.

I hereby adopt it.

G Let me, however, add a few comments of mine. The factual situation that prompted the applicants herein to seek, among other reliefs, “an order granting leave to the applicants to **represent, maintain** and or **prosecute** this appeal in a representative capacity, that is: **for themselves and other delegates** elected at the
H 1st November, 2014 Ward Congress Election of Peoples Democratic Party (PDP) held in Enugu State and who had given their names and signatures on Exhibit I, annexed to this application, is that the 2nd set of respondents, herein, who had sued for themselves on behalf of other delegates elected on 1st November, 2014
I (including these applicants) have compromised and are no longer willing to proceed further after the decision of the Court of Appeal. They wrote a letter, Exhibit CA2, dated 15th May, 2015, to intimidate their original foes, the PDP, that they “are no longer aggrieved with the actions of the party nor is there a need for us
J to further proceed with the matters”, their original grievance having been

A addressed by the PDP with the “primary (having) eventually conducted with the elected 3 man delegates participating”. The 2nd set of respondents wrote the letter, Exhibit CA2, “on behalf of ourselves and all the delegates who authorized us **to initiate**” the suit **No. FHC/ABJ/CS/816/2014: BARRISTER ORJI CHINENYE GODWIN & ORS vs. PDP & ORS.** And appeal **No. CA/A/28/2015; PDP vs. BARRISTER ORJI CHINENYE GODWIN & ORS.** It is this letter, Exhibit CA2, that has caused the mutiny of applicants herein against the 2nd set of respondents who hitherto were their representatives in interest.

C The named party in a representative action is *dominus Litis*, and because he is *dominus Litis*; he remains so and could discontinue, compromise, submit to dismissal as he pleases. See **OKONJI vs. NJOKANMA (1989) 20 NSCC (Pt. III) 138 at 141; (1989) 4 NWLR (Pt. 114) 161 at 167.** It is this legal authority of the *dominus Litis* exercised by the 2nd Set of respondents that has irked or unsettled the applicants and thus prompting this application. But can the applicants contest this power of compromise inherent in the *dominus Litis*? The agent, and this includes a named representative maintaining an action for himself and on behalf of other unnamed parties, can and has powers to, compromise, discontinue and even submit to dismissal of the suit. Unless these powers are expressly curtailed the named representative, being *dominus litis*, can always in his power exercise them. See **OTAPO vs. SUNMONU (1987) 2 NWLR (Pt. 58) 587.**

G When the 2nd set of respondents were empowered by the other unnamed parties, and subsequently granted leave by court, to maintain the action for themselves and on behalf of other delegates elected on 1st November, 2014 (including the applicants herein) the general authority inherent in them to discontinue, compromise and even submit to dismissal of the same suit was not expressly curtailed. There is no evidence of such curtailment. The compromise, in Exhibit CA2, binds the applicants herein. See **OTAPO vs. SUNMONU (supra).**

I I accept the proposition that the *dominus litis* is like the counsel in relation to the conduct of the case he has been instructed. Counsel in conducting a civil case is, as a matter of law, practice and civil procedure, in complete control of the case. He is a master of his own house. Whatever his decisions there are in relation to the conduct of the proceedings in the action, the decisions are binding on the client. See **ELIKE vs. NWANKWOALA (1984) ANLR 505.**

J The effect of Exhibit CA2, in my view, is that it operates as estoppel by

- A** conduct, the type of estoppel contemplated by Section 169, Evidence Act 2011. That is; a party who has, either by his declaration or act, caused or permitted another to believe a thing to be true and to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceeding between himself and
- B** such person or such person's representative in interest, to deny the truth of that thing. He must accept the new legal relationship as modified by his own words or action, whether or not it is supported by any point of law, or by any consideration but only by his word or conduct. See **A.G. RIVERS STATE vs. A.G. AKWA-IBOM STATE (2011) 8 NWLR (pt. 1248) 31 SC**. These applicants herein, represented by the 2nd set of respondents, in view of Exhibit CA2, can not be allowed to approbate and reprobate at the same time. They are estopped by operation of Exhibit CA2.
- D** The other point of interest, in this application, is the fact that the applicants and the 2nd set of respondents all belong to the class of delegates elected at the 1st November, 2014 Ward Congress Elections of Peoples Democratic Party (PDP) held in Enugu State. They should be seen to have commonality of interest. The
- E** applicants were among the unnamed delegates represented by the 2nd set of respondents to initiate the suit **No. FHC/AB/CS/816/2014** and defend appeal **No. CA/A/28/2015**. It is a settled principle of law that persons who join up as plaintiffs in an action can not set up conflicting claims between themselves. In other words,
- F** in the same suit the plaintiffs must act together. See **EJEZIE & ANOR. vs. CHRISTOPHER ANUWU & ORS. (2008) 4-5 SC (Pt. 1) 31**. It is therefore, strange to see in this case that the “**plaintiffs**” who are seeking leave to appeal are, at the same time, among the respondents in the application and the proposed
- G** appeal. The applicants herein were among the unnamed delegates elected at the 1st November, 2014 Ward Congress Elections of the Peoples Democratic Party (PDP) held in Enugu who were represented by the 2nd set of respondents in the suit **No. FHC/ABJ/CS/816/2014** and the appeal **No. CA/A/28/2015**. They have split
- H** from the 2nd set of respondents. They have now risen against the 2nd set of respondents on one hand in the mutiny. They are also, on the other hand, proceeding against the persons sued originally by the 2nd set of respondents. The principle of law that no person can in the same suit be both plaintiff and defendant at the same time even in different capacities was re-stated by this court in **EJEZIE vs. ANUWU (supra)**.
- I**

J The factual situation in this case is that the essentials of representative action are not very much present in this case. The intra party conflict between the applicants and the 2nd set of respondents is a clear evidence that between them

A there is no commonality of interest nor a common grievance. If the applicants were seeking to appeal as interested parties; that application will be governed by different considerations.

B This application cannot be granted in the circumstances. It is accordingly refused.

Ejembi Eko,
Justice, Supreme Court

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1. PEOPLES DEMOCRATIC PARTY PDP	}	APPELLANTS/ RESPONDENTS
2. HON. UCHE LILLIAN EKWUNIFE...		
AND		
1. CHIEF (SIR) VICTOR UMEH, OFR.	}	RESPONDENTS/ APPLICANTS
2. ALL PROGRESSIVES GRAND ALLIANCE (APGA)		
3. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)		
4. THE RETURNING OFFICER, ANAMBRA COUNCIL SENATORIAL DISTRICT		
5. THE COLLATION OFFICER, ANAOCHA LGA		
6. THE COLLATION OFFICER, AWKA NORTH LGA		
7. THE COLLATION OFFICER, AWKA SOUTH LGA		
8. THE COLLATION OFFICER, DUNKOFIA LGA		
9. THE COLLATION OFFICER, IDEMILI NORTH LGA		
10. THE COLLATION OFFICER, IDEMILI SOUTH LGA		
11. THE COLLATION OFFICER, NJIKOKA LGA		
12. THE RESIDENT ELECTORAL COMMISSIONER, ANAMBRA STATE.		

SC. 204/2016

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 10TH FEBRUARY, 2017

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD
MARY UKAEGO PETER-ODILI
OLUKAYODE ARIWOOLA
AMINA ADAMU AUGIE
EJEMBI EKO

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

ACTION: "Abuse of Process" – Meaning.

ACTION: Abuse of Process – Conditions that constitute abuse of process.

ACTION: Abuse of process – Onus of Proof – How discharged.

ACTION: Abuse of process – Where the parties and causes of action are not the same – Whether the subsequent suits can be labeled abuse of process.

ACTION: Abuse of process – Whether the mere filing of another suit in another court on the same subject matter constitutes an abuse of process.

ACTION: Parties – Where a party is inconsistent in the conduct of a particular case – Implications thereof.

ACTION: Parties – Where a party is inconsistent in the conduct of a particular case distinguished from his inconsistency in his position in the conduct of different cases.

ACTION: Purpose of preliminary objection – Need to differentiate it with issues for determination.

APPEAL: Issues for determination – Purport.

CASE LAW: Principles in Ajide vs. Kelani – Considerations thereof.

*CASE LAW: The Principles in **Dangama vs. Usman (2013) 6 NWLR (Pt. 1349) 50.***

*CASE LAW: The Principles in **Onuaguluchi vs. Ndu (2001) 7 NWLR (Pt. 72) 309.***

CONSTITUTIONAL LAW: S. 246(3) of the Constitution of Federal Republic of Nigeria 1999 (as amended) – Whether right of appeal exists in decisions of the Court of Appeal in respect of appeals from election tribunals.

COURT: Supreme Court – Where the Supreme Court lacks jurisdiction to entertain appeals from the Court of Appeal – Whether it can properly entertain an appeal on an application which is an offshoot against the decision of the Court of Appeal.

PRACTICE AND PROCEDURE: Jurisdiction – Fundamental nature of – Need to dispose issue of jurisdiction before other issues.

PRACTICE AND PROCEDURE: Abuse of process – Party, who alleges abuse of process will not rely on processes in a suit which is on a different target for abuse of process.

WORD AND PHRASES: “Final” – Meaning

WORDS AND PHRASES: 'Appeal' – Meaning

Issues for determination

Whether having regard to Section 246(1) (b) and (3) of the 1999 Constitution, this court has jurisdiction to entertain this Appeal.

Facts of the Matter

On the 28/3/2015 the Independent National Electoral Commission conducted National Assembly Election for Anambra Senatorial District.

The 1st appellant herein contested as the candidate of the 2nd appellant whilst the 1st respondent herein contested as the candidate of the 2nd respondent.

At the conclusion of the Senatorial Election, INEC declared the appellants winners. The 1st and 2nd respondents as Petitioners approached the National Assembly Election Petition Tribunal Awka, contending, that the 2nd appellant herein was not qualified to contest the Senatorial Election and that the election was fraught with several malpractices amongst other grounds.

By its judgment delivered on 9/10/2015, the trial tribunal dismissed the petition.

Dissatisfied with the decision of the trial tribunal, the 1st and 2nd respondents herein, as appellants, appealed to the Court of Appeal.

In a well-considered judgment delivered on 7/12/2015, the Court of Appeal allowed the appeal. The Court of Appeal nullified the election of the 2nd appellant herein on the ground that being PDP's candidate, she was not “**the product of a valid primary and was therefore not duly and legitimately nominated. That has disqualified her from contesting the election into the Anambra Central Senatorial District.**”

The Court of Appeal nullifying the Anambra Central Senatorial District election then ordered INEC to conduct fresh election within 90 days from the date of the judgment. The INEC then scheduled fresh elections in the Anambra Senatorial District to hold on 5/3/2016. The appellants in reaction approached the court below seeking the following reliefs:

- (a) **An order extending time within which the applicant can apply to this honourable court to set aside its judgment in Appeal No. CA/E/EPT/28/2015 delivered on the 7th December 2015.**
- (b) **An order setting aside the judgment of this honourable court in CA/E/EPT/28/2015 delivered on the 7th December, 2015.**
- (c) **An order of interlocutory injunction restraining the respondents either by themselves, agent or privies from conducting any fresh election for the Anambra Senatorial District on the 5th day of March, 2016 or any other date as being published by the respondent and/or giving effect of the judgment of this honourable court of 7th December 2015 in Appeal No: CA/E/EPT/28/2015 Between Umeh & Anor. vs. INEC & Ors pending the hearing and determination of the originating motion filed by the applicant. See pages 2 and 25 of the records.**

The 1st and 2nd respondents filed a preliminary objection against the said originating motion. The court below refused the application holding that it was incompetent and thereby stuck it out. It is against that ruling that the appellants have come before the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *The mere filing of another suit before another court does not constitute an abuse of process*

The law does not say that once a party files another suit before another court on the same subject matter, there is abuse of court process. A subject matter may give rise to different rights. In other words, different suits can emanate from same subject matter but with different rights and reliefs.

INEC excluded **PDP** from participating in the fresh election fixed for **5/3/2016** and **PDP** challenging its exclusion by filing the **Suit No FHC/ABJ/CS/97/2016** on **10/2/2016**, wherein it said its candidate at the election that culminated in the judgment of the court below delivered on **7/12/2015**, was no longer its member.

At this point, the parties were no longer on the same page. The said suit had a different cause of action, and the applicants were not parties to the Suit, as the issue did not concern them. However, **PDP** and the same candidate it

said was no longer its member filed an application at the court below on **11/2/2016**, asking it to set aside its earlier decision nullifying the election. The Federal High Court delivered its judgment in the said Suit on **29/2/2016**. The court below delivered ruling on **3/3/2016**, wherein it dismissed the application to set aside its decision.

PDP and the same candidate of the election of **28/3/2015**, appealed against the decision dismissing the said application, which is this appeal that the applicants label an abuse of court process because of what **PDP** said in another suit altogether. (*P 205 paras D–E; F–J*).

2. *Where suits have the same origin but different causes of action.*

This appeal and that suit may have arisen from the same judgment but the nullified election and the court ordered election are two different things.

The court below nullified the election of **28/3/2015** and the appellants applied to have that decision set aside but the court dismissed the said application and they appealed to this court. An appeal is an invitation to a higher court to review a decision of a lower court whether on the proper consideration of facts before it, and the law, that court arrived at a correct decision See **Oredeyin vs. Arowolo (1989) 4 NWLR (Pt. 114) 172 @ 211**.

The decision the appellants are asking this court to review in this appeal is the decision of the court below dismissing their application to set aside the judgment nullifying that election.

In the same judgment, the court below also ordered **INEC** “to conduct a fresh election into the Anambra Central Senatorial District, within 90 days”. But **INEC** excluded **PDP** from the said fresh election and it filed the said suit challenging **INEC** for that. The decision of the Federal High Court is also subject to appeal and the applicants say that there are pending appeals against that decision in this court and court below.

The respondents made an issue of it by arguing that the applicants failed to show the relevance of those appeals to their objection as they did not produce notices of appeal to enable this court see the issues and reliefs sought in those appeals; and that their conduct is a deliberate act on their part to mislead this court. In my view, this spat over appeals arising from the said Suit is unnecessary because the appeals are more or less running on parallel lines. The nullified election, which is the subject of this appeal, is on a different tangent from the fresh election, the subject of that Suit.

(*P 206 paras A–G*).

3. *Distinction between the instant case and Ajide vs. Kelani*

The applicants pointed out that a party will not be allowed to change his position as he moves through steps of the court, and cited some authorities, which the respondents argued are “*inapplicable and unhelpful*” to the applicants. I agree entirely. For instance, in **Ajide vs. Kelani** (*supra*) cited by the applicants, the appellant admitted in his pleading that the disputed property was originally partnership property but he changed his position in the witness box to say it had never been partnership property and has always been his personal property. But the trial court, surprisingly dismissed the plaintiff's case, holding as follows:

“In short, it can be said that the plaintiff's case has been so badly presented that nothing can be made of it. It is no consolation to the plaintiff that the 1st defendant [the said applicant] is in my view, a most unreliable person whose evidence ought not to be believed”

The court below reversed the Judgment of the trial court and the appellant appealed to this court. In dismissing the appeal, this court per Oputa, (JSC), decried the situation as follows:

“From the pleadings of the parties, from the sudden change of front of the appellant in the witness box, from the finding of the trial court that the appellant was “a most unreliable person”, I wonder how any court of law, equity and justice can decree in favour of such an appellant as now appeals to this court.”

Oputa, (JSC), further elaborated as follows in the judgment:

“A party should be consistent in stating his case and consistent in proving it. He will not be allowed to take one stance in his pleadings; then turn somersault during the trial; then assume nonchalant attitude in the Court of Appeal; only to revert to his case as pleaded in the Supreme Court. Justice is much more than a game of hide and seek. It is an attempt, our human imperfections notwithstanding, to discover the truth. Justice will never decree

anything in favour of so slippery a customer as the appellant.”
(Pp 206–207 paras G–F)

4. *Inconsistency of a party in the conduct of a case distinct from inconsistency in his positions in different cases*

If the point I am trying to put across is not clear; let me explain. The *inconsistent positions* in the cases; cited by the applicants *moved through steps of the court*, in one and the same action.

In this case, this **appeal No. Sc. 204/2016** has to do with the election of **28/3/2015**; it started at the trial tribunal and went on appeal to the court below before it finally got to this court. **Suit No. FHC/ABJ/CS/97/2016** has to do with the fresh election ordered by the court below; it is a Federal High Court matter. The point of divergence came after the order for fresh election, and **INEC** issued a notice excluding **PDP** from participating in the fresh election. At that point, the election petition was dead; it was determined when the court below nullified the election.

The Suit filed at the Federal High Court was a fresh action aimed at getting **INEC** to include **PDP** in the said fresh election. The applicants were not parties; and issues and reliefs sought in that suit had nothing to do with them or their election petition. It was a fight between **PDP** and **INEC** to have **PDP** included in the fresh election ordered by the court below and nothing more; the notion that there is an abuse of court process is erroneous.

The bottom line is that the application lacks merit and it is, therefore, dismissed. *(Pp 207–208 paras G–B).*

5. *The meaning of abuse of court process*

The abhorrent nature of an abuse of court process has made the courts, the Supreme Court not an exception to deplore in very strong terms the invidious situation that is thrown up when the court process is abused especially by multiplicity of suits. Therefore abuse of process connotes that the process of the court has not been used bona fide and properly. Another way of stating the position is that the common denominator in the concept of abuse of process is the improper use of the judicial process in litigation to interfere with the due administration of justice. It is in the wrongful deployment of the machinery of justice to the annoyance and irritation of the opponent by the institution of multiple and divergent suits/proceedings over the same subject matter. I place reliance on **C.B.N. vs. Ahmed** (2000) 11 NWLR (Pt. 724) 369; **Arubo vs.**

Aiyeleru (1993) 24 NSCC (Pt. 1) 255 at 265; **Saraki vs. Kotoye** (1992) 9 NWLR (Pt. 264) 156 at 188-189 and the more recent case of **A.G. Anambra State vs. UBA** (2005) 15 NWLR (Pt. 947) 44. (*P 223 paras E–H*).

6. *Conditions where abuse of process is said to apply*

Clearly the conditions under which an abuse is said to apply are not present. The conditions are such that they must co-exist and they are thus:

1. **There must be in existence a multiplicity of actions.**
2. **The parties in the said action must be same.**
3. **The subject matter and issues in the actions must be the same.**

All these conditions the applicants have not established. See **Ayanru vs. Mandilas Ltd** (2007) 10 NWLR (Pt. 1043) 462 at 485; **Ume vs. Iwu** (2008) 8 NWLR (Pt. 1089) 225 at 243; **Ogojeofor vs. Ogojeofor** (2006) 3 NWLR (Pt. 966) 205 at 22-211; **Okafor vs. A.G. Anambra State** (1991) 6 NWLR (Pt. 200) 659 at 681. (*P 224 paras D–G*).

7. *How to prove abuse of process*

It is settled that in the matter of abuse of court process, it is the later action that constitutes an abuse of court process and for sure, this application fails off the marks. See **Ukachukwu vs. PDP** (2013) LPELR; **Dingyadi vs. INEC** (No. 2) (2011) 18 NWLR (Pt. 1224) 154.

In effect what I am laboring all the while to put across is that the circumstances under which the concept of abuse of court process can be invoked are far from the current circumstances. It is not enough to say that an appellant or applicant has filed two or more appeals or applications as the case may be, the opponent must take a further step to establish that the appeals or motions fall within the definition of abuse of court process, that is that the conditions on which the concept is said to apply are in existence. If those conditions earlier stated which must go together none excepting do not exist then the abuse is not proved and the process cannot be said to be an abuse of court process. That in my humble view is what is in place here as the applicants have failed to establish the abuse in the filing of the appeal which they seek to have struck out or dismissed which appeal stands independent of any other and has the right to be heard by this court. See **Society BIC SA & Ors Charzin Ind. Ltd** (2014) LPELR SC; **Arin vs. Chaka** (2001) 14 NWLR (Pt. 734) 612 at 620. (*P 225 paras A–E*)

8. *Fundamental nature of jurisdiction*

As I said, this appeal is purely about jurisdiction, which is described as the life wire of any litigation, and it is trite that where an objection is raised as to jurisdiction, the objection must be dealt with first before anything else. The reason being that if the court has no jurisdiction, the proceedings, however ably and well conducted, will be a nullity; so to be on the safe side and not to waste time, it must be taken first. (*P 214 paras F – G*)

9. *The purpose of preliminary objection*

As this court held in **Akpan vs. Bob (2010) 17 NWLR (Pt. 1223) 421**, a preliminary objection seeks to provide an initial objection before the actual commencement of the thing being objected to. In other words, the primary purpose of every preliminary objection is to determine the proceeding *in limine*, and thereby dispense with the need to go into the suit, application or appeal. (*P 216 paras C – D*).

10. *Meaning of issue for determination*

An issue for determination is raised from grounds of appeal, and is usually a proposition of law or of fact in dispute between the parties, which is necessary for determination, and the determination of which would affect the result of the appeal – See **Adejumo vs. Ayantegbe (1989) 3 NWLR (Pt. 110) 417 SC**. (*P 216 paras D. -- E*)

11. *Issues of jurisdiction are treated first*

The fact is that every court has jurisdiction to enquire into whether it has jurisdiction over any matter or not, and if it finds that it does not have requisite jurisdiction, it takes its hands off, and the matter end there, because where a court has no jurisdiction, *the juridical basis for the exercise of power over such matter is absent* – See **Ajomale vs. Yaduat (No. 1) (1991) 5 SCNJ 172**.

In effect, the preliminary objections raised by the respondents comes first, and must be determined before I venture into the merits or otherwise of the appeal itself. The point they are making is that by Section 246(3) of the Constitution, the court below is the final and apex court “*in respect of appeals arising from the National and State Houses of Assembly Election Petitions*”.

That Section uses the word – “*final*”, which means *last, coming at the end* – See **Awuse vs. Odili (2003) 18 NWLR (Pt. 851) 116**, where Niki Tobi, (JSC), added that

“As an adjective, when used to qualify the noun “decision”, it [final] means in ordinary parlance that the decision cannot be changed as the matter is deemed to be completely settled”. (Pp 216–217 paras G–A)

12. *Right of appeal to the Supreme Court under S.246(3) (1)(b) of the 1999 Constitution*

The interpretation of Section 246(3) of the 1999 Constitution vis-à-vis jurisdiction of this court has been settled by this court in a long line of cases, and the consensus is that an appeal in respect of a decision of the tribunal in an election matter, when decided by the court below, cannot be taken on appeal to this court but is final for all purposes – see **Onuaguluchi vs. Ndu** (*supra*) and **Dangana vs. Usman** (*supra*), cited by the 1st set of respondents. In **Dangana vs. Usman** (*supra*), Adekeye, JSC, relying on **Onuaguluchi vs. Ndu** (*supra*), observed:

“By virtue of Section 246(1) (b)(i) and (3) of the 1999 Constitution, the Court of Appeal has the mandate to decide an appeal arising from an election petition and shall be the final court. Whether it did so perfectly, rightly or wrongly, the decision it arrives at cannot be taken on appeal to the Supreme Court for consideration. The Supreme Court cannot entertain appeals which it has no jurisdiction to adjudicate upon. Once a court has no jurisdiction, a party cannot use any statutory provision or common law principle to impose it because absence of jurisdiction is irreparable in law. The matter ends there.”

That is the position of this court, however, the appellants argued that **Dangana vs. Usman** (*supra*) and **Onuaguluchi vs. Ndu** (*supra*) are distinguishable and inapplicable in this case because in this appeal, they are challenging the refusal of the court below to set aside its judgment for lack of jurisdiction, while in **Dangana's Case** (*supra*) and **Onuaguluchi's Case** (*supra*), the appeals were directly against judgments of the court below, and in none was there an application to set aside the Judgment for being a nullity, filed by the appellants; and that whereas the judgment of the court below was given

without jurisdiction, this court has the jurisdiction to entertain this appeal, particularly as the appropriate application had been made to the court below but it refused to set same aside, when it was apparent that the said court lacked requisite *vires* to decide the issue in the first place. (*P 217 paras B–I.*)

Per Aujie (JSC):

This argument presupposes that the said application to set aside the judgment of 7/12/2015, which led to the ruling, appealed against, was floating in the air, and is detachable from the judgment itself that dealt with the decision of the tribunal regarding the election petition. How is that possible? The application was anchored on something, and that something is the judgment of the court below delivered on 7/12/2015 in respect of an appeal filed by the 1st and 2nd respondents against the decision of the tribunal on the election petition they filed.

This court dealt with a similar situation in the recent case of *Bello & Anor vs. Damina & Ors* [S.C. 168/2016], where the appellants filed an application asking the court below to set aside its judgment delivered in an election petition appeal, for lack of jurisdiction.

In its judgment delivered on **9/12/2015**, this court restated its position about Section 246(3) of the 1999 Constitution, as follows:

“It is not in doubt that the application filed before the lower court is an offshoot of the court's decision and by extension, this appeal had its origin from that and is also against the decision of the lower court on subject matter of election petition decision or decisions. The present appeal is in one guise challenging the decision of the court below declining jurisdiction when it was approached and prayed upon to set aside its judgment. With this explanation, can this court be clothed with jurisdiction to entertain and determine same appeal??? I do not think so. Looking closely at the wording of Section 246(3) it is clear that the decision of the Court of Appeal is final. The decision, therefore, has no business climbing or driving to this court for adjudication because this court is completely bereft of jurisdiction to entertain, hear and determine any such appeal from the lower court”.

What more can I say? Nothing has changed since the judgment was delivered

on **9/12/2016**, and I can only restate what this court has said times without number once the court below delivers its judgment on a National Assembly Election Petition Appeal, the judgment is final, and this court has no jurisdiction to hear any appeals related thereto, no matter how cleverly framed. The preliminary objections succeed. (*Pp 217–218 paras I –I*)

Nigerian Cases Cited

A.G. Anambra State vs. UBA (2005) 15 NWLR (Pt. 947) 44.
Adejumo vs. Ayantegbe (1989) 3 NWLR (Pt. 110) 417 SC.
Ajomale vs. Yaduat (No. 1) (1991) 5 SCNJ 172.
Akpan vs. Bob (2010) 17 NWLR (Pt. 1223) 421
Arin vs. Chaka (2001) 14 NWLR (Pt. 734) 612 at 620
Arubo vs. Ayieleru (1993) 24 NSCC (Pt. 1) 255 at 265;
Awuse vs. Odili (2003) 18 NWLR (Pt. 851) 116
Ayanru vs. Mandilas Ltd (2007) 10 NWLR (Pt. 1043) 462 at 485;
C.B.N. vs. Ahmed (2000) 11 NWLR (Pt. 724) 369;
Dangana vs. Usman (supra)
Dingyadi vs. INEC (No. 2) (2011) 18 NWLR (Pt. 1224) 154.
Oguejeofor vs. Ogojeofor (2006) 3 NWLR (Pt. 966) 205 at 22-211;
Okafor vs. A.G. Anambra State (1991) 6 NWLR (Pt. 200) 659 at 681.
Onuaguluchi vs. Ndu (supra)
Oredoyin vs. Arowolo (1989) 4 NWLR (Pt. 114) 172 @ 211.
Saraki vs. Kotoye (1992) 9 NWLR (Pt. 264) 156 at 188-189
Society BIC SA & Ors vs. Charzin Ind. Ltd (2014) LPELR SC;
Ukachukwu vs. PDP (2013) LPELR;
Ume vs. Iwu (2008) 8 NWLR (Pt. 1089) 255 at 243;

Nigerian statute cited

Section 246(1) (b) and (3) of the 1999 Constitution

Representation

P.I.N. Ikwueto, (SAN), **with** Ifeatu E. Ebiokoye, (Esq.),
 C.I. Mbaeri, (Esq.), C. Ogbuefi, Esq., C.D. Ezech, (Esq.),
 N. U. Odimegwu (Miss), and C. C. Emekekwe, (Esq.)

For the Applicants

Dr. Alex A. Izinyon, (SAN), **and** J.S. Okutepa, (SAN), **with:**
 G. C. Igbokwe, (Esq.), K. O. Omoruan, (Esq.), F.O. Izinyon, (Esq.)

A H. Abdurahman (Mrs.), E. Ogbojafor, (Esq.), L.O. Fagbemi, (Esq.)
Ojonim S. Apeh, (Esq.), Abodia O. Okutepa (Miss), and Ikechukwu Ezechukwu
Jnr., (Esq.)
For the 1st and 2nd Respondents.

B S.O. Ibrahim, (Esq.), **with** Rahimatu Aminu (Mrs.) and
Ahmed Goni Ismail, (Esq.)
For the 3rd and 12th Respondents.

C **ADAMU AUGIE, (JSC) (Delivering the Lead Judgment):** The applicants are
praying this court to strike out or dismiss **Appeal No. SC. 204/2016** for being an
abuse of court process. The start off point in unraveling what led to this
D application is the petition they filed at the National Assembly Election Petition
Tribunal, Anambra State, wherein the applicants challenged the declaration of 2nd
appellant herein as the duly elected Senator representing Anambra Central
Senatorial District. The Tribunal dismissed their Petition on **9/10/2015**, and they
E filed **Appeal No. CA/E/EPT/28/2015** at the Enugu Division of the court below,
which held as follows in its judgment delivered on **7/12/2015**:

F **“...Since by Paragraph 25(1) of Exhibit R1, it is the State Special
Congress that should conduct the primary for the purpose of
nominating a candidate to contest election into the National
Assembly. The 11th respondent [i.e. 2nd appellant] was therefore
not the product of a valid primary and was, therefore, not duly
G and legitimately nominated that has disqualified her from
contesting the elections into the Anambra Central Senatorial
District.”**

H The court below ordered **INEC** to conduct a fresh election and **INEC** scheduled
fresh elections for **5/3/2016** but excluded **PDP** from participating in the court
ordered election. At which point, **PDP** commenced an action against it at the
Federal High Court, by way of originating summons filed on **10/2/2016**. In the
I said **Suit No FHC/ABJ/CS/97/2016**, **PDP** as the sole plaintiff averred as follows
in paragraph 12 of its affidavit in support that:

“The plaintiff’s candidate at the election of 28/3/15, Hon.

J

- A** **Ekwunife [2nd appellant herein] has since left the party [PDP] as she has defected to the All Progressive Party [APC] where she contested the primary election of the party for the selection of its candidate for the court ordered fresh election aforesaid.**
- B** **That she lost the said election but remains a member of the said party [i.e.APC]”.**

C The Federal High Court delivered its Judgment on **29/2/2016**, wherein it granted the orders as prayed, including an order of:

- D** **“Perpetual injunction restraining [INEC] - - From conducting the said court ordered fresh election for [the said] Senatorial Seat without the due participation of the Plaintiff [PDP] and its candidate”.**

E Meanwhile, the appellants filed an application dated **11/2/2016**, at the court below in which they prayed for the following orders:

- F** **(1) An order extending time within which the applicants can apply to this honourable court to set aside its judgment in Appeal No. CA/E/EPT/28/2015 delivered on 7/12/2015.**
- G** **(2) An order setting aside the judgment of this Hon. Court in CA/E/EPT/28/2015 delivered on 7/12/2015, on the grounds to wit:**
- H** **(i) It lacks jurisdiction to adjudicate on the issue of sponsorship and/or nomination masquerading as qualification in the said matter which was the main fulcrum of the said decision**
- I** **(ii) The said decision was arrived at per incuriam.**
- J** **(iii) The said order is a null order which ex debito justitiae is liable to be set aside pro tan to.**
- I** **(iv) Setting aside the said order restores all parties therein to the status quo ante belum before the purported filing of the Petition at the National Assembly Election Petition on 8/4/2015 and such petition never existed, which was the basis of the**

A court judgment on 7/12/2015.”

B The applicants, as 1st and 2nd respondents, objected on the ground that the application was statute-barred since it was filed outside 60 days delimited by Section 285(7) of the Constitution for the court below to determine election matters. In its ruling delivered on 3/3/2016, the court below concluded as follows:

C “This is an appeal cloaked in the guise of a motion. We cannot sit on appeal over our own judgment. This court is the final court. Once a court delivers judgment, subject to the “slip rule” principle, that court becomes funtus officio. Even if we make a mistake on law or fact (though not conceded here) we cannot correct it. I must re-echo the words of Belgore, (JSC) in Obioha v. Ibero supra where his lordship held that the law does not permit a court double say on the same matter. There must be an end to litigation. The motion -- is incompetent and completely misconceived”.

This is the ruling appealed against, subject of this appeal they want dismissed or struck out. Their **grounds of objection** are:

- F**
- G i. Simultaneously but prior to the instant appeal, the 1st appellant is pursuing an intrinsically divergent proceeding in Suit No. FHC/ABJ/CS/97/2016 PDP vs. INEC where [it] unequivocally swore under Oath that the 2nd appellant herein “Hon. Ekwunife has since left the party i.e (PDP) as she defected to the All Progressive Congress where she contested the primary election of the party for the selection for its candidate for the court-ordered fresh election” in Anambra Central Senatorial District”.**
 - H ii. The case of PDP in the said Suit No. FHC/ABJ/SC/97/2016 is among other things that the present 2nd appellant having since defected to the APC wherein she contested the APC primary election “lost the said primary/election but remains a member of the said party” i.e the [APC].**
- I**
- J**

- A** iii. By the final judgment delivered by the Federal High Court on 29/2/2016 in the said Suit NO. FHC/ABJ/CS/97/2016, the learned trial court made the following finding of fact:
- B** (a) Section 35 of the Election Act states that a person can cease to be a member of a political party either by death or if he withdraws. Hon. Uche Ekwunife in exercise of her constitutional right withdraw her membership of the plaintiff (i.e PDP) and joined All Progressive Congress.
- C** (b) This is precisely [its] case as stated in paragraphs 12 of the affidavit in support of the originating summons thus:
- D**
- E**
- F**
- G**
- H**
- I**
- J**
- (c) On the strength of the above findings of facts, the learned trial court granted all the reliefs sought by PDP in its originating summons, including an order restraining *INEC* “from conducting the said court ordered fresh election for the Senatorial seat of Anambra Central Senatorial District without the due participation of the plaintiff and its candidate.
- (d) The findings of facts of the learned trial court based on *PDP*’s declaration under oath that Hon. Uche Ekwunife is no longer a member of PDP having defected to the APC, is still subsisting and binding on PDP.
- iv. Suit No. FHC/ABJ/CS/97/2016 aforesaid is presently under appeal before this Hon. Court as Appeal No. SC. 619/2016; albeit on the challenge by the PDP that the

- A** Court of Appeal lacked the jurisdiction to grant the applicants herein leave to appeal against the final judgment of the learned trial court.
- B** v. There is no appeal nor challenge by any person, including the appellants, regarding the findings of fact made by the learned trial court that the 2nd appellant has since left the PDP and defected to APC where she contested but lost the Party's primary election though still remains a member of the [APC].
- C** vi. The findings and determination made by the Federal High Court on 29/2/3016 in the suit instituted by the PDP were made long before the appellants filed the present appeal on 9/3/2016.
- D** vii. PDP's pursuit of this appeal is tantamount to cherry picking and is aimed at an illegitimate use of the court's process to hedge the risk that the pending appeal against the Suit No. FHC/ABJ/CS/97/2016 aforesaid will yield an unfavourable outcome by disallowing PDP from participating in the court ordered Anambra Central Senatorial Election.
- E** viii. The instant appeal is an act of forum shopping and amounts to a gross abuse of the judicial process.
- F**

The application is supported by a 24-paragraph affidavit and attached thereto is a copy of the Judgment of the Federal High Court in the **Suit No**
G FHC/ABJ/CS/97/2016 as **Exhibit APGA1**. They filed a written address by Patrick I.N. Ikwueto, SAN, C.I. Mbaeri, Esq., Isaiah Bozimo, Esq., and C.D. Eze, Esq., wherein they formulated two issues for determination; namely:

- H** (a) The PDP (1st appellant herein) having obtained judgment in Suit No. FHC/ABJ/CS/97/2016 PDP vs. INEC on 29/2/2016 that the 2nd appellant, Hon. Uche Ekwunife, has ceased to be a member of the party (PDP) as she has joined APC, where she contested but lost the primary election; is the institution of this appeal on 9/3/2016 and seeking to have the same Hon. Uche Ekwunife declared/returned as the PDP Senatorial candidate for the same constituency
- I**
- J**

- A** **not a gross abuse of process?**
(b) Is it objectionable for PDP to advance intrinsically divergent positions in multiple proceedings before this honourable court as to its candidate for Anambra Central Senatorial District?
B

The appellants as respondents opposed the application with a 28-Paragraph counter affidavit. They filed a written address by D. Alex Izinyon, SAN, G.C.

- C** Igbokwe, Esq., B.K. Abu, Esq., C.S. Ekeocha, Esq., K.O. Omoruan, Esq., F.O. Izinyon, Esq., Mrs Hannatu Abdurrahman, L.O. Fagbemi, Esq. Alex Izinyon II, Esq., Josephine Majebi (Miss) and Charity Adah (Miss), wherein they also formulated two issues for determination:

- D** **1. Whether the [applicants] who allege abuse of court process, have proved the existence of multiplicity of suit between the parties in this appeal on same subject matter, issues and reliefs in order to entitle them to the grant of their prayers.**
E **2. Whether this appeal predicated on distinct issues, subject matter and reliefs, not pending before any other court between the parties can be said to amount to an abuse of process.**
F

- G** The 3rd – 12th respondents participated in the main appeal but they are “*indifferent to this application*”, and filed no processes.

This application is, therefore, between the applicants and appellants in the main appeal, who will be called respondents.

- H** The issues they both formulated amount to splitting hairs, and to cut to the chase, it is my view that the Issue that calls for determination is simply whether this **Appeal No. SC. 204/2016** constitutes an abuse of court process in view of 1st appellant's averment in **Suit No FHC/ABJ/CS/97/2016** that 2nd appellant is no longer a member of the Party, and has decamped to **APC**.

- I** To put the issue in proper perspective, the applicants were not parties in the said **Suit No FHC/ABJ/CS/97/2016** between **PDP** [1st appellant] and **INEC** [3rd respondent], which is the subject of other appeals pending in this court and court below.

- J** The applicants submitted that the absurdity of the position now canvassed

A by the appellants in this appeal is that whilst in **Suit No FHC/ABJ/CS/97/2016**, determined on **29/2/2016**, **PDP** is vehement in its assertion that the 2nd appellant has since left the party and defected to **APC**, in this appeal filed on **9/3/2016**, the same **PDP** is pontificating that the 2nd appellant be restored and returned to her

B position as its candidate, who won the said Anambra Central Senatorial District Election, and thus entitled to be put back in office as the Senator representing that district in the 8th National Assembly. Furthermore, that the attitude of this court is that a party must be consistent in making his case and should not be allowed to

C change his position as he moves through the steps of the courts, **Ajide vs. Kelani (1985) 3 NWLR (Pt. 12) 248, Akeredolu vs. Miniko (2014) 1 NWLR (Pt. 1388) 402, Dnaiel vs. INEC (2015) 9 NWLR (Pt. 1463) 113, NJC vs. Agumagu (2015) 10 NWLR (Pt. 1467) 365** cited; that this court as the apex court is not only

D a court of justice and equity but by its constitutional role, is also a policy court. They added that:

E “The question is, should this court countenance proceedings such as this appeal, where a party manifestly adopts and advocates a patently inconsistent position, particularly where the inconsistent/divergent position is an adjudged position by a

F court of competent jurisdiction based on representations made by the party to [it]. Your lordships are respectively urged to refuse the invitation by the appellants aimed at using the process of this court as a dice that can be played as how and when it suits [their] fancy”.

G It is their contention, therefore, that the institution of this appeal by the appellants on **9/3/2016** is a gross abuse of process and they referred us to a number of authorities on the said subject.

H The respondents, on the other hand, argued that for there to be an abuse of court process, there must be in existence a multiplicity of actions; parties in the action must be the same; and subject matter and issues in the actions must be the same – **Society Bic S.A. & Ors. vs. Charzin Ind. Ltd. (2014) LPELR SC 79/2005, Umeh vs. Iwu (2008) 8 NWLR (Pt. 1089) 225 at 243, Ogojeifo vs. Ogojeifo (2006) 3 NWLR (Pt. 966) 205, Okafor vs. .A.G. Anambra State (1991) 6 NWLR (Pt. 200) 656** cited.

I Furthermore, that a good look at the originating summons in the said **Suit**

J

- A** No **FHC/ABJ/CS/97/2016** shows that the reliefs and issues in that suit relate to some other proposed election to be held on **5/3/2016**, which is not the same as that wherein the 2nd appellant was returned before the return was nullified by the court below in **Appeal No. CA/E/EPT/28/2015**, that the parties are different since the
- B** applicants were not parties in that suit, and reliefs sought and issues in that suit have no bearing with issues and reliefs sought in this appeal; that the petition and judgment of the court below that gave rise to this appeal pre-date the said suit and appeals relied upon by the applicants, and the judgment of the court below that is
- C** being challenged in this appeal was delivered on **7/12/2015**; that the law is settled that in issues of this nature, it is the latter action that constitutes abuse of court process – **Ukachukwu vs. PDP (2013) LPLER-SC, Dingyadi vs. INEC (No. 2) (2011) 18 NWLR (Pt. 724) 369** cited; and that the present appeal does not
- D** constitute an abuse of the process of this court and does not amount to forum shopping.

What is abuse of court process? The applicants did say that such instances vary, citing **A.G., Anambra State V. UBA (2005) 15 NWLR (Pt. 974) 44**, where

E this court explained that:

- F** “The concept of abuse of judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. Its one common feature is the improper use of the judicial process by a party in litigation to interfere with the due administration of justice. It is also recognized that the abuse of process may lie in both a proper and improper use of the
- G** judicial process in litigation. But the employment of judicial process is only regarded as an abuse when a party improperly uses the judicial process to the irritation and annoyance of his opponent, and the efficient and effective administrative
- H** justice.”

They also cited **CBN vs. Ahmed (2000) 11 NWLR (Pt. 724) 369; Arubo vs. Aiyeleru (1993) 24 NSCC Pt. 1) 255, and Saraki vs. Kotoye (1992) 9 NWLR (Pt. 264) 156** where Karibi-Whyte, (JSC), stated that the common denominator with the concept of abuse of court process “*is the improper use of the judicial process in litigation to interfere with the due administration of justice*”.

I

Ironically, the respondents cited **Umeh vs. Iwu (supra)**, which must be

J

- A** familiar to the applicants because in that case, the 1st applicant, Chief Victor Umeh, was the 1st appellant, and INEC and APGA, 2nd applicant, were 2nd and 4th respondents. The case is a better authority than any other case I can muster in resolving the Issue at hand, and I will set it out in some detail.
- B** In **Umeh vs. Iwu** (*supra*), the 3rd and 4th respondents sued the 1st and 2nd respondents at the **Federal High Court** seeking declaratory/injunctive reliefs to stop them from interfering with the affairs of 4th respondent [APGA]. The appellants applied and were joined as the 3rd and 4th defendants to the said Suit.
- C** The 3rd and 4th respondents and 2 Ors instituted another suit against the appellants and 12 Ors at the **High Court of the Federal Capital Territory** seeking *inter alia* a declaration that the defendants, including the appellants, were no longer members or national officers of APGA. The 1st and 2nd respondents were
- D** not parties but upon their application, they were joined as 15th & 16th respondents. But pursuant to a motion for discontinuance, their names were struck out. Following the discountenance in that court, the appellants filed a Suit at the **Federal High Court** that was struck out for being an abuse of court process as the
- E** subject matter was same as that pending at **FCT High Court**. The 3rd and 4th respondents then filed the Suit at the **Federal High Court** that led to the decision cited by the respondents. The appellants were not parties to the suit but they applied and were joined as parties. As soon as they were joined, they filed an
- F** application to dismiss the suit as an abuse of court process. The trial judge, Adah, J. (as he then was) held thus:

- G** “ The bottom line of an abuse of court process is a situation where a litigant will choose to use the legal process improperly to annoy and embarrass another through filing of multiple actions in one or different courts against the same parties on the same issues. In this case, the situation complained of is where
- H** the plaintiff and some of the parties - - have been having a legal battle before the *FCT High Court* over the leadership tussle in the 2nd plaintiff. The issues involved are similar but the parties are not the same. The 1st and 2nd defendant against who this
- I** action was originally directed, were not in the earlier case. The applicants were joined in this case because they applied to be joined as interested parties. Since they saw this suit before the court and secured the leave to join, raising the issue of abuse to

J

A end the matter *in limine* is in itself odious to the principles of equality and justice.

B It is more abusive of the courts process for a party to seek to join the suit and stand on the basis of his being joined in the suit to say that the suit is an abuse of the process of this court. I do not believe from the facts of this case that there is any abuse of the process in this case. The 1st and 2nd defendant sued in this court were not sued before the FCT High Court and it is worthy of note that this court is the court that has jurisdiction to entertain the suit against the 1st and 2nd defendants and not the FCT High Court. To shut down this case therefore will orchestrate injustice to the bone fide suit filed by the plaintiffs in this instant case. I hold therefore that this application is with all respect lacking in merit”.

E At the court below, Adekeye, JCA (as he then was) stated:

F “I have looked through the facts and circumstances of initiating the suits before the Federal Capital Territory High Court and the Federal High Court Abuja. It is apparent that the end result of the two suits are meant to have an impact on APGA but the 3rd Respondent has grievance towards those he considered to be dissident factors in the party, which suit is before the

G Federal Capital Territory High Court. The Suit before the Federal High Court is against the Chairman INEC and INEC, the 1st and 2nd respondents challenging their intermeddling with the affairs of the party by giving recognition to the

H appointment of Chief Victor C. Umeh as the Ag. National Chairman of APGA in the letter dated 28.6.2006, contrary to the Constitution of the Party, 1999 Constitution of the Federal Republic of Nigeria and the Electoral Law. I cannot identify

I any multiplicity of action here or abuse of the judicial process. Parties are permitted to air their grievance at the law courts as when there is a right there must be a remedy”.

J On a further appeal to this Court, Chukuma-Eneh (JSC), held:

A

“- Abuse of court process, simply, in practical sense denotes a situation where a party has instituted a multiplicity of suits against the same opponent in respect of the same subject matter and on the same issues. This matter of using court process which is obviously lacking in *bona fide* leads to the irritation and annoyance of the other party and thus impeding due administration of justice. Therefore, to sustain a charge of abuse of process there must co-exist inter alia:

B

C

- (1) A multiplicity of suits
- (2) Between the same opponents
- (3) On the same subject matter
- (4) On the same issues

D

All these pre-conditions are mutually inclusive as they are conjunctive”.

E

He reproduced the decision of the trial court, and further held:

F

“I agree with this brilliant finding; it has captured at once the principles on abuse of process. It cannot be faulted. If I may recall, the appellants have been joined as 15th & 16th defendants to *Suit* No. FCT/HC/CS/278/2005. The joinder, however, has to be revoked when the plaintiffs discontinued against them i.e 15th

G

& 16th defendants. Interestingly enough, the appellants have taken the issue of multiplicity of suits as an abuse of process vis-à-vis the instant suit when the appellants are no longer parties to one of the suits i.e, FCT/HC/CV/278/2005. They cannot run

H

away from that fact to hinge their entire case on the finding that as the two suits have impact on the leadership tussle of the 4th respondent [APGA] the instant suit without more constitutes an abuse of process. It is doubtful if they can make out a case of

I

abuse of process on these peculiar facts. On the question of the same subject matter the instant *Suit* No. FCT/ABJ/CS/278/2005 has been instituted to challenge the 1st and 2nd

J

defendants/respondents on their power to attempt to confer recognition of National Chairman or acting National Chairman

A of the 2nd plaintiff/4th respondent to any other person but the 1st plaintiff/3rd respondent contrary to the Party's Constitution and an order of injunction. The Suit No. FCT/HC/CV/278/2005 on the other hand is founded on a
B declaration that the 1st and 11th defendants are no longer members of the party and on the expulsion of the 1st and 14th defendants from the party. Again, the subject matter in either
C of the two suits is not the same. It is difficult to see how the charge of abuse of court process can be made to stand on these facts, it cannot. On whether the two suits have raised the same issues, it goes without much debating of the point that this is not so. Based on the above careful appraisal of the two suits, the
D contending issues in both suits are not the same. There can be no doubt that the conditions I have set out above to guide my discussion on abuse of process in this matter are non-existent in the two suits and therefore this issue has to be resolve against
E the appellants and in favour of the respondents. I have not found any abuse of court process on the facts of the aforesaid two suits even though in the end they may have their roots in the tussle for leadership of the 4th respondents (i.e. APGA)."

F In his judgment, Onnoghen, (JSC) (as he then was) observed:

G "From the reliefs claimed in the two suits, it is very clear that though they relate to the leadership of the 4th respondent, they are definitely not the same. It is therefore, under the circumstance not correct to say that the two suits are pending before courts of concurrent jurisdiction and therefore subject to the principles of abuse of court process. It is very clear that
H whereas in Suit No. FCT/HC/CV/278/2005, the 3rd respondent seeks to ventilate his grievance against those considered to be dissident groups within the party, in the instant case the 3rd and 4th respondents are proceeding against the 1st and 2nd respondents, who are the Chairman of INEC and INEC respectively challenging their alleged intermeddling or
I interference with the internal affairs of the 4th respondents by

J

- A giving recognition to the appointment of the 1st appellant as Chairman of the 4th respondent contrary to the Constitutional provision of the 4th respondent, the 1999 Constitution and the 2002 Electoral Act. Clearly, there is no abuse of court process**
- B known to law, having regards to the facts of this case.”**

What can be that clearer? In that case involving the applicants, this court did not find any abuse of court process although the suits filed had their roots in the tussle for leadership of **APGA**.

- C** They are back in this court, but this time, the tussle is over the senatorial seat of the Anambra Central Senatorial District. Let us dissect the circumstances that triggered this application, bearing in mind that the law does not say that once a party files another suit before another court on the same subject matter, there is abuse of court process. A subject matter may give rise to different rights. In other words, different suits can emanate from same subject matter but with different rights and reliefs.

- E** In this case, this appeal and the said suit are offshoots of the same struggle over a senatorial seat. At the base of both is the said judgment of the court below delivered on **7/12/2015**, wherein it ordered fresh elections into the said senatorial seat; that is when and where they took different journeys of their own.

- F** **INEC** excluded **PDP** from participating in the fresh election fixed for **5/3/2016** and **PDP** challenged its exclusion by filing the **Suit No FHC/ABJ/CS/97/2016** on **10/2/2016**, wherein it said its candidate at the election that culminated in the judgment of the court below delivered on **7/12/2015**, was no longer its member.

- G** At this point, the parties were no longer on the same page. The said suit had a different cause of action, and the applicants were not parties to the suit, as the issue did not concern them. However, **PDP** and the same candidate it said was no longer its member filed an application at the court below on **11/2/2016**, asking it to set aside its earlier decision nullifying the election. The Federal High Court delivered its Judgment in the said suit on **29/2/2016**. The court below delivered ruling on **3/3/2016**, wherein it dismissed the application to set aside its decision.

- I** **PDP** and the same candidate of the election of **28/3/2015**, appealed against the decision dismissing the said application, which is this Appeal that the applicants label an abuse of court process because of what **PDP** said in another suit altogether.

- J** I must say the respondents are right; this appeal and that suit may have

A arisen from the same judgment but the nullified election and the court ordered election are two different things.

The court below nullified the election of **28/3/2015** and the appellants applied to have that decision set aside but the court dismissed the said application
B and they appealed to this court. An appeal is an invitation to a higher court to review a decision of a lower court whether on the proper consideration of facts before it, and the law, that court arrived at a correct decision – See **Oredeyin vs. Arowolo (1989) 4 NWLR (Pt. 114) 172 @ 211.**

C The decision the appellants are asking this court to review in this appeal is the decision of the court below dismissing their application to set aside the Judgment nullifying that election.

In the same Judgment, the court below also ordered **INEC** “to conduct a
D *fresh election into the Anambra Central Senatorial District, within 90 days*”. But **INEC** excluded **PDP** from the said fresh election and it filed the said suit challenging **INEC** for that. The decision of the Federal High Court is also subject to appeal and the applicants say that there are pending appeals against that
E decision in this court and court below. The respondents made an issue of it by arguing that the applicants failed to show the relevance of those appeals to their objection as they did not produce notices of appeal to enable this court see the issues and reliefs sought in those appeals; and that their conduct is a deliberate act
F on their part to mislead this court. In my view, this spat over appeals arising from the said suit is unnecessary because the appeals are more or less running on parallel lines. The nullified election, which is the subject of this appeal, is on a different tangent from the fresh election, the subject of that suit.

G The applicants pointed out that a party will not be allowed to change his position as he moves through steps of the court, and cited some authorities, which the respondents argued are “*inapplicable and unhelpful*” to the applicants. I agree entirely. For instance, in **Ajide vs. Kelani (supra)** cited by the applicants,
H the appellant admitted in his pleading that the disputed property was originally partnership property but he changed his position in the witness box to say it had never been partnership property and has always been his personal property. But the trial court, surprisingly dismissed the plaintiff’s case, holding as follows:

I “In short, it can be said that the plaintiff’s case has been so badly presented that nothing can be made of it. It is no consolation that the 1st defendant [the said applicant] is in my
J view, a most unreliable person whose evidence ought not to be

A **believed”**

The court below reversed the judgment of the trial court and the appellant appealed to this court. In dismissing the appeal, this court per Oputa, (JSC),

B decried the situation as follows

C **“From the pleadings of the parties, from the sudden change of front of the appellant in the witness box, from the finding of the trial court that the appellant was “a most unreliable person”, I wonder how any court of law, equity and justice can decree in favour of such an appellant as now appeals to this court.”**

D Oputa, (JSC), further elaborated as follows in the judgment:

E **“A party should be consistent in stating his case and consistent in proving it. He will not be allowed to take one stance in his pleadings; then turn summersault during the trial; then assume nonchalant attitude in the Court of Appeal; only to revert to his case as pleaded in the Supreme Court. Justice is much more than a game of hide and seeks. It is an attempt, our**

F **human imperfections notwithstanding, to discover the truth. Justice will never decree anything in favour of so slippery a customer as the appellant.”**

G If the point I am trying to put across is not clear; let me explain. The *inconsistent positions* in the cases; cited by the applicants *moved through steps of the court*, in one and the same action.

In this case, this **Appeal No. Sc. 204/2016** has to do with the election of

H **28/3/2015**; it started at the trial tribunal and went on appeal to the court below before it finally got to this court. **Suit No. FHC/ABJ/CS/97/2016** has to do with the fresh election ordered by the court below; it is a Federal High Court matter. The point of divergence came after the order for fresh election, and **INEC** issued a

I notice excluding **PDP** from participating in the fresh election. At that point, the election petition was dead; it was determined when the court below nullified the election.

J The suit filed at the Federal High Court was a fresh action aimed at getting

- A INEC** to include **PDP** in the said fresh election. The applicants were not parties; and issues and reliefs sought in that Suit had nothing to do with them or their election petition. It was a fight between **PDP** and **INEC** to have **PDP** included in the fresh election ordered by the court below and nothing more; the notion that **B** there is an abuse of court process is erroneous.

The bottom line is that the application lacks merit and it is, therefore, dismissed. I make no order as to costs.

C

Amina Adamu Augie,
Justice, Supreme Court

AUGIE, (JSC): This appeal relates to the Senatorial Election held in Anambra State, on **28/3/2015**, and the appeal turns purely on the issue of jurisdiction.

- D** The 1st and 2nd respondents had challenged the return of the 2nd appellant as the duly elected senator representing the Anambra Central Senatorial District, at the Anambra State National Assembly Election Petition Tribunal [the Tribunal], on the following **Grounds:**

E

(a) **That she was not duly elected by a majority of lawful votes cast at the election.**

F

(b) **That her election and return was invalid by reason of corrupt practices and substantial non-compliance with the provisions of the Electoral Act and that;**

(c) **She was at the time of the election not qualified to contest the election.**

G

After the tribunal dismissed their petition in its Judgment delivered on **9/10/2015**, they appealed to the court below, wherein they raised three issues for determination, including **Issue 1**, which questions:

H

“Whether the learned trial tribunal correctly and rightly determined that the [2nd appellant herein] was qualified to contest the Senatorial Election within the context of Section 65(2) (b) of the 1999 Constitution (as amended) read together with Section 138 (1) (a) of the Electoral Act, 2010 (as amended).”

I

- J** The court below, in its judgment delivered on **7/12/2015**, allowed the appeal, and

A with regard to the question in **Issue 1**, it held as follows:

B “Whether it was the “National Body of PDP in Anambra State”
C the “5-Man National Assembly Electoral Committee” of the
D Caretaker Committee that conducted the primary which
 produced the 11th respondent [2nd appellant herein] as the
 nominated candidate of PDP to contest the election, is
 immaterial; since by paragraph 25(1) of Exhibit R1, it is the
 State Special Congress that should conduct the primary for the
 purpose of nominating a candidate to contest election into the
 National Assembly. The 11th respondent was therefore not the
 product of a valid primary and was - - - not duly and
 legitimately nominated. That has disqualified her from
 contesting the elections into the Anambra Central Senatorial
 District.”

E Having resolved the issue in their favour, it further stated as follows:

F “It is totally unnecessary to go into the other issues raised
 especially as we have set aside the judgment for being perverse.
 Nothing can be built on it. In other words, the complaint of
 mutilation/ cancellation and non-compliance, even if
 determined in favour of the appellants would not add value to
 the position”.

G It then set aside “*the perverse decision of the Tribunal delivered on 9/10/2015*”
 and ordered INEC [3rd Respondent] “*to conduct a fresh election into the*
Anambra Central Senatorial District within 90 days” from that day **7/12/2015**.

H About two months later, the appellants, who were 11th & 12th respondents, filed an
 application on **12/2/2016**, wherein they prayed the court below for the following
 orders:

- I** (1) **An order extending time within which the applicants can**
apply to this honourable court to set aside its judgment in
Appeal No. CA/E/EPT/28/2015 delivered on 7/12/2015.
- (2) **An order setting aside the judgment of this Hon. Court in**
CA/E/EPT/28/2015 delivered on 7/12/2015; on the
- J**

- A** grounds
- (i) It lacks the jurisdiction to adjudicate on the issue of sponsorship and/or nomination masquerading as qualification in the said matter which was the main fulcrum of the said decision.
- B**
- (ii) The said decision was arrived at *per incuriam*
- (iii) The said order is a null order which *ex debito justitiae* is liable to be set aside *pro tanto*
- C**
- (iv) Setting aside the said order restores all parties therein to the *status quo ante belum* before the purported filing of the petition at the National Assembly Election Petition Tribunal on 8/4/2015 as such petition never existed, which was the basis of the court judgment on 7/12/2015.”
- D**

They also filed another motion on notice for an order of interlocutory injunction restraining respondents from conducting a fresh election, pending the hearing of their application to set aside the judgment.

E The 1st and 2nd respondents herein reacted by filing a notice of preliminary objection on 24/2/2016 praying the court below to strike out and/or dismiss the two applications, on the following grounds:

F

- (a) Both applications are statute-barred. They were filed outside the period of 60 days delimited by Section 285(7) of the 1999 Constitution (as amended) for this honourable court to hear and dispose of election matters arising from the decision of the National and State House of Assembly Election Tribunal and/or the decision of this honourable court.
- G**
- (b) Any time limited by the constitution for the doing of any act or thing, cannot be extended.
- H**
- (c) Both applications are not brought according to due process of law. They invite the honourable court to sit on appeal over its final decision in an appeal arising from the National and State Houses of Assembly Election Tribunal”.
- I**

J In its ruling delivered on 3/3/2016, the court below *crystallized* all the issues

A canvassed by the parties into a sole issue, as follows:

B **“Whether [the] court has the jurisdiction to set aside its final Judgment in an election petition outside provisions of Section 285(1) of the 1999 Constitution by reason of want of jurisdiction or by reason of being a decision reached, *per incuriam*”**

C In resolving this issue, the court below per Ogunwumiju, (JCA), held:

D **“The inherent powers of this court to set aside its own judgment, which is a nullity, cannot be activated on the argument that because a judgment may have been delivered *per incuriam* on the merit and *a fortiori* this court is empowered to ignore its rules and interpreted provision of the constitution. On that leg, this motion is incompetent and liable to be struck out being in violation of Order 7 rule 12 of the Court of Appeal rules and Section 285(7) of the Constitution. On the 2nd leg of this issue, learned applicants' counsel is urging us to set aside the judgment because this court has now been adjudged by the Supreme Court *to lack the jurisdiction to adjudicate* on appeal in respect of the subject matter submitted to this court for determination on appeal. We shall not be drawn into the arguments of whether the judgment was delivered *per incuriam* or not. Neither are we going to be enticed into dabbling in the issue of the purport of the recent Supreme Court decisions. However, we need to mention in passing that the judgment sought to be set aside was delivered on 7/12/2015, well BEFORE Supreme Court judgments which are detailed below- The essence of applicants' prayer is that the recent judgments of the Supreme Court giving a final seal to the question of candidates' nomination by the party should have a retroactive effect on previous judgments of the Court of Appeal or even the Supreme Court to render those previous judgments liable to be set aside as a nullity for being delivered *per incuriam*. That is, we must hold that our decision given earlier in time should be set aside. I must mention that the judgment of this court relied on previous judgments of the Supreme Court at the time. This court**

- A** followed *stare decicis* at that time. A departure by the Supreme Court from a previous decision law does not effect the previous decisions rendered by it or by lower courts who relied by *stare decicis* on the old judgments. Jurisprudence only requires
- B** lower courts to follow current trends and shift. Previous decisions based on previous views cannot be affected.”

The court below concluded as follows in the aforesaid ruling:

- C** “There is no pretence here that the rules of natural justice were breached or that Order 19 rule 4 is applicable. This is an appeal cloaked in the guise of a motion. We cannot sit on appeal over our own judgment. This court is the final court. Once a court delivers judgment, subject to the “slip rule” principle, that court becomes *functus officio*. Even if we make a mistake on law or fact (though not conceded here) we cannot correct it. I must re-echo the words of Belgore, JSC in *Obioha vs. Ibero supra* where his lordship held that the law does not permit a Court double say on the same matter. There must be an end to litigation. The motion is incompetent and completely misconceived. It is hereby dismissed. Consequently, the motion praying for an order of injunction restraining the respondents from conducting fresh election is hereby struck out as having been overtaken by the outcome of this motion”.

- G** Dissatisfied with the ruling of the court below, the appellants filed a notice of appeal containing five grounds of appeals in this court, and they formulated two issues for determination in their brief settled by Dr. Alex Izinyon, SAN, G.I.
- H** Igbokwe, Esq., B.K. Abu, Esq., C.S. Ekeocha, Esq., K.O. Omoruan, Esq., F.O. Izinyon, Esq., Hannatu Abdurrahman (Mrs.); L.O. Fagbemi, Esq., Alex Izinyon 11, Esq.; Josephine Majebi (Miss) and Charity Adah (Miss). The issues are:

- I** 1. Whether the appellants' application was in violation of Order 7 rule 12 of the Court of Appeal Rules and Section 287 of the 1999 Constitution (as amended) and a final judgment under Section 246 (3) of the Constitution,
- J** having regards to the sole issue decided in the judgment.

A 2. Whether the learned justices of the Court of Appeal were right in the reasons they gave in refusing to set aside the judgment of 7/12/2015, which was given without jurisdiction, and a nullity.

B

Again, the 1st and 2nd respondents have filed a notice of preliminary objection, which they argued in their brief of argument prepared by Patrick I.N. Ikwueto, SAN, C.I. Mbaeri, Esq., Isaiah Bozimo, Esq., and C.D. Ezech, Esq. The ***Grounds***

C for their objection are as follows:

- D 1. By Section 246(3) of the 1999 Constitution (as amended) “The decisions of the Court of Appeal in respect of appeals arising from the National and State House of Assembly Election Petitions shall be final”.**
- E 2. On 3/3/2016, the court below relied on the above constitutional provision in refusing the appellants’ motion praying the court to sit on appeal and set aside its final judgment delivered on 7/12/2015 in Election Petition Appeal No. CA/E/EPT/28/2015.**
- F 3. By its ruling of 3/3/2016 the court below refused to sit on appeal over its final judgment of 7/12/2016. Hence this appeal.**
- G 4. The jurisdiction of [this] court is limited and circumscribed by the 1999 Constitution (as amended). Hence, [this] appeal is unconstitutional and amounts to a gross abuse of court process.**
- H 5. Neither the court below nor this court has jurisdiction to sit on appeal over the final decision of the Court of Appeal “in respect of appeals arising from the National and State House of Assembly Election Petitions”, as in the instant appeal.**
- I 6. The instant appeal is an exercise in gross frivolity. It ought to be struck out with heavy costs as a deterrent.**

J The 3rd – 12th respondents also filed their own notice of preliminary objection in their own brief prepared by S.O. Ibrahim, Esq., Bertha Ijeoma Amadi (Mrs.), Abdulaziz Sani Esq., Alhassan A. Umar, Esq., Nneka Nobis-Elendu (Mrs.) And Fatukasi Temilola (Miss). They are objecting to the competence of this appeal on

A the ***Grounds*** that:

- B i. By virtue of Section 246(1) (b) and (3) of the 1999 Constitution (as amended), the appellants have no right of appeal from the decision of the court below in respect of an election petition.
- C ii. The court below is the final appellate court that has the requisite jurisdiction of entertaining appeals arising from election petitions.
- D iii. The notice of appeal dated and filed on 9/3/2016 is grossly incompetent.
- iv. The appellants' brief of argument dated and filed 21/3/2016 is incompetent.

They submitted that the sole Issue that calls for determination is:

E **“Whether having regard to Section 246(1) (b) and 3 of the 1999 Constitution of the Federal Republic of Nigeria (as amended), this court has jurisdiction to entertain this appeal”.**

F As I said, this appeal is purely about jurisdiction, which is described as the life wire of any litigation, and it is trite that where an objection is raised as to jurisdiction, the objection must be dealt with first before anything else. The reason being that if the court has no jurisdiction, the proceedings, however ably and well conducted, will be a nullity; so to be on the safe side and not to waste time, it must be taken first.

G The issue, as the 2nd set of respondents pointed out is [whether having regard to Section 246(1) (b) and (3) of the 1999 Constitution, this court has jurisdiction to entertain this appeal]. The position of the two sets of respondents is that the appeal is unconstitutional and this court has no jurisdiction to determine it. The 1st set cited **Dangana vs. Usman (2013) 6 NWLR (Pt. 1349) 50**, where this court relied on its decision in **Onuaguluchi vs. Ndu (2001) 7 NWLR (Pt. 712) 309**, and invited us to follow those decisions and conclude that the court below was right when it upheld the finality of its Judgment of 7/12/2015.

I As to the appellants' argument that this appeal is not against the final decision of 7/12/2015 but against the ruling of 3/3/2016, wherein it refused to set aside the said final judgment of 7/12/2015, they submit that this contention

A merely seeks to differentiate between Six and Half a Dozen, and is a clever subterfuge, which this court warned in **Dangana vs. Usman and Onuaguluchi vs. Ndu** (*supra*) must not be encouraged to foist an otherwise incompetent appeal on this court. They further submitted as follows in their said brief.

B “The appellants, in their notice of appeal, under “**Reliefs Sought from the Supreme Court**”, are asking [this court] to strike out the said election petition **Appeal No. CA/E/EPT/28/2015**. If [they] are praying this Hon. Court to strike out **Appeal No. CA/E/EPT/28/2015**; is that not a frontal attack on the judgment
C of the court below delivered in the said **Appeal No. CA/E/EPT/28/2015**. My noble lords are humbly urged to uphold that from the real meaning and intendment of the RELIEF sought the appellants' primary and ultimate desire is to set aside the subsisting judgment of the court below in **Appeal No.**
D **CA/E/EPT/28/2015**, delivered on 7/12/2015. This purported appeal is a clear invocation of the appellate jurisdiction of this court over election petition appeal No. No matter how [they] intend to mask it. We invite your lordships to decline jurisdiction and strike out the instant appeal for being unconstitutional,
E incompetent and a gross abuse of the judicial process”. The 2nd Set of respondents also submitted that the said **Appeal No. CA/E/EPT/28/2015** under which this appeal emanated from shows that it is an appeal arising from an election petition appeal decision. They cited **Madumere vs. Okwara (2013) 12 NWLR (Pt. 1368) 303** and **HDP vs. Obi (2011) 18 NWLR (Pt. 1278) 80 at 111**, and urged us
F to sustain their preliminary objection, and strike out this appeal.

The appellants argued in their reply brief that the objections to the appeal are a misconception of the law and decision of this court; that the sole ground
G upon which the election was nullified was that the 1st appellant did not conduct any credible primaries to nominate the 2nd appellant, and the 1st set of respondents admitted as much; that this is the same position they took in their petition as filed before the tribunal that gave rise to the judgment in **CA/E/EPT/28/2015**, but in
H arguing their preliminary objection, they have relied heavily on the provision of Section 246(3) of the constitution, which given the peculiar facts and circumstances of this appeal, does not avail them; and that a judgment of a court can only be said to be final, when the court that gave the judgment is properly
I clothed with jurisdiction over the issue it adjudicated and pronounced upon **Ucha vs. Onwe (2011) 4 NWLR (Pt. 1237) 386** and **PDP vs. Onwe (2011) 4 NWLR (Pt. 1236) 166 cited**. They further submitted as follows in their brief.

The court below lacked jurisdiction to determine the issue of the alleged

J

A non-holding of primaries by the 1st appellant [It] lacked jurisdiction to entertain any issue arising from the provisions of Section 87 of the Electoral Act, 2010 (as amended). In the circumstance the provisions of Section 246(3) and 285(7) of the 1999 Constitution do not apply to the judgment of the court below delivered on 7/12/2015, which was outside the jurisdiction conferred on the court below by the constitution”.

Apparently, in arguing that the said Section 246(3) of the Constitution does not apply, and that the 1st set of respondents had said one thing in their petition and another thing in their objection, the appellants blurred the lines between the objection and the issue in the appeal. As this court held in **Akpan vs. Bob (2010) 17 NWLR (Pt. 1223) 421**, a preliminary objection seeks to provide an initial objection before the actual commencement of the thing being objected to. In other words, the primary purpose of every preliminary objection is to determine the proceeding *in limine*, and thereby dispense with the need to go into the suit, application or appeal. An issue for determination is raised from grounds of appeal, and is usually a proposition of law or of fact in dispute between the parties, which is necessary for determination, and the determination of which would affect the result of the appeal – see **Adejumo vs. Ayantegbe (1989) 3 NWLR (Pt. 110) 417 SC**.

In this case, by the preliminary objection raised, the two sets of respondents are saying this court has no jurisdiction to deal with the appeal because Section 246(3) of the constitution stipulates that “*the decisions of the Court of Appeal in respect of appeals arising from the National and State Houses of Assembly election petitions shall be final*”. The fact is that every court has jurisdiction to enquire into whether it has jurisdiction over any matter or not, and if it finds that it does not have requisite jurisdiction, it takes its hands off, and the matter end there, because where a court has no jurisdiction, *the juridical basis for the exercise of power over such matter is absent* – see **Ajomale vs. Yaduat (No. 1) (1991) 5 SCNJ 172**.

In effect, the preliminary objections raised by the respondents comes first, and must be determined before I venture into the merits or otherwise of the appeal itself. The point they are making is that by Section 246(3) of the constitution, the court below is the final and apex court “*in respect of appeals arising from the National and State Houses of Assembly Election Petitions*”. That section uses the word “*final*”, which means *last, coming at the end* – See **Awuse vs. Odili (2003) 18 NWLR (Pt. 851) 116**, where Niki Tobi, (JSC), added that:

“As an adjective, when used to quality the noun “decision”, it

A [final] means in ordinary parlance that the decision cannot be changed as the matter is deemed to be completely settled”.

The interpretation of Section 246(3) of the 1999 Constitution vis-à-vis jurisdiction of this court has been settled by this court in a long line of cases, and the consensus is that an appeal in respect of a decision of the tribunal in an election matter, when decided by the court below, cannot be taken on appeal to this court but is final for all purposes – see **Onuaguluchi vs. Ndu** (*supra*) and **Dangana vs. Usman** (*supra*), cited by the 1st set of respondents. In **Dangana vs. Usman** (*supra*), Adekeye, (JSC), relying on **Onuaguluchi vs. Ndu** (*supra*), observed:

D “By virtue of Section 246(3) (1) (b) and (3) of the constitution, the Court of Appeal has the mandate to decide an appeal arising from an election petition and shall be the final court. Whether it did so perfectly, rightly or wrongly, the decision it arrives at cannot be taken on appeal to the Supreme Court for consideration. The Supreme Court cannot entertain appeals which it has no jurisdiction to adjudicate upon. Once a court has no jurisdiction, a party cannot use any statutory provision or common law principle to impose it because absence of jurisdiction is irreparable in law. The matter ends there.”

That is the position of this court, however, the appellants argued that **Dangana vs. Usman** (*supra*) and **Onuaguluchi vs. Ndu** (*supra*) are distinguishable and inapplicable in this case because in this appeal, they are challenging the refusal of the court below to set aside its judgment for lack of jurisdiction, while in **Dangana's Case** (*supra*) and **Onuaguluchi's Case** (*supra*), the appeals were directly against judgments of the court below, and in none was there an application to set aside the judgment for being a nullity, filed by the appellants; and that whereas the judgment of the court below was given without jurisdiction, this court has the jurisdiction to entertain this appeal, particularly as the appropriate application had been made to the court below but it refused to set aside, when it was apparent that the said court lacked requisite *vires* to decide the issue in the first place.

This argument presupposes that the said application to set aside the judgment of 7/12/2015, which led to the ruling, appealed against, was floating in the air, and is detachable from the judgment itself that dealt with the decision of

A the tribunal regarding the election petition. How is that possible? The application was anchored on something, and that something is the judgment of the court below delivered on **7/12/2015** in respect of an appeal filed by the 1st and 2nd respondents against the decision of the tribunal on the election petition they filed.

B This court dealt with a similar situation in the recent case of **Bello & Anor vs. Damina & Ors [S.C. 168/2016]**, where the appellants filed an application asking the court below to set aside its Judgment delivered in an election petition appeal, for lack of jurisdiction.

C In its judgment delivered on **9/12/2015**, this court restated its position about Section 246(3) of the 1999 Constitution, as follows:

D **“It is not in doubt that the application filed before the lower court is an offshoot of the court's decision and by extension, this appeal had its origin from that and is also against the decision of the lower court on subject matter of election petition decision or decisions. The present appeal is in one guise challenging the decision of the court below declining jurisdiction when it was approached and prayed upon to set aside its judgment. With this explanation, can this court be clothed with jurisdiction to entertain and determine same appeal??? I do not think so.**

E **Looking closely at the wording of Section 246(3) it is clear that the decision of the court of appeal is final. The decision, therefore, has no business climbing or driving to this court for adjudication because this court is completely bereft of jurisdiction to entertain, hear and determine any such appeal from the lower court”.**

F

G

What more can I say? Nothing has changed since the judgment was delivered on **9/12/2016**, and I can only restate what this court has said times without number once the court below delivers its Judgment on a National Assembly Election Petition Appeal, the judgment is final, and this court has no jurisdiction to hear any appeals related thereto, no matter how cleverly framed. The preliminary objections succeed.

I Since this court lacks jurisdiction to entertain the appeal itself, the application to regularize appellants' reply brief is also affected. The end result is that this **Appeal No. SC. 204/2016** is struck out and the said application is also

J struck out. I make no order as to costs.

A

**Amina Adamu Augie,
Justice, Supreme Court**

PETER-ODILI, (JSC): I had the privilege of reading in draft the ruling of my learned brother, Amina Adamu Augie (JSC), which decision and reasonings I am in total agreement with. To place on record my support, I shall make some remarks.

The applicants, Chief (Sir) Victor Umeh and All Progressives Grand Alliance (APGA) pray for an order striking out or dismissing the appeal No SC. 204/2016 for being a gross abuse of the Court's process.

The grounds for this application will best be set out an introduction of what is in contention and I shall quote them verbatim hereunder, viz:

D

GROUND FOR THIS APPLICATION

i. Simultaneously but prior to the instant appeal, the 1st appellant herein (Peoples Democratic Party) as a Political Party is pursuing an intrinsically divergent proceeding in Suit No. FHC/ABJ/CS/97/2016, PDP vs. INEC wherein the Political Party (PDP) unequivocally swore under Oath that the 2nd appellant herein “Hon. Ekwunife has since left the party (i.e. PDP) as she defected to the All Progressives Congress when she contested the primary election of the party for the selection of its candidate for the court-ordered fresh election” in Anambra Central Senatorial District”.

ii. The case of the PDP (as the plaintiff) in the said suit No. FHC/ABJ/CS/97/2016 is among other things that the present 2nd appellant, Hon. Ekwunife having since defected to the APC wherein she contested the APC primary election “lost the said primary/election but remains a member of the said party” i.e. the All Progressives Congress (APC). Your lordship's attention is drawn to pages 253-254 of the records of appeal; particularly paragraph 12 thereof.

iii. By the final judgment delivered by the Federal High Court on 29 February 2016 in the said Suit No. FHC/ABJ/CS/97/2016, the learned trial court made the following finding of fact:

(a) Section 35 of the Electoral Act stated that a person can cease to be a member of a political party either by death or if he withdraws. Hon. Uche Ekwunife in exercise of her

- A** *constitutional right withdrew her membership of the plaintiff (i.e PDP) and joined the All Progressives Congress.*
- (b)** This is precisely the plaintiff's case as stated in paragraph 12 of the affidavit in support of originating summons thus:
- B**
- C** “That the plaintiff's candidate at the election of 28/3/2015 Hon. Ekwunife has since left the party as she has defected to the All Progressives Congress where she contested the primary election of the party for the selection of its candidate for the court ordered fresh election aforesaid. That she lost the said primary election but remains a member of the said party”.
- D**
- (c)** On the strength of the above findings of fact, the learned trial court granted all the reliefs sought by PDP in its originating summons, including an order restraining INEC “from conducting the said court ordered fresh” election for the Senatorial seat of Anambra Central Senatorial District without the due participation of the plaintiff and its candidate”.
- E**
- (d)** The findings of fact of the learned trial court, based on PDP's declaration under oath that Hon. Uche Ekwunife is no longer a member of PDP having defected to the APC, is still subsisting and binding on PDP.
- F**
- iv.** Suit No. FHC/ABJ/CS/97/2016 aforesaid is presently under appeal before this honourable court as Appeal No. SC. 619/2016; albeit on the challenge by the PDP that the Court of Appeal lacked the jurisdiction to grant the applicants herein leave to appeal against the final judgment of the learned trial court.
- G**
- H** **v.** There is no appeal nor challenge by any person, including the appellants herein, regarding the findings of fact made by the learned trial court that the 2nd appellant herein has since left the PDP and defected to APC where she contested but lost the party's Primary election the still remains a member of the said Party, APC.
- I**
- vi.** The findings and determination made by the Federal High Court on 29th February 2016 in the suit instituted by the PDP
- J**

- A** (1st appellant herein) were made long before the appellants filed the present appeal on 9 March 2016.
- B** **vii.** PDP's pursuit of this appeal is tantamount to cherry picking and is aimed at an illegitimate use of the court's process to hedge the risk that the pending appeal against Suit No FHC/ABJ/CS/97/2016 aforesaid will yield an unfavourable outcome by disallowing PDP from participating in the court order Anambra Central Senatorial Election.
- C** **viii.** The instant appeal is an act of forum shopping and amounts to a gross abuse of the judicial process.

The back ground facts are not necessary to be repeated as the lead ruling has made a good case of that.

D On the 4th day of November 2016 date of hearing, P.I.N. Ikwueto SAN in moving the motion adopted his written address filed alongside the motion paper. In it he distilled two issues for determination which are thus:

- E** **a.** The PDP (1st appellant herein) having obtained judgment in Suit No. FHC/ABJ/CS/97/2016 PDP vs. INEC on 29 February 2016 that the present 2nd appellant, **F** Hon. Uche Ekwunife, has ceased to be a member of the party (PDP) as she has joined APC, where she contested but lost the primary election; is the institution of this appeal on 9 March 2016 and seeking to have the same **G** Hon. Uche Ekwunife declared/returned as the PDP Senatorial candidate for the same constituency not a gross abuse of process?
- H** **b.** It is objectionable for PDP to advance intrinsically divergent positions in multiple proceedings before this honourable court as to its candidate for Anambra Central Senatorial District?

I The motion is also supported by a 24 paragraph affidavit. The appellants/ respondents deposed to a counter affidavit filed on 21/10/16 of 28 paragraphs and in its attached a written address of Dr. Alex A. Izinyon SAN who raised two issues for determination as follows:

- J** **1.** Whether the 1st and 2nd respondents who allege abuse of

A court process, have proved the existence of multiplicity of suit between the parties in this appeal on same subject matter, issues and reliefs in order to entitle them to the grant of their prayers.

B 2. Whether this appeal predicated on distinct issues, subject matter and reliefs, not pending before any other court between the parties can be said to amount to an abuse of court process.

C I find the two issues crafted by the respondents easy for use and I shall utilize them and taken together.

D ISSUES 1 AND 2

These ask if the applicant who allege abuse of court process have proved the existence of a multiplicity of suits between the parties on appeal on same subject matter, issues and reliefs to warrant a grant of the reliefs sought.

E Setting in motion his argument, learned senior counsel, Patrick Ikwueto contended that the starting point is that the current state of our law is that only a Political Party that is entailed to canvass for votes for any election at any election. He cited Section 221 of the 1999 Constitution (as amended) CFRN for short). He **F** also referred to **Section 68 (i) (g) of the same CFRN; Abegunde vs. Ondo State House of Assembly (2015) 4-5 SC (Pt. 1) 1.**

That what the appellants are canvassing in the main appeal before this court is a departure from the inception of the Suit. No FHC/ABJ/CS/97/2016 **G** determined on 28 February 2016 from which this appeal before the Supreme Court emanates, that a party is not allowed to change course as he goes along his matter from the commencement and at the appeal level whichever the stage. He referred to *Ajide v Kelani* (1985) 3 NWLR (Pt. 12) 248 etc.

H Mr. Ikwueto SAN contended further that the institution of this appeal SC.204/2016 is an abuse of court process for which this court should wield the big stick. He referred to **A.G. Anambra vs. UBA (2005) 15 NWLR (Pt. 947) 44; CBN vs. Ahmed (2000) 11 NWLR (Pt. 724) 369; Aruba vs. Aiyeleru (1993) 24 NSCC (Pt. 1) 255 at 265.**

I Dr. Izinyon SAN for the respondents contended that there is no multiplicity of action as the issues and reliefs sought in this appeal are different from the other suit in SC 619/2016 and so the abuse of court process does not **J** arise. He cited **Ukachukwu vs. PDP (2013) LPELR SC, Dingyadi vs. INEC**

A (NO. 2) (2011) 18 NWLR (Pt. 1224) 154.

The stance of the application is that the Political Party itself, PDP (1st appellant) by its own express confirmation represented that the 2nd appellant, Hon. Uche Ekwunife who was its candidate at the election of 28/3/2015 has since left PDP having defected to APC and so the basis of the trial court findings and judgment cannot sustain the present appeal. The reason being that by maintaining the present appeal, the appellants are restructuring the case that brought about FHC/ABJ/CS/97/2016 which is the foundation of the present appeal therefore going against the principle that a party should not change course midstream, thereby producing a situation of gross abuse of court process.

The opposing angle of the respondents is that the judgment in Suit No. FHC/ABJ/CS/97/2016 did not make any finding that the 2nd appellant was not the 1st appellant's candidate at the Senatorial election held on 28/3/2015 as the judgment relates to an election that is yet to be held while the present appeal has to do with 1st appellant's position in this appeal which relates to the holding of the Senatorial election on 28/3/2015 for Anambra Central Senatorial District. That the applicants have failed to establish the gross abuse of court process they posit.

The abhorrent nature of an abuse of court process has made the courts, the Supreme Court not an exception to deplore in very strong terms the invidious situation that is thrown up when the court process is abused especially by multiplicity of suits. Therefore abuse of process connotes that the process of the court has not been used bona fide and properly. Another way of stating the position is that the common denominator in the concept of abuse of process is the improper use of the judicial process in litigation to interfere with the due administration of justice. It is in the wrongful deployment of the machinery of justice to the annoyance and irritation of the opponent by the institution of multiple and divergent suits/proceedings over the same subject matter. I place reliance on **C.B.N. vs. Ahmed (2000) 11 NWLR (Pt. 724) 369; Arubo vs. Ayieleru (1993) 24 NSCC (Pt. 1) 255 at 265; Saraki vs. Kotoye (1992) 9 NWLR (Pt. 264) 156 at 188-189** and the more recent case of **A.G. Anambra State vs. UBA (2005) 15 NWLR (Pt. 947) 44.**

Having set out the general principles of what is known to be an abuse of court process for which the court fighting jealously to protect its integrity reacts with a dismissal of the irritating process to clear the environment of pollution. Getting back to the facts prevailing before court to see if the concept of an abuse of court process is in existence here.

A perusal at the originating summons in Suit No. FHC/ABJ/CS/97/2016

- A** shows that the reliefs and issues in that suit relate to a future election intended to be held on 5/3/16, a situation distinct from that where the 2nd appellant returned before the said return or result was nullified by the Court of Appeal in Appeal No. CA/EEE/EPT/28/2015. It is true that the two appeals before the Court of Appeal
- B** Nos. CA/A/160/2016 and CA/A165/2016 allegedly pending in that court below arose from the one judgment of the trial court in FHC/ABJ/CS/97/2016. It is clear that the two appeals aforesaid do not relate to the election of 28/3/2016 or the challenge of the Court of Appeal judgment in CA/E/EPT/28/2016. Therefore as
- C** can be seen in Suit No. FHC/ABJ/CS/97/2016, Peoples Democratic Party v INEC, the 1st and 2nd respondents/applicants herein were not parties in the said suit. The reliefs sought and issues having no bearing from those in CA/E/EPT/28/2015 which are distinct and different from each other. Clearly the
- D** conditions under which an abuse is said to apply are not present. The conditions are such that they must co-exist and they are thus:

- E**
1. **There must be in existence a multiplicity of actions.**
 2. **The parties in the said action must be the same.**
 3. **The subject matter and issues in the actions must be the same.**

- F** All these conditions the applicants have not established. See **Ayanru vs. Mandilas Ltd (2007) 10 NWLR (Pt. 1043) 462 at 485; Ume vs. Iwu (2008) 8 NWLR (Pt. 1089) 225 at 243; Ogojeofor vs. Ogojeofor (2006) 3 NWLR (Pt. 966) 205 at 22-211; Okafor vs. A.G. Anambra State (1991) 6 NWLR (Pt. 200)**

- G** 659 at 681.

Briefly stated the appeal SC. 619/2016 is an appeal against the ruling of the Court of Appeal in Appeal No. CA/A160/16 dismissing a motion challenging the record of appeal before it. Suit No FHC/ABJ/CS/97/2016 as well as Appeal Nos.

- H** AC/A/160/16 and CA/A/165/2016 relate to an election that is yet to be held, earlier fixed for 5/3/2016 but which was cancelled. In other words, the right of the appellants in the present appeal sought to have dismissal does not arise from the same set of facts as in the cases of Suit No. FHC/ABJ/CS/97/2016 and
- I** CA/A/160/2016, CA/A/165/16 and SC 619/2016.

Again to be noted is that the petition and judgment of the Court of Appeal that gave rise to this present appeal pre-date the said suit and appeals relied upon by the 1st and 2nd respondents/applicants and the judgment of the Court of appeal

- J** that is being challenged in this appeal by the appellant was delivered on

- A** 7/12/2015. Placing these facts in context, it is settled that in the matter of abuse of court process, it is the later action that constitutes an abuse of court process and for sure, this application falls off the marks. See **Ukachukwu vs. PDP (2013) LPELR; Dingyadi vs. INEC (No. 2) (2011) 18 NWLR (Pt. 1224) 154.**
- B** In effect what I am laboring all the while to put across is that the circumstances under which the concept of abuse of court process can be invoked are far from the current circumstances. It is not enough to say that an appellant or applicant has filed two or more appeals or applications as the case may be, the
- C** opponent must take a further step to establish that the appeals or motions fall within the definition of abuse of court process, that is that the conditions on which the concept is said to apply are in existence. If those conditions earlier stated which must go together none excepting do not exist then the abuse is not proved
- D** and the process cannot be said to be an abuse of court process. That in my humble view is what is in pace here as the applicants have failed to establish the abuse in the filing of the appeal which they seek to have struck out or dismissed which appeal stands independent of any other and has the right to be heard by this court.
- E** See **Society BIC SA & Ors Charzin Ind. Ltd (2014) LPELR SC; Arin vs. Chaka (2001) 14 NWLR (Pt. 734) 612 at 620.**

From the foregoing and the better and fuller reasoning in the lead Ruling, I hereby dismiss this application as I abide by the consequential orders made.

- F** **Mary Ukaego Peter-odili**
Justice, Supreme Court

- PETER-ODILI, (JSC):** I agree with the judgment just delivered by my learned
- G** brother Amina Adamu-Augie (JSC) and to place on record my support for the reasoning I shall make some remarks.

- This is an appeal against the ruling of the Court of Appeal delivered on the 3rd day of March, 2016 which dismissed the appellants' application to set aside its
- H** judgment. It is against that decision that the appellant have filed the appeal before the Supreme Court.

FACTS BRIEFLY STATED

- I** On the 28/3/2015 the Independent National Electoral Commission conducted National Assembly Election for Anambra Central Senatorial District.

The 1st appellant herein contested as the candidate of the 2nd appellant whilst the 1st respondent herein contested as the candidate of the 2nd respondent.

- J** At the conclusion of the Senatorial Election, INEC declared the appellants

A winners. The 1st and 2nd respondents as petitioners approached the National Assembly Election Petition Tribunal Awka, contending , that the 2nd appellant herein was not qualified to contest the Senatorial Election and that the election was fraught with several malpractices amongst other grounds.

B By its judgment delivered on 9/10/2015, the trial Tribunal dismissed the petition.

Dissatisfied with the decision of the trial tribunal, the 1st and 2nd respondents herein, as appellants, appealed to the court below.

C In a well-considered judgment delivered on 7/12/2015, the court below allowed the appeal. The Court of Appeal nullified the election of the 2nd appellant herein on the ground that being PDP's candidate, she was not **“the product of a valid primary and was therefore not duly and legitimately nominated. That**

D **has disqualified her from contesting the election into the Anambra Central Senatorial District.”**

The Court of Appeal nullifying the Anambra Central Senatorial District election then ordered INEC to conduct fresh election within 90 days from the date of the judgment. The INEC then scheduled fresh elections in the Anambra Senatorial District to hold on 5/3/2016. The appellants in reaction approached the court below seeking the following reliefs:

F (a) **An order extending time within which the applicant can apply to this honourable court to set aside its judgment in Appeal No. CA/E/EPT/28/2015 delivered on the 7th December 2015.**

G (b) **An order setting aside the Judgment of this honourable court in CA/E/EPT/28/2015 delivered on the 7th December, 2015.**

H (c) **An order of interlocutory injunction restraining the respondents either by themselves, agent or privies from conducting any fresh election for the Anambra Senatorial District on the 5th day of March, 2016 or any other date as being published by the respondent and/or giving effect on the judgment of this honourable court of 7th December 2015 in Appeal No: CA/E/EPT/28/2015 between Umeh & Anor. vs. INEC & Ors pending the hearing and determination of the originating motion filed by the applicant. See pages 2 and 25 of the records.**

J

A

The 1st and 2nd respondents filed a preliminary objection against the said originating motion. The court below refused the application holding that it was incompetent and thereby stuck it out. It is against that ruling that the appellants

B

have come before this court.

Upon the settlement and exchange of briefs of arguments, Dr. Alex Izinyon SAN of counsel for the appellants adopted their brief of argument filed on 21/3/16 and a reply brief of 19/8/16.

C

In the appellants' brief of argument they identified two issues for determination which are thus:

D

1. **Whether appellants application was in violation of Order 7, Rule 12 of the Court of Appeal Rules and section 285(7) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and a final judgment under section 246(3) of the constitution, having regards to the sole issue decided in the judgment. (Encompassing grounds 1 and 2 of the notice of appeal.)**

E

2. **Whether the learned justices of the Court of Appeal were right in the reasons they gave in refusing to set aside the judgment of 7/12/2015 which was given without jurisdiction and a nullity. (From Grounds 3, 4, 6 of the grounds of appeal).**

F

G Patrick I.N. Ikwueto SAN of counsel for the 1st and 2nd respondents adopted their brief of argument filed on 3/5/2016 in which he argued the preliminary objection.

H

Learned counsel for the 3rd 12th respondent, S.O. Ibrahim adopted its brief of argument filed on the 24/3/16. He also raised and argued a preliminary objection to the competence of the appeal.

I

It is needless to say that the matter of the two preliminary objections must be firstly tackled and settled before the court can venture forth. This is so because on it depends the competence and jurisdiction of the court. For if the objection succeed that would kill the appeal and so bring to an end the dispute before court. Therefore it is a fundamental hurdle which has to be scaled through before anything else. See **SPDC vs. Amadi (2011) 14 NWLR (Pt. 1266) 157 at 183.**

PRELIMINARY OBJECTION OF 1ST & 2ND RESPONDENTS

J

The preliminary objection is predicated on 6 grounds. To wit:

- A (a)** By section 246(3) of the 1999 Constitution (as amended) “The decisions of the Court of Appeal in respect of appeals arising from the National and State Houses of Assembly election petitions shall be final.”
- B (b)** On 3rd March 2016, Court of Appeal relied on the above constitutional provision above in refusing the appellants' motion praying the Court of Appeal to sit on appeal and set aside its final judgment delivered on 7th December 2015 in Election Petition Appeal No. CA/E/EPT/28/2015.
- C (c)** By its ruling of 3rd March 2016, the Court of Appeal refused to sit on appeal over its final judgment delivered on 7th December 2015. Hence this appeal.
- D (d)** The jurisdiction of the Supreme Court is limited and circumscribed by the 1999 Constitution (as amended). Hence, the instant appeal is unconstitutional and amounts to a gross abuse of court process.
- E (e)** Neither the court below nor this honourable court has jurisdiction to sit on appeal over the final decision of the Court of Appeal “in respect of appeals arising from the National and State Houses of Assembly Election Petitions”, as in the instant appeal.
- F (f)** The instant appeal is an exercise in gross frivolity. It ought to be struck out with heavy costs as a deterrent.

NOTICE OF PRELIMINARY OBJECTION OF 3RD – 12TH RESPONDENTS

- G 1.** Take notice that at the hearing of this appeal, the 3rd – 12th respondents shall raise objection to the competence of the appeal and shall contend that this honourable court lacks the jurisdiction to entertain this appeal as presently constituted.
- H 2.** Further take notice that the grounds upon which this objection is based are as follows:
- I (i)** By virtue of section 246(1) (b) and (3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), appellants have no right of appeal from the decision of court below in respect of an election petition.
- J (ii)** The court below is the final appellate court that has the requisite jurisdiction of entertaining appeals arising from election petitions.

- A** (iii) **The notice of appeal dated and filed on 9th March, 2016 is grossly incompetent.**
 (iv) **The appellants' brief of argument dated and filed 21st March, 2016 is incompetent.**

B

ISSUE FOR DETERMINATION ON THE PRELIMINARY OBJECTION
Whether having regard to section 246(1) (b) and (3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) is this honourable court has

C **jurisdiction to entertain this appeal.**

It is the reply brief of the appellant that responses to these objections are contained.

- Arguing for the 1st and 2nd respondents, learned senior counsel, P.I.N.
D Ikwueto contended that by section 246(3) of the 1999 Constitution (as amended) the Court of Appeal is the final and apex court in respect of appeals arising from the National and State Houses of Assembly Elections Petitions. **Dangana vs. Usman (2013) 6 NWLR (Pt. 1349) 50; Onuaguluchi vs. Ndu (2001) 7 NWLR (Pt. 712) 309 at 321.**

That the masking of the appeal to this court has not changed the nature of what is before the court and the Supreme Court has no vires to enter into it under any guise.

- F** Learned counsel for the 3rd – 12th respondents submitted that this appeal cannot be accommodated under section 233(2)(b) and (c) of the constitution as the decision appealed against did not emanate from civil or criminal proceedings as clearly indicated by the appeal No which is CA/E/EPT/28/2015 of the court
G before. That section 246(3) of the constitution has specifically provided for the situation on ground and excluded the appellate jurisdiction of the Supreme Court in relation to matters such as this. He relied on **Madumere vs. Okwara (2013) 12 NWLR (Pt. 1368) 303 at 317; HDP v Obi (2011) 18 NWLR (Pt. 1278) 80 at 111.**

- Responding learned counsel for the appellant, Dr. Izinyon SAN contended that the Court of Appeal or court below cannot have its judgment on CA/E/EPT/28/2015 as final as it was not so clothed with the garment of finality
I since the issue of the alleged non-holding of primary election by 1st appellant since 1st appellant in reply to the petition at the Election Tribunal had stated that 2nd appellant was its member and 1st appellant sponsored as candidate for the said senatorial election. Learned counsel relied on **Ucha vs. Onwe (2011) 4 NWLR (Pt. 1237) 385 at 427; PDP vs. Onwe (2011) 4 NWLR (Pt. 1236) 166 at 172.**

J

A That the court below lacked the jurisdiction to entertain any issue arising from the provisions of section 87 of the Electoral Act, 2010 (as amended). That the provisions of section 246(3) and 285 (7) of the 1999 Constitution do not apply to the judgment delivered on 7/12/2015 upon which this appeal is based. He **B** stated that it is on that ground that this appeal is well positioned for the determination thereof by this court.

In brief these objections are based in the first part on the side of the 1st and 2nd respondents that this appeal is an invocation of the appellate jurisdiction of the **C** Supreme over Election Petition Appeal No CA/E/EPT/28/2015 which jurisdiction the apex court lacks in the circumstance. The 3rd – 12th respondents towing the same line contend that even the appeal cannot be accommodated under section 233(2)(b) and (c) of the constitution. On the other part the appellant **D** disagrees with the respondents on the basis that since in the election petition appeal, the appeal court extended its jurisdiction in determining the issue of alleged non-holding of primaries by the 1st appellant basing it in nullifying the election of the 2nd appellant as senator. Therefore that this court has the power to **E** rectify the anomaly in hearing the appeal and granting the reliefs sought by the appellants.

A revisit to the port of embarkation to this present destination would help refresh the memory and that is: The court below had first heard the appellants' **F** originating motion seeking extension of time and an order to set aside the judgment of 7/12/2015 together with the 1st and 2nd respondents' preliminary objection challenging the competence of the originating motion. In the ruling the Court of Appeal in 3/3/2016 held as follows:

G “(a) That the Court of Appeal is bound by the interpretation of section 285(7) of the 1999 Constitution made by the Supreme Court in PDP v CPC (2011) 17 NWLR (Pt. 1277) 485 at 508 to the effect that no court has the power to extend time to do anything in relation to an election petition or judgment thereon or arising therefrom. **H**

(b) Accordingly, the originating motion seeking the extension of time as well as seeking to set aside the Court of Appeal's final judgment of 7th December 2015 in Election Petition Appeal No. CA/E/EPT/28/2015 is incompetent and liable to be struck out being in violation of Order 7 Rule 12 of the Court of Appeal Rules and **I**

J

- A** **section 285(7) of the constitution.**
- (c)** **The 2016 decisions of the Supreme Court in SC. 907/2015 Shinkafi vs. Yari and Sc 928/2015 Tarzoor vs. Ortom as well as Ishaku vs. Alnassan on nomination of candidates by political parties did not render previous judgments on the point per incuriam and liable to be set aside as a nullity.**
- B**
- (d)** **That the judgment of the Court of Appeal relied on previous judgments of the Supreme Court at the time.**
- C** **(e)** **The Court of Appeal determined that it had no jurisdiction to sit on appeal over its final decisions given under section 246(3) of the 1999 constitution since it stands to reason that the basic principles of law relating to the finality of judgments of the Supreme Court (as a final court under the 1999 constitution as amended) will equally extend to the finality of the judgment of the Court of Appeal as a final court under section 246(3) of the constitution.**
- D**
- E** **(f)** **The Court of Appeal concluded by saying thus:**
- F** **“There must be an end to litigation. The motion for the above reasons is incompetent and completely misconceived. It is hereby dismissed.” See pages 417 426 of the record.**
- G** **The provisions of the said section 246 of the constitution would be quoted hereunder thus:**
- “Section 246 read:**
- H** **1. An appeal to the Court of Appeal shall lie as of right from**
- a. Decisions of code of conduct tribunals established in the fifth schedule to this constitution;**
- I** **b. Decisions of the National and State House of Assembly Election Tribunals; and**
- c. Decisions of the Governorship Election Tribunal on any question as to whether**
- (i) Any person has been validly elected as a member of the National Assembly of a**
- J**

- A** **State under this constitution.**
- (ii)** **Any person has been validly elected to the office of a Governor or Deputy Governor; or**
- B** **(iii) The term of office of any person has ceased or the seat of any such person has been vacant.**
- 2.** **The National Assembly may confer jurisdiction upon the Court of Appeal to hear and determine appeals from any decision of any other court of law or tribunal established by the National Assembly.**
- C**
- 3.** **The decisions of the Court of Appeal in respect of appeals arising from the National and State House of Assembly election petitions shall be final”.**
- D**

This court in **Dangana vs. Usman (2013) 6 NWLR (Pt. 1349) 50** per Adekeye (JSC) stated at page 81 as follows:

F **“it is apparent that the provisions of the 1999 Constitution as amended do not envisage an appeal to the Supreme Court from the Court of Appeal in National Assembly Election Petitions based on whether anybody has been validly elected as a member of the National Assembly. The Court of Appeal shall be the final court by virtue of section 246(3) of the 1999 Constitution. The provisions of section 246(3) affirms the previous decisions of this court”.**

G

Going on further, Adekeye (JSC) relied on the decisions of this honourable court in **Onuaguluchi vs. Ndu (2001) 7 NWLR (Pt. 712) 309 at 321**, wherein it was held thus:

I **“Where an appeal is actually in respect of National Assembly Election or other relevant election, whatever error of a procedural nature or of a procedural vice as to jurisdiction or competency, cannot be corrected by this court. They can only be corrected by the Court of Appeal itself or else they will remain uncorrected, unresolved as this court cannot intervene**

J

- A** since it has no appellate or supervisory jurisdiction over the Court of Appeal in such circumstances. This court will not permit or encourage any subterfuge under which it may assume jurisdiction to hear an appeal in respect of which the
- B** constitution has in clear and unambiguous language made the Court of Appeal the final court. It follows that an appeal in respect of a decision of the tribunal in an election petition when decided by the Court of Appeal cannot be taken on appeal to the
- C** Supreme Court but is final for all purposes.”

My lord Adekeye (JSC) then concluded as follows at page 83;

- D** “In short, by virtue of section 246(1) (b) and (3) of the 1999 Constitution, the Court of Appeal has the mandate to decide an appeal arising from an election petition and shall be final court. Whether it did so perfectly, rightly or wrongly, the decision it
- E** arrives at cannot be taken on appeal the Supreme Court for consideration. The Supreme Court cannot entertain appeals which it has no jurisdiction to adjudicate upon. Once a court has no jurisdiction, a party cannot use any statutory provision
- F** or common law principle to impose it because absence of jurisdiction is irreparable in law. The matter ends there.”

In his contribution at page 93-94, Rhodes-Vivour (JSC) stated:

- G** “The starting point would be to find out the intention of the legislature. Subsection (3) of section 246 of the constitution is clear.
- H** The words used are plain as plain can be. The intention of the legislature clearly expressed is that all appeals from National and State House of Assembly election petitions shall come to an end after the Court of Appeal delivers its judgment. There shall
- I** be no further appeal to the Supreme Court.... The intention of the legislature is that the Court of Appeal shall be the final court for hearing of election petition appeals arising from the National and State House of Assembly election.....
- J**

A

This appeal is from the elections conducted by INEC for the Kogi East Senatorial Seat. It is an appeal from the National Assembly Election petition in view of the fact that it is for a senatorial seat. By virtue of the clear provisions of subsection (3) of the section 246 of the constitution, the judgment of the Court of Appeal delivered on the 13th day of December 2011 is final.

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This court has no jurisdiction to hear an appeal from the judgment even if the judgment is wrong. It remains inviolate forever. The pending appeals are incompetent.”

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Going along that same path as well set out by this court in the case above cited this court in a judgment anchored by Amiru Sanusi JSC in **Hon. Barambu Umaru Kwaru & Anor. vs. Peoples Democratic Party (PDP) in SC 120/2016** delivered on 9th day of December 2016 stated thus:

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“There is no doubt that the application the appellant filed before the lower court as stems from the decision the election petition which went on appeal to the lower court. The lower court determined that appeal and gave its final judgment determining finally, the right of the parties on that appeal. By the provisions of section 246(3) of the 1999 constitution as amended that decision has flair of finality. The decision of the court below has therefore no stair case for climbing to this court for rededication in whatever guise (sic) because this court is bereft of jurisdiction to hear any such appeal from the lower court on that subject matter. The Court of Appeal is a court of final resort and it had already heard and determined the appeal hence the matter was conclusively spent by virtue of the provisions of section 246(3) of the 1999 constitution as amended.”

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It may be that an argument may crop up citing section 233 (2) of the constitution to same situation. That provision stipulates as follows:

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- A Section 233 (2):**
“An appeal shall lie from decision of the Court of Appeal to the Supreme Court as of right in the following cases:
- B (b) Decisions in any civil or criminal proceedings on questions as to the interpretation or application of the constitution.**
- C (c) Decision in any civil or criminal proceedings on questions as to whether any of the provisions of chapter iv of the constitution has been, is being or is likely to be, contravened in relation to any person”.**

D An attempt to so smuggle the present package through that section 233(2) of the constitution would fail woefully in the light of the specific and particularized provisions of section 246 of constitution custom made for the current position, while Section 233(2) is a general provision. In a similar situation this court had in the case of: **Madumere vs. Okwara (2013) 12 NWLR (Pt. 1368) 303 at 317**

E paras F-E, stated as follows:

F “It is instructive to restate here that this court has held that where a specific provision of statutes is subsequent to a general provision, the specific provision of the statutes will prevail. In A-G, Ogun State & Ors. vs. A.G. Federation (2003) FWLR (Pt. 143) 206 at 246; (2002) 18 NWLR (Pt. 798) 232 at 283, paras. E-F, Uwais CJN (as he then was) restated the principle thus:

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H It seem to me that the provisions of section 162 subsection (1) and (10) of the 1999 constitution are general in nature while those of section 163 (b) of the constitution, which deal in particular with capital gains Tax and Stamp Duties, are specific. Therefore, the latter provisions override the former for *generalibus specialia derogant* (i.e. special things derogate from general things.) see also Edet Akpan vs. The State (1986) 3

I NWLR (Pt. 27) 225.”

J The correct pick on the issue in the instant case, therefore is that the specific provision under section 233(2) (b) (c) donates and subscribes the right of an aggrieved person to appeal against the

- A** **decision of the court below arising from the National and State House of Assembly Election Petition. By the clear and unambiguous words of the provisions of section 246(3) which make the court below the last port for any relief and its decision**
- B** **final as it were. There cannot be a further appeal against the lower court's decision. This court has stated this much in very many decisions and there is no feature in the present case which makes departure from that position legally permissible. See**
- C** **Onuaguluchi vs. Ndu (2001) 7 NWLR (Pt. 712) 309 at 321; Dingyadi vs. INEC (No. 1) (2010) 7 NWLR (Pt. 1224) 1 at 98; Ugwa vs. Lekwauwa (2010) 19 NWLR (Pt. 1226) 26 at 47 and Sha'Aban vs. Sambo (2010) 19 NWLR (Pt. 1226) 535 at 360-361.**
- D**
- Respondents' objection also hinge on section 285 (30 of the 1999 constitution (as amended). It is argued that were the appellants to have the right of appeal succeeds by the operation of the section 285(6)) and (7) of the 1999 Constitution
- E** (as amended), is unavailing. A detailed consideration of that ambit of respondents' objection is a luxury this court refuses to indulge in. After all, the right of appeal which is a sine qua-non to any such exercise does not enure to the appellants.”
- F** For me, towing the same line as my learned brothers in the earlier cases cited and put in context with what this court is faced, it is to be recanted that no court has the power to confer or donate jurisdiction to itself as it has to act within the perimeters or confines or boundaries of the law. Also jurisdiction cannot be
- G** conferred to the court as the appellants now seek by the consent of even all the parties involved in this process and it cannot also be circumvented rather it is circumscribed within the boundaries allotted it by the relevant law or constitutional provision. It is for that reason that by the very wordings of the
- H** provisions of the section 246(3) of the 1999 Constitution (as amended). When the Court of Appeal delivered its judgment on the 7th December 2015 in Election Petition Appeal **CA/E/EPT/28/2015**_nullifying the general election that produced the status of the 2nd appellant as a senator, that decision cut short that
- I** senatorial position for her regarding the entire process. It was a final judgment delivered with finality never to be revisited in any form by the Court of Appeal. Bringing it to the Supreme Court as has been sought is an act in futility since there is no jurisdiction in the apex court to entertain such an appeal, hear or determine.
- J** It is immaterial and of no moment to posit as appellants are doing that the Court of

- A** Appeal went outside its jurisdiction. This is so because even if a mistake was made by that court, the appeal dies with that error as the matter of the election petition in issue has by that final decision being settled for all time. In other words they journey has come to an end since the traveler came to his final destination.
- B** See the case of **Opara vs. Amadi (2013) 12 NWLR (Pt. 1369) 572 at 532; Salim vs. Idris (2014) 15 NWLR (Pt. 1429) 36; Emordi vs. Igbeke (2011) 4 SC (Pt. 11) 107.**

C From the foregoing and the fuller and better reasoning in the lead judgment, I too see the merit in this preliminary objection which I uphold. I strike out the appeal as I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

- D** **EJEMBI EKO, (JSC):** The 3rd respondent, INEC, conducted election on 28th March, 2015 to elect the senator representing Anambra Central Senatorial District in the National Assembly. Two political parties, All Progressive Grand Alliance (APGA) and the Peoples Democratic Party (PDP) participated in the election. APGA and PDP, respectively, are the 2nd respondent and 1st appellant in this appeal. The 2nd appellant was the candidate sponsored in the election by the PDP (1st Appellant). The candidate of APGA (2nd respondent) was the 1st respondent. The 2nd appellant, sponsored by the 1st appellant, was returned as the winner of the election.
- E**
- F**

G Dissatisfied with the outcome of the election, the 1st and 2nd respondent approached the National and State Houses of Assembly Election Tribunal to challenge the return of the 2nd appellant by the 3rd respondent. The sole ground for the petition was that the 2nd respondent's nomination and sponsorship by his party being defective, the 2nd respondent was accordingly not qualified to contest the election. No other person, who participated in the nomination process, complained. The PDP (the 1st appellant) had in fact put up the 2nd appellant as their sole and only candidate for the election.

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I The Election Tribunal, upon hearing the petition, dismissed it. Aggrieved, the 1st and 2nd respondents appealed the decision of the tribunal to the Court of Appeal which, allowing the appeal, held that the 2nd appellant was not qualified to contest in the election on the ground that the nomination process by which she came to be the PDP candidate was effective. The judgment was delivered on 7th December, 2015.

J Section 246(1)(b) of the 1999 Constitution, as amended, specifically

A provides that an appeal to the Court of Appeal shall lie as of right from the decisions of the National and State House of Assembly Election Tribunal. By the clear and unambiguous provisions of Section 246(3) of the same 1999 Constitution, as amended:

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“(3) ***The decisions of the Court of Appeal in respect of appeals arising from the National and State Houses of Assembly Election petitions shall be final***”.

C

On 12th February, 2016, exactly 65 days after the Court of Appeal judgment nullifying the election of the 2nd appellant, the appellants brought an application to the Court of Appeal praying that the decision be set aside. The grounds for the

D application includes the fact that the decision was reached per *in curiam* and that since the decision of the Court of Appeal was predicated on proper or improper nomination, as the basis for the disqualification of the 2nd appellant, the issue was pre-eminently a pre-election issue, which the National and State Houses of
E Assembly Election Tribunal lacks jurisdiction to entertain. The application was brought *ex debito Justitia*. The Court of Appeal dismissed the application. Section 285(7) of the 1999 Constitution, as amended, prescribes 60 days within which the
F Court of Appeal shall hear and dispose of any appeal from the decision of an election tribunal. In dismissing the application, the Court of Appeal held that it lacked jurisdiction, having become *functus officio*, to review its own judgment, and that the application was statute barred by the operation of Section 285(7) of the Constitution as amended. It is from this decision that the appeal has arisen.

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The cause of action for this appeal arose from election into the Senate of the National Assembly and the decision of the Court of Appeal from the decision of the National and State Houses of Assembly Tribunal. By virtue of Section 285 of the 1999 Constitution, as amended, exclusive jurisdiction is vested on the

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National and State Houses of Assembly Election Tribunal by the Constitution to hear and determine election petitions complaining about any undue return of any person from a National Assembly Election. Section 246 of the same Constitution that vests exclusive jurisdiction on the Court of Appeal to hear and determine

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appeal from the decisions of the National and State Houses of Assembly Election Tribunal expressly, and clear terms, in sub-section (3) thereof provides that the decision of the Court of Appeal in respect of appeals from the National and State Houses of Assembly Election Petition Tribunal shall be final. No supervisory

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- A** jurisdiction has been vested in the Supreme Court to review decisions of the Court of Appeal. In respect of any matter caught by Section 246(1)(b) and (3) of the 1999 Constitution, as amended. The constitutional reality is that Section 246(3) of the 1999 Constitution, as amended, has explicitly limited the jurisdiction of the
- B** Supreme Court vested by Section 233 of the same Constitution.

- This appeal is almost on all fours with the appeal in **HON. SUNDAY UGWA & ANOR. vs. HON. OJI LEKWAWA & ANOR. (2010) 19 NWLR (Pt. 1226) 26** wherein this court stated emphatically that in respect of any matter
- C** covered by Section 246(1)(b) and (3) of the 1999 Constitution, be it post final decision or any decision whatsoever, the decision of the Court of Appeal is final. Even if the decision is patently wrong no appeal lies from it to this Court or any other court. See also **ONUAGULUCHI vs. NDU & ORS. (2001) 7 NWLR (Pt. 712) 309 at 321; AWUSE vs. ODILI (2003) 18 NWLR (Pt. 851) 116.**
- D**

- This is a court of law, created and empowered by the constitution. It derives its jurisdiction from the same constitution. Accordingly, where the constitution expressly limits the scope of its jurisdiction it will be *ultra vires*, on
- E** the basis of *nemo quod dat non habet*, for it to assume, assert and exercise the jurisdiction and powers not vested in it by the constitution, or to exercise the jurisdiction and powers expressly taken away from it by the constitution. Court's jurisdiction to entertain a given matter is statutory. The absence of jurisdiction
- F** renders the proceedings and any decision therefrom a nullity, no matter how well conducted. There is no dearth of authorities of this court on this as can be seen from **MADUKOLU vs. NKEDMILIM (1962) 1 SCNLR 341; TIMITIMI vs. AMABEBE & ORS. 14 WACA 374; ADESOLA vs. ABIDOYE (1999) 14**
- G** **NWLR (Pt. 637) 28; TUKUR vs. GOVT. OF TARABA STATE (1997) 6 NWLR (Pt. 510) 549, etc.**

- This court has cause, recently, to re-state the law on the finality of Court of Appeal decisions under Section 246(3) of the 1999 Constitution, as amended, in
- H** **KAWUWA vs. PDP SC. 120/2016** delivered on 9th December, 2016. **HON. BELLO vs. HON. DAMISA & ORS. SC. 168/2016** delivered on 9th December, 2016 and **OSI vs. ACCORD PARTY & ORS. SC. 187/2016**. In all these cases and others before, it was held that by virtue of Section 246(3) of the 1999
- I** Constitution, as amended, the decision of the Court of Appeal in respect of appeals from the National and State Houses of Assembly Election Tribunal is final. See also **SALIU vs. IDRIS (2014) 15 NWLR (Pt. 1429) 36 at 60; JEJEDE vs. AKANDE (2014) 16 NWLR (Pt. 1432) 43 AT 72; OKADIGBO**

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A vs. EMEKA & ORS. (2012) LPELR 7839 SC; OKPARA & ANOR. vs. AMADI (2013) 6-7 SC. (Pt. 2) 49; MADUMERE & ORS. vs. OKWARA (2013) 6-7 SC (Pt. 2) 95; EMORDI vs. IGBEKE (2011) 4 SC. (Pt. 2) 107; DANGANA vs. USMAN (2012) LPELR-7827 SC.

B Election petitions and decisions of the National and State Houses of Assembly Election Tribunal are forbidden fruits to the Supreme Court of Nigeria. The Court of Appeal is the final court. There is no right of further appeal from the decision of the Court of Appeal. Section 246(3) of the 1999 Constitution is very clear and leaves no one in doubt about this. This is what makes this appeal a sheer abuse of process. It was brought against the clear and unambiguous provisions of the constitution. It has no backing of the law. Rather, it is brought in flagrant disobedience of the clear letters and spirit of the constitution.

D The appeal deserves to be and it is hereby struck out. This court lacks the necessary *vires* to entertain the appeal and all the interlocutory applications in the appeal are hereby struck out as I sustain the preliminary objection of Mr. Ikwuneto, SAN, to the appeal.

E **Ejembi Eko,**
Justice, Supreme Court

F **EJEMBI EKO, (JSC):** The facts in this application have been adroitly summarized in the ruling just delivered by my learned brother, Amina Adamu Augie, (JSC), which ruling I had the privilege of reading in draft.

G The kernel of the applicants' preliminary objection on grounds of abuse of court process is their contention that the appellant's are simultaneously in two law courts canvassing two mutually inconsistent and absurd positions. In other words, that the appellants are before two courts of law urging or praying for contradictory reliefs from the two corners of one mouth at the same time. It is absurd, the applicants who are respondents in the appeal **NO. SC. 204/2016** submit, for the appellants to ask that the 2nd appellant who was their candidate to be restored or reinstated as the candidate who won the senatorial election in the Anambra Central District; and at the same time, in the suit **No. FHC/ABJ/CS/97/2016** at the Federal High Court (determined on 29th February, 2016), to posit in the appeal therefrom, that the 2nd appellant, having since defected to All Progressive Congress (**APC**), is no longer their candidate. It is on this contention that the respondents in the appeal **No. SC. 204/2016**, applicants are praying that this appeal be struck out or dismissed for being a gross abuse of

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A court process.

Abuse of court's process manifests in a variety of situations and/or circumstances. There is however a common feature: that is, an improper use of judicial process by a party in litigation to interfere with the due administration of

B justice. See **SARAKI vs. KOTOYE (1992) 9 NWLR (pt. 264) 156; ARUBO vs. AIYELERU (1993) 24 NSCC (pt. 1) 255; CBN vs. AHMED (2000) 11 NWLR (pt. 724) 369.**

This court in **OKAFOR vs. A.G. ANAMBRA STATE (1991) 3 NWLR (pt. 200) 659**, per Karibi-Whyte, JSC at page 681 stated that “an abuse of process of the court is only possible by improper use of the issue to the irritation and annoyance of the opponent” and that “multiplicity of actions on the same matter may constitute an abuse of process of the court. His lordship however adds
D emphatically that “this is so only where the action is between the same parties with respect to the same subject matter”. As a matter of fact, between the appellants in appeal **No. SC. 204/2016** and the applicants there is only one action i.e. **No. SC. 204/2016**. Applicants are not parties in the suit **No. E FHC/ABJ/CS/97/2016.**

There may be a situation where there exist multiple transactions between the same parties. Such multiple transactions between the same parties may, often times, give rise to multiple causes of action. Each cause of action, in that
F situation, gives rise to a distinct right of action. The exercise of such right of action in such a situation between the same parties can not be said to be multiplicity of actions between the same parties in respect of the same cause of action to warrant a plea of abuse of court's process. Where, therefore, there exists
G a pending suit on a cause of action different and distinct from another in a subsequent suit between the same parties, the existence or pendency of the previous suit on an entirely different cause of action between the same parties does not make or constitute the subsequent suit an abuse of the court's process.

H Rather, what makes the subsequent suit an abuse of the process of court is the institution of a fresh action between the same parties and on the same subject-matter against the same opponent on the same issues when the previous suit has not yet been disposed of. See **OKAFOR vs. A.G. ANAMBRA STATE (supra)**
I **MORGAN vs. WETAFRICAN AUTOMOBILE ENGINEERING CO. LTD (1971) 1 NMLR 219; OKOROMADU vs. OKOROMADU (1977) 3 SC. 21; OYGBOLA vs. ESSO WEST AFRICA INC. (1966) 1 ALLNLR. 170.**

The appeal **No. Sc. 204/2016** pending in this court in an offshoot of the
J appeal **No. CA/E/EPT/28/2015** in which judgment was delivered on 7th

A December, 2015. In the said appeal **No. CA/E/EPT/28/2015** the 2nd appellant in the appeal **No. SC. 204/2016** was declared by the Court of Appeal

B **“not the product of a valid primary and was, therefore, not duly and legitimately nominated that has disqualified her from contesting the elections into the Anambra Central Senatorial District”.**

C The Court of Appeal made a consequential order directing Independent National Electoral Commission (INEC) to conduct fresh election on 5th March, 2016 and specifically directed that the People's Democratic Party (**PDP**) be excluded from the re-run election. In the suit **No. FHC/ABJ/CSS/97/2016** the **PDP** was the sole plaintiff at the Federal High Court. The 2nd appellant in the appeal **No. SC. 204/2016** was not a party in that suit filed on 10th February, 2016. The 1st appellant in the appeal **No. SC. 204/2016** averred in the suit **No. FHC/ABJ/CS/97/2016** that the 2nd appellant had ceased to be their member and candidate, as she had defected to another political party, **APC**. INEC remains a party common to the suit **No. FHC/ABJ/CS/97/2016** and appeal **No. SC/204/2016**.

The applicants who are complaining that the appeal **No. SC. 204/2016** constitutes an abuse of court's process in view of the previous and subsisting suit **No. FHC/ABJ/CS/97/2016** are not parties in the suit **No. FHC/ABJ/CS/97/2016**. How therefore can these parties claim that the appeal **No. SC. 204/2016** has annoyed, irritated or oppressed them who are strangers to the suit **No. FHC/ABJ/CS/97/2016**? Between the applicants herein and the appellants in appeal **No. SC. 204/2016** there can be no multiplicity of actions. The elements of institution of a fresh action between the same parties; on the same opponent and on the same issues are totally lacking in this application. The applicants have not established that the appeal **No. SC. 204/2016** constitutes an intent to irritate, annoy and oppress them viz-a-viz the previous and existing suit **No. FHC/ABJ/CS/97/2016**. I do not see how the appellants in the appeal **No. SC. 204/2016**, in view of the existing suit **No. FHC/ABJ/CS/97/2016**, have abused the rights of the applicants herein, or that they have so oppressed, irritated or annoyed the applicants by appellants maintaining against them the appeal **No. SC. 204/2016**.

There is no substance in his application, which in my firm view is frivolous. Accordingly, it is hereby dismissed. I also make no order as to costs.

Ejembi Eko,

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Justice, Supreme Court

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**PETER OGBU
AND
THE STATE**

SC. 450/2014

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

FRIDAY, 24TH FEBRUARY, 2017

BEFORE THEIR LORDSHIPS

**OLABODE RHODES-VIVOUR
CLARA BATA OGUNBIYI
AMIRU SANUSI
AMINA ADAMU AUGIE
PAUL ADAMU GALINJE**

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

APPEAL: Brief writing – Reply – Brief – Role.

CONSTITUTIONAL LAW: Right to life – Justified killing – Section 33(2) (a) of the Constitution of the Federal Republic of Nigeria (1999) (as amended) – When applicable.

CRIMINAL LAW: “Criminal responsibility” – Meaning.

CRIMINAL LAW: Concept of self defence – Whether there is any distinction in the principles of self defence in the Criminal Code and Penal Code.

CRIMINAL LAW: Self defence – Application

CRIMINAL LAW: Self defence – Application in the Penal Code – How determined.

CRIMINAL LAW: Self defence – Guiding principles.

CRIMINAL LAW: Self defence – Justification – S. 32(2) of Constitution of Federal Republic of Nigeria 1999 (as amended) – Considerations thereof.

CRIMINAL LAW: Self defence – Section 59 of the Penal Code – Ingredients.

CRIMINAL LAW: Self defence – When erroneously applied in the Penal Code – Effect.

CRIMINAL LAW: Self defence – Where applicable – Effect .

CRIMINAL LAW: Self defence – Whether self defence is a complete defence in the Penal Code

WORDS AND PHRASES: “Self defence” – Meaning.

Issue for Determination

Whether the defence of self– defence is a complete defence under the Penal Code Law of Benue State.

Facts of the Matter

The appellant, who was “16 years, 6 months and 10 days old”, got into a fight with one Aondongusha Abunku “*alias Oryankwagh*”, outside a carpentry workshop, in Makurdi, on **23/5/2009**. He picked up a knife and stabbed the said *Oryankwagh* in the chest, and the said *Oryankwagh* was taken to a hospital, where he died a few hours later.

He was arraigned before the High Court, Makurdi, on a charge of culpable homicide punishable with death. He pleaded not guilty. The prosecution called six witnesses. The appellant admitted in his statement to the police [**Exhibit 3**] and his testimony in court that he stabbed the deceased to death, but he put up a defence of self-defence.

At the trial court, the appellant raised the issue of “*whether the prosecution proved the case of culpable homicide punishable with death against [him] as required by law*”. The respondent's Issue was “*whether [his] purported defence that he stabbed the deceased in self-defence can avail him having regard to circumstances of the case*”. The court found him guilty of the offence of culpable homicide not punishable with death. The appellant's appeal to the Court of Appeal centered on self-defence. The Court of Appeal dismissed his appeal hence the further appeal to the Supreme Court.

Held (Unanimously allowing the appeal)***1. The role of a reply brief.***

A reply brief is necessary when an issue of law or new questions are raised in the respondent's brief. This is because its function is only to refute the arguments, if any, in the respondent's brief [Onwudiwe vs. FRN (2006) 10 NWLR (Pt. 988) 382 SC]. (P 258 paras H–I.)

2. The meaning of 'self-defence'.

The real question is whether there is a difference when it comes to self-defence, which is the use of force to protect oneself, one's family or property from a real or threatened attack – See *Black's Law Dictionary*, 8th Ed.

It is a recognized principle worldwide that a citizen has the right to defend his person, family and property against unwarranted aggression, trespass or threat. This right is guaranteed to all Nigerian citizens by the 1999 Constitution (as amended), which provides in Section 33(2) that:

“A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such and in such circumstances as are permitted by law, or such force as is reasonably necessary:

a. For the defence of any person from unlawful violence or for the defence of property”.(P 259 paras A–D)

3. The guiding principles of self-defence.

The guiding principles are necessity and proportion – the force must have been necessary and it must have been reasonable – See – *Black's Law Dictionary*, 8th Ed, and *Adeyeye vs. State* 2013) 11 NWLR (Pt. 1364) 47, where Ogunbiyi, JSC, stated as follows:

“The two questions, which ought to be posed, and therefore, answered before the trial court, were – (1) on the evidence, was the defence of self-defence necessary? (2) Was the injury inflicted proportionate to the threat offered, or was it excessive? If, however, the threat offered is disproportionate with the force used in repelling it, and the necessity of the

occasion did not demand such self-defence, then the defence cannot avail the accused". [R. vs. Onyeamaizu (1958) NRNLR 93]. (P 259 paras D–H)

4. *Whether any difference in the plea of self-defence in the criminal code and the penal code.*

There is no difference whatsoever – a successful plea negatives the existence of an offence, so that where a person kills another in defence of himself, such a killing is excused, and it does not amount to manslaughter under the criminal code, nor culpable homicide NOT punishable with death under the penal code.

Section 32(2) (a) of the constitution makes it clear that one can take the life of another if such killing is reasonably justifiable for the defence of any person from unlawful violation or defence of property.

This provision is embedded in the penal code and criminal code.

Section 59 of the Penal Code says that “nothing is an offence, which is done in the lawful exercise of the right to private defence”. Section 32(3) of the criminal code also says that a person is not criminally liable for an act “when the act is reasonably necessary in order to resist actual and unlawful violence threatened to him or to another person in his presence”. (P 262 paras A–D).

Per Augie, (JSC)

“In Uwaekweghinya vs. State (2005) 9 NWLR (Pt. 930) 227, this court considered the provision of Section 286 of the Criminal Code; Belgore, (JSC) (as he then was) explained.

“The victim of an unprovoked and unlawful attack is entitled to defend himself and in doing so to use such force as is reasonably necessary to ward off the attack. If the unprovoked attack is likely to cause him grievous harm or even death or he is reasonably in apprehension of the same, he is entitled to use such force available to preserve himself from such grievous harm or death. The purport of self-defence is to negative the existence of an offence so that where a person kills another in self-defence, the killing, unlike in provocation as a defence, does not amount to an

offence but total exoneration of the accused. Thus, the Accused is discharged and acquitted of any offence. That is - S. 286 Criminal Code and its proviso.

This court dealt with the exact same provisions of the penal code in Kwaghshir & Anor vs. The State (1995) 3 NWLR (Pt. 386) 651 SC, which originated from the High Court of Benue State. The trial court had sentenced the appellants to death for murder. The court below dismissed their appeal and affirmed their conviction and sentence.

This court allowed their appeal and acquitted and discharged them because the defence provided by *Section 65* read together with *Section 59* of the Penal Code availed 1st appellant and excluded him from criminal responsibility. Ogwuegbu, (JSC), observed as follows:

“The question is whether the 1st appellant was entitled to be acquitted as having acted in private defence as provided in Section 59 of the Penal Code - The 1st appellant asserted his right of private defence and in his evidence, gave full account of what happened. On the strength of the evidence, it could not be said that the violence used by the 1st appellant went far beyond anything that was required in the defence of his person or liberty - The 1st appellant explained the circumstance, which gave rise to the right of private defence, which he claimed in justification of the killing. It is the duty of the prosecution to disprove the defence. This it failed to do. Even though, the 1st appellant had disarmed the deceased before stabbing him, he had no means of running away after disarming the deceased as the latter was still on him. It is clear that the 1st appellant acted within his rights in the heat of the moment. The right of private defence availed him in the circumstances to exclude criminal responsibility for causing the death of Abamber Avenda. Both Appeals succeed and are hereby allowed - Each appellant is acquitted and discharged”.

(Pp 262 – 263 paras D – G)

5. *The effect of a plea of self defence where applicable under the criminal and Penal Codes.*

The effect is the same across the board and where the defence of self-defence is applicable, it does not serve merely as a mitigating circumstance but as a complete exculpatory circumstance.

The appellant is right; not only did the court below miscalculate the effect of a defence of self-defence under the penal code, it also failed to factor in the distinction between the provisions in Chapter II of the penal code vis-à-vis provisions in Chapter XVIII of the same code.

(Pp 263;265 paras G–H; E).

6. *The meaning of 'criminal responsibility'*

Chapter II of the *Penal Code* deals with criminal responsibility. Responsibility means answerability or accountability; it is used in the criminal law in the sense of “criminal responsibility”, which means – “answerability to the criminal law” – *Black's Law Dictionary*, 8th Ed. The simple moral idea, incorporated in all legal systems, including the Nigerian criminal law, is that no one should be convicted of a crime, unless some measure of subjective fault can be attributed to him.

Section 59 of the Penal Code insists that nothing is an offence, which is done in the lawful exercise of the “right of private defence”. The right of private defence is known in English Law as self-defence, and as the appellant rightly submitted, they mean the same thing and have the same exonerating effect under the criminal and penal codes. For instance, in *Uwaekweghinya vs. State* (supra), this court held:

The purport of self-defence is to negative the existence of an offence so that where a person kills another in self-defence, the killing, unlike in provocation as a defence, does not amount to an offence but total exoneration of the accused. Thus, the accused is discharged and acquitted of any offence. That is the provision of S. 286 Criminal Code and its proviso.

In *Kwaghshir's case* (supra), under the penal code, this court held:

It is clear that the 1st appellant acted within his rights in the heat of the moment. The right of private defence availed

him in the circumstances to exclude criminal responsibility for causing the death of Abumber Avenda.

But the said defence operates with certain conditions, by virtue of the enabling provisions in both the criminal code and the penal code, which place restrictions on the enjoyment of that right. Section 60 of the Penal Code provides that subject to restrictions set out in Sections 62 and 63 of the code, every person has a right to defend his body and body of another “against any offence affecting the human body”.

By virtue of Section 62 of the Penal Code, self-defence must be proportional to the harm that is intended to be prevented, otherwise, the use of the right will not be justified, and Section 63 provides that there is no right of private defence in cases in which there is time to have recourse to the protection of public authorities, e.g the police.

(Pp 265 – 266 paras F – F)

7. *Self-defence is a complete defence in the penal code.*

The court below started off wrongly when it held that the defence of self-defence will ameliorate but not completely exonerate the guilt of the appellant, unlike the effect under the criminal code. The correct position is that self-defence is a complete defence under the criminal code and the penal code, and a successful defence of self-defence leads to the discharge and acquittal of the accused – [Uwaekweghinya vs. State (*supra*), Kwaghshirvs. State (*supra*)].

It reinforced that erroneous perception when it further held that the said Section 223(2) mitigates the charge of culpable homicide punishable with death to culpable homicide not punishable with death “by reason of self-defence”, which is a misapprehension of the law, and a mix-up of principles of self-defence or right of private defence.

Simply put, the said may be exercised against an aggressor, and subject to the aforesaid restrictions, it extends to killing where the act being repelled is an attack, which causes reasonable apprehension of death or grievous hurt. If the right of private defence is exceeded or

abused and it has caused death; where it is exercised in good faith, without premeditation and without intending to do more harm than is necessary, it becomes culpable homicide *NOT* punishable with death, and a finding involving this Section does not amount to an acquittal.

The main issue for determination in this appeal is whether or not a defence of self defence is a complete defence. By the use of the phrase self defence, it signifies admission of a crime by an accused person but with a caveat however that the act was done in self defence. In other words, there must have been a reason for the act which in normal circumstance would not have happened. (Pp 267; 269 paras E–I; H–I.)

8. *The import of S.33 (2) (a) of the 1999 Constitution (as amended)*
When regard is had to Section 33(2)(a) of the constitution, it becomes obvious that the lower court was in great error as rightly submitted by the appellant's counsel. This I say because the import of the constitutional provision (supra), is where one's right to life stops where another's right to defend self takes-off. In other words, the taking of the assailant's life in defence of one's life or other person's life is constitutional and not an offence.

For all intents and purposes and, as rightly submitted by the appellant's counsel, the cumulative effect of the foregoing depicts that the appellant's act is not an offence under Section 59 of the Penal Code; it is not also an offence under Section 33(2)(a) of the constitution; hence by the provision of Section 36(8), the appellant should not be held guilty of a criminal offence. The section provides as follows:

“No person shall be held to be guilty of a criminal offence on account of any act or omission that did not at the time it took place, constitute such as offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.”

(P 271 paras B–F)

Nigerian Cases Cited in this Judgment

A. Famakinwa vs. State (2016) 1-3 SC (Pt. 1) p. 139;
Abadallabe vs. Bornu Native Authority (1963) NSCC 132;
Abara vs. State (1981) 2 NCR 110;
Abdulkareem vs. Incar Nigeria Ltd (1984) 15 NSCC 603;

Adeyeye vs. State (2013) 11 NWLR (Pt. 1364) 47;
Ahmed vs. State (1999) 7 NWLR (Pt. 612) 641;
Ajunwa vs. The State (1988) 2 NSCC 15;
Ajunwa vs. The State (1988) 4 NWLR (Pt. 89) 330;
Ameh vs. The State (1978) NSCC 373;
Apugo vs. State (2007) 2 NNCC 30;
Apugo vs. The State (2007) 2 NCC 30;
Gabriel vs. State (1989) 5 NWLR (Pt. 122) 457;
Gambo Musa vs. State (2009) ALL FWLR (Pt. 492) 2010;
Hashe vs. Magaji (2009) ALL FWLR (Pt. 461) 887;
Ibodo vs. Enarofia (1780) 5-7 SC 42;
In Sule vs. State (2009) 6 SCNJ 65;
Joseph vs. The State (2011) 16 NWLR (Pt. 1273) 226;
Kim vs. State (1992) 4 NWLR (Pt. 233) p. 17;
Kwaghshir & Anor vs. The State (1995) 3 NWLR (Pt. 386) 651 SC;
Musa vs. State (2009) ALL FWLR (Pt. 492) 1020;
Onwudiwe vs. FRN (2006) 10 NWLR (Pt. 988) 382 SC;
Paul Ameh vs. The State (1978) NSCC 373 to 374;
Paul Ameh vs. The State (1978) NSCC 373 to 374;
R vs. Onyeamaizu (1958) NRNLR 93;
R vs. Oshunbiyi (1961) ALL NLR (Pt. 4) 453;
R. vs. Onyeamaizu (1958) NRNLR 93;
Silas Sule vs. The State (2009) 38 NSCQR (Pt. 11) 1069;
Sodeinde vs. Registered Trustees Ahmadiyya Movement in Islam (1982) 2 SCNLR 284 at 326;
State vs. Azeez (2008) 35 NSCOR 426;
Sule vs. State (2009) 38 NSCQR (Pt. 11) 1069;
The State vs. Dr. Kura (1975) 5 UILR;
The State vs. DR. Murtari Kura (1975) 5 UILR;
Uwaekweghinya vs. State (2005) 9 NWLR (Pt. 930) p. 227; and
Wachukwu vs. Owunmanne (2011) 14 NWLR (Pt. 1266) 1.

Nigeria Statutes Cited

The Penal Code;
 The Criminal Code;
 The Constitution of the Federal Republic of Nigeria 1999;

A Representations:**Miss E.N. Tinoshaw** with **O.F. Eche, (Esq.)** – *for the appellant***Mrs B.E.T. Surma (PSC 11. MOJ, Benue State)** – *for the respondent*

B AUGIE, (JSC) (Delivering the Lead Judgment): This appeal turns on a narrow issue whether a plea of self-defence is a complete defence under the penal code law of Benue State.

The appellant, who was “16 years, 6 months and 10 days old”. Got into a fight with one Aondongusha Abunku “*alias Oryankwagh*”, outside a carpentry workshop, in Makurdi, on **23/5/2009**. He picked up a knife and stabbed the said *Oryankwagh* in the chest, and the said *Organkwagh* was taken to a hospital, where he died a few hours later.

D He was arraigned before the High Court, Makurdi, on a charge of culpable homicide punishable with death. He pleaded not guilty. The prosecution called six witnesses. The appellant admitted in his statement to the police [**Exhibit 3**] and his testimony in court that he stabbed the deceased to death, but he put up a defence of self-defence.

E At the trial court, the appellant raised the issue of “*whether the prosecution proved the case of culpable homicide punishable with death against [him] as required by law*”. The respondent's Issue was “*whether [his] purported defence that he stabbed the deceased in self-defence can avail him having regard to circumstances of the case*”.

F In answer, the trial court held that the prosecution proved a case of culpable homicide against him beyond reasonable doubt, however, it was **G** “*unable to hold that [his] intention was to kill the deceased*”. As to the defence of self-defence, the trial court held as follows:

In Sule v. State (2009) 6 SCNJ 65, the Supreme Court held:

H

“Self-defence means that the accused person did the act while in the process of defending himself, but with no intention to kill or cause grievous bodily harm.”

I

I agree with the defence counsel that Section 223(2) of the code override Section 62 and 63 and raise the issue of pre-meditation and intention. The above case i.e. *Sule v. State* (supra) has also

J

- A** held that for the defence to avail an accused person, there must be lack of intention on the part of the accused to kill the deceased. From the testimony of *PW2* who was an eye-witness, the cause of the fight was the allegation by the deceased that the accused was abusing him in Igede language. The story of the accused person is not different. In other words, it was the deceased that initiated the fight. There is no evidence from the prosecution that there had been previous misunderstanding between the accused and the deceased and the latter set out on a revenge mission. I agree with the prosecuting counsel that the accused person had the opportunity to flee and may have used more force than necessary; I am however, unable to hold that the intention of the deceased was to kill the deceased. Upon a calm and careful review of the evidence before the court, my answer to *Issue 2* is in the affirmative. That is that the defence of self-defence avails the Accused Person. And I so hold.
- B**
- C**
- D**
- E**

It found him guilty of the offence of culpable homicide not punishable with death and in passing sentence, the trial court stated as follows

- F** While the convict may have shown remorse that will not serve as a lesson to other young persons. It is also not in doubt that the deceased's family has also suffered some loss and they also need justice to be done to them. I agree with the prosecuting state counsel that the payment of a fine will not be appropriate in the circumstance of this case. The maximum punishment prescribed by Section 225 of the code is life imprisonment, considering that the convict is a young person, I hereby sentence the convict, Peter Ogbu, to a prison term of 10 years (ten years) without an option of fine.
- G**
- H**

- The appellant's appeal to the court below centered on self-defence, and in affirming the decision of the trial court, the court below held:
- I**

- Now, the castle of the appellant has been built on self-defence. Since the trial court has found in [his] favour that the defence of self-defence availed him and the respondent is equally at one
- J**

- A** with this finding, having not appealed against it, what is left for consideration - - is the consequential effect of the said defence on the offence with which [he] has been charged. - - The trial court also found that there was no ingredient of premeditation on [his] part. This simply means that before the time of the commission of the offence charged [he] did not plan to commit the offence - Again, I must agree with learned counsel for the respondent that the case relied upon by learned counsel for the appellant, are not relevant to the circumstances of the instant matter. And as rightly held by learned trial judge, [he] was charged under the penal code and not criminal code, the appellant could only be convicted under Section 223(2) and sentenced under Section 225, both of the penal code. For, to use the words of learned counsel for the respondent, the defence of self-defence will only “ameliorate” but not completely exonerate the guilt of the appellant, quite unlike what the effect will be if he had been charged under the criminal code.
- B**
- C**
- D**
- E**

On the issue of the Sentence, the court below observed as follows:

- F** The maximum punishment for the offence for which the appellant was convicted is life imprisonment without an option of fine, see Section 225 of the penal code. It is patent on the face of the printed record of appeal that the learned trial Judge took into consideration the tender age of the appellant, hence, he sentenced [him] to ten years imprisonment term without an option of fine. I cannot find any reason whatsoever pointing to the fact that the learned trial judge exercised his discretion in sentencing the appellant, wrongly. It should be remembered that justice is not a one way traffic under our criminal justice system. It is three – pronged, that is, justice first and foremost to the victim of a crime, in the instant matter, the victim is dead.
- G**
- H**
- I** Secondly, justice to the society, especially to relatives of the victim on the one hand and the rest of society on the other. That is, ultimately, one of the ends of justice is that the members of society must be deterred from the commission of the type of crime in issue. And finally, justice to the convict, in the instant
- J**

- A** **case, the appellant. I hold that in the entire process of his trial which I consider to be fair, conviction and sentencing, no miscarriage of justice was occasioned to the appellant.**
- B** The appellant has appealed to this court with a notice of appeal that contains five grounds of appeal, and he formulated five issues for determination in his brief of argument prepared by Chief Agbo Sunday, S.O. Ocheal, FCA I, Elizabeth Tionsha (Miss), Comfort K. Umburga (Mrs), TyekuAtsehekaa (Mrs),
C MorenikeFayomi (Mrs), and J.P.A. Agbo, Esq. The said five Issues for determination are :
- D** 1. **Whether the court below was right when in its judgment it held that the defence of self-defence is not a complete defence or answer to an offence of culpable homicide punishable with death or not punishable with death under the Penal Code Cap. 124 Law of Benue State, 2004?**
- E** 2. **Whether the court below was right in affirming the decision of the trial court that the respondent proved beyond reasonable doubt a case of culpable homicide against the appellant when the trial court made a finding of fact that the defence of self-defence availed the appellant who had no intention to kill the deceased?**
- F** 3. **Whether the court below in its Judgment adequately appreciated, considered and or decided on all issues properly raised and canvassed before it by the appellant in arriving at its decision?**
- G** 4. **Whether the court below was right when it held that the trial court had not wrongly exercised its discretion in sentencing the appellant o 10 years imprisonment without option of fine, having regards for the facts and circumstances of the case on appeal?**
- H** 5. **Whether the court below was right when it held in its judgment that the respondent's brief of argument was not an incompetent process in law and thereby dismissing the appeal on the issue?**
- I**
- J**

A The respondent formulated only one issue for determination in its brief of argument settled by L.M Sokpo, Esq., and that is:

B Whether the court below was right by affirming and upholding the conviction and sentence passed by the trial court on the appellant for the offence of culpable homicide not punishable with death contrary to Section 225 of the Penal Code Cap. 124 - - Laws of Benue State, 2004.

C As I said at the beginning, the crux of the issue in this appeal is whether the defence of self-defence is a complete defence or not. Once that issue is resolved, all the other issues will fall into line.

D The appellant says that the court below erred in holding that a defence of self-defence is not a complete defence under the penal code, and thus, drawing a distinction between the effect of a successful defence under the penal code and criminal code.

E He submitted that its decision is not only a misconception of a defence of self-defence under the penal code Law applicable to Benue State but erroneous on the applicable laws, including application of the provisions of penal code and criminal code.

F He referred this court to provisions of the penal code law, dealing with criminal responsibility – that is, Section 43 to 67, and submitted that the implication of the lower courts' findings is that the defence of self-defence availed him, and by Section 59, the irresistible conclusion is that his act is defence of himself is not an offence, and that the penal code, which says an act done in lawful exercise of the right of private defence is not an offence, cannot turn round to punish the doer of such act, the implication of which will amount to contradiction in its provisions thereof.

H Furthermore, that his case is not an offence under Section 59 of the Penal Code, it is not an offence under Section 33(2)(a) of the 1999 Constitution, therefore, under Section 36(8) of the Constitution, he shall not be held guilty of a Criminal Offence.

I He also cited *Abadallabe vs. Bornu Native Authority (1963) NSCC 132*, *Ameh v State (1978) NSCC 373*, *Musa vs. State (2009) All FWLR (Part 492) 1020* *Apugo vs. State (2007) 2 NNCC 30* and *Ajunwa vs. State (1988) 2 NSCC 497*, where this court dealt with this issue, and arrived at conclusions

J contrary to the position of the court below. He further argued as follows:

- A Self-defence and Section 59 of Penal Code have the same tenor. Nothing done in the lawful exercise self-defence is an offence. The law justifies it. The law excused it. The law does not go back to punish for what it jutisfies or excused. It is thus an**
- B erroneous view to state that successful plea of the defence can only ameliorate the punishment - - It is not the practice of this court to interfere with concurrent findings of lower courts. The two courts below affirmed that the defence of self-defence**
- C availed [him] without qualification. [He] must take the full and not half benefit of the said concurrent finding that the defence of self-defence availed him.**
- D** The respondent's position is that the decision of the court below is legally sound and correct, as under the penal code, the defence of self-defence is not a complete answer to a charge of culpable homicide punishable with death; that the authorities he cited are not applicable because they were based on the criminal
- E** code; and that the trial court should have convicted and sentenced the appellant to death but for the defence of self-defence, which only ameliorated his punishment, and not completely exonerated him.
- It cited **Sule vs. State (2009) 38 NSCQR (Pt. 11) 1069, Notes on the**
- F Penal Code Law(1978) 4th Ed. By S.S. Richardson, Abara vs. State (1981) 2 NCR 110, State vs. Azeez (2008) 35 NSCOR 426** and submitted that the heavy weather made of the provisions of the Penal Code – Sections 59-63, and Chapter II, which covers Sections 43-67 of the Penal Code Law, is nothing but an
- G** academic voyage, aimed at wasting the time of this court.
- The appellant submitted in his reply brief that the true and legitimate exposition/interpretation of law and reliance placed on a defence of self-defence cannot amount to heavy weather made of it or an academic voyage aimed at
- H** wasting this court's time.
- He went on to canvass more or less the same arguments as in the main brief, which is, certainly, not the role of a reply brief. A reply brief is necessary when an issue of law or new questions are raised in the respondent's brief. This is
- I** because its function is only to refute the arguments, if any, in the respondent's brief – see **Onwudiwe vs. FRN (2006) 10 NWLR (Pt. 988) 382 SC.**
- This Appeal calls into question the dichotomy between the Criminal Code, applicable in the Southern part of Nigeria, and the Penal Code, applicable in the
- J** Northern part of the same country.

- A** However, the real question is whether there is a difference when it comes to self-defence, which is the use of force to protect oneself, one's family or property from a real or threatened attack – see *Black's Law Dictionary*, 8th Ed. It is a recognized principle worldwide that a citizen has the right to defend his person, family and property against unwarranted aggression, trespass or threat.

This right is guaranteed to all Nigerian citizens by the 1999 Constitution (as amended), which provides in Section 33(2) that:

- C** A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such and in such circumstances as are permitted by law, of such force as is reasonably necessary
- D** b. For the defence of any person from unlawful violence or for the defence of property.

- So, the guiding principles are necessity and proportion – the force must have been necessary and it must have been reasonable – see – *Black's Law Dictionary*, 8th Ed, and **Adeyeye vs. State 2013) 11 NWLR (Pt. 1364) 47**, where Ogunbiyi, (JSC), stated as follows:

- F** The two questions, which ought to be posed, and therefore, answered before the trial court, were – (1) on the evidence, was the defence of self-defence necessary? (2) Was the injury inflicted proportionate to the threat offered, or was it excessive? If, however, the threat offered is disproportionate with the force used in repelling it, and the necessity of the occasion did not demand such self-defence, then the defence cannot avail the accused. See **R. vs. Onyemaizu (1958) NRNLR 93.**

- That said; the actual limits within which Section 32(2) (a) of the Constitution operates are set out in the Criminal and Penal Codes. The **Criminal Code** provides as follows in its **Section 286**

- J** When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for him to use such force to the assailant; as is reasonable necessary to make effectual defence against the

- A** **assault: Provided that the force used is not intended and is not such as is likely to cause death or grievous harm. If the nature of the assault is such as to cause reasonable apprehension of death or grievous harm and the person using force by way of**
- B** **defence believes, on reasonable ground that he cannot otherwise preserve the person defended from death or grievous harm, it is lawful for him to use any such force to the assailant as is necessary for defence, even though such force may cause**
- C** **death or grievous harm.**

The relevant provisions of the *Penal Code* are as follows:

D Section 59

Nothing is an offence which is done in the lawful exercise of the right of private defence.

E Section 60

Every person has a right, subject to the restrictions hereinafter contained, to defend

- (a) His own body and the body of any other person against**
- F** **any offence affecting the human body.**

Section 62

- G** **The right of private defence in no case extends to inflicting of more harm than it is necessary to inflict for the purpose of defence.**

Section 63

- H** **There is no right of private defence in case in which there is time to have recourse to the protection of the public authorities.**

Section 65

- I** **The right to private defence of the body extends, under the restrictions mentioned in Sections 62 and 63, to the voluntary causing of death only when the act to be repelled is of any of the following descriptions, namely:**

J

- A (a) An attack which causes reasonable apprehension of death or grievous hurt.**

Section 223(2) of the Penal Code further provides as follows:

B

Culpable homicide is not punishable with death if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the powers given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.

D

The appellant was faced with a death sentence having been charged with the offence of culpable homicide punishable with death. But the trial court accepted his defence of self-defence and convicted him for the lesser offence of culpable homicide NOT punishable with death.

E

Since there was no appeal against the trial court's finding that the said self-defence availed him, the court below only considered the *consequential effect of the said defence on the offence, with which the appellant has been charged*". The effect thereof in this appeal is that the question of whether the defence of self-defence was necessary or whether the injury inflicted by the appellant on the deceased was proportionate to the threat he posed, is of no concern to this court.

F

However, in affirming his conviction and the custodial sentence, the court below acknowledged that "*the castle of the defence of the Appellant has been built on self-defence*" and concluded as follows:

G

H

The appellant was charged under the Penal Code and not Criminal Code; [he] could only be convicted under Section 223(2) and sentenced under Section 225 of the Penal Code. The defence of self-defence will only "ameliorate" but not completely exonerate the guilt of the appellant, quite unlike what the effect will be if he had been charged under the Criminal Code.

I

In other words, what this court is being called upon to consider is the effect of a successful plea of self-defence, and whether it is different under the **Penal Code**

J

A from what obtains under the **Criminal Code**.

Let me immediately say that there is no difference whatsoever a successful plea negatives the existence of an offence, so that where a person kills another in defence of himself, such a killing is excused, and it does not amount to

B manslaughter under the **Criminal Code**, or culpable homicide NOT punishable with death under the **Penal Code**.

Section 32(2) (a) of the constitution makes it clear that one can take the life of another if such killing is reasonably justifiable for the defence of any person

C from unlawful violation or defence of property.

This provision is embedded in the **Penal Code** and **Criminal Code**.

Section 59 of the **Penal Code** says that “*nothing is an offence, which is done in the lawful exercise of the right to private defence*”. Section 32(3) of the

D **Criminal Code** also says that a person is not criminally liable for an act “*when the act is reasonably necessary in order to resist actual and unlawful violence threatened to him or to another person in his presence*”. In **Uwaekweghinya vs. State (2005) 9 NWLR (Pt. 930) 227**, this court considered the provision of

E Section 286 of the Criminal Code; Belgore, (JSC) (as he then was) explained

F **The victim of an unprovoked and unlawful attack is entitled to defend himself and in doing so to use such force as is reasonably necessary to ward off the attack. If the unprovoked attack is likely to cause him grievous harm or even death or he is reasonably in apprehension of the same, he is entitled to use such force available to preserve himself from such grievous harm or death. The purport of self-defence is to negative the existence of an offence so that where a person kills another in self-defence, the killing, unlike in provocation as a defence, does not amount to an offence but total exoneration of the accused.**

G

H **Thus, the accused is discharged and acquitted of any offence. That is -- S. 286 Criminal Code and its proviso.**

I This court dealt with the exact same provisions of the Penal Code in **Kwaghshir & Anor vs. The State (1995) 3 NWLR (Pt. 386) 651 SC**, which originated from the High Court of Benue State. The trial court had sentenced the appellants to death for murder. The court below dismissed their appeal and affirmed their conviction and sentence.

J

A This court allowed their appeal and acquitted and discharged them because the defence provided by **Section 65** read together with **Section 59** of the Penal Code availed 1st appellant and excluded him from criminal responsibility. Ogwuegbu, (JSC), observed as follows:

B

C The question is whether the 1st appellant was entitled to be acquitted as having acted in private defence as provided in *Section 59* of the Penal Code. The 1st appellant asserted his right of private defence and in his evidence, gave full account of what happened. On the strength of the evidence, it could not be said that the violence used by the 1st appellant went far beyond anything that was required in the defence of his person or liberty. The 1st appellant explained the circumstance, which gave rise to the right of private defence, which he claimed in justification of the killing. It is the duty of the prosecution to disprove the defence. This it failed to do. Even though, the 1st appellant had disarmed the deceased before stabbing him, he had no means of running away after disarming the deceased as the latter was still on him. It is clear that the 1st appellant acted within his rights in the heat of the moment. The right of private defence availed him in the circumstances to exclude criminal responsibility for causing the death of Abamber Avenda. Both appeals succeed and are hereby allowed. Each appellant is acquitted and discharged.

G

There is the answer; the effect is the same across the board and where the defence of self-defence is applicable, it does not serve merely as a mitigating circumstance but as a complete exculpatory circumstance.

H

In this case, the appellant explained in **Exhibit 3**, his statement to the police, that the deceased was fighting with someone else when he turned to him and started fighting him for no just cause; and that:

I

J It was when the beating was too much and those boys who were there refused to separate the fight. The fight took place at Izela's (sic) shop and it was there I took the knife on top of the table and stabbed Oryankwagh on the stomach.

A In his evidence as DW2, he added a new twist to what had happened:

B **He then started beating me and the people around refused to separate us. Ezra and PW2 were present. When the beating was too much he pushed me to the table and pinned me there. I then took a knife which was on the table and used it on him.**

C The trial court noted that the only difference between both versions is that he did not say in **Exhibit 3** that the deceased pinned him down on a table, and held that his aspect of his testimony was an after-thought.

The trial court went on to outline the provisions of the Penal Code:

D **The right to private defence of self is provided in Section 65 of code thus - - - Section 62 63 of the code also limits the right of private defence. They provide still on this right of self-defence, Section 223(2) of the code provides.**

E It agreed with defence counsel that the said Section 223(2) “*overrides Section 62 & 63 and raises the issue of premeditation and intention*”. Thereafter, it concluded that the defence of self-defence availed him. On this issue of Section F 223(2) of the code, the court below held:

G **Learned counsel for the appellant contended that the learned trial Judge did not convict [him] under any specific provision of the law. This contention is completely misconceived. The learned trial judge clearly relied on Section 223(2) of the Penal Code, which mitigates the charge of capable homicide punishable with death with which the appellant was charged, to culpable homicide not punishable with death by reason of self-defence, for which the appellant was convicted.**

I The appellant submitted that the court below was misled in the construction of the said Section 223(2) as the proper and logical question is when does the sanction clause (i.e. culpable homicide is NOT punishable with death) of Section 223(2), come into operation.

J He answered that it operates or applies when the court holds that the defence of self-defence does not avail the offender; and when it holds that the

A defence avails him, as in this case, the Section does not apply. He further submitted as follows at page 12 of his brief:

Once the court holds that a defence of self-defence availed the offender; as in the instant case, that holding negatives the operation of the sanction clause of Section 223(2) of the Penal Code. For the essence of the defence of self-defence is that the act of the offender, which constitutes the [said] defence is justified or excused by law. Self-defence and Section 59 of Penal Code have the same tenor. Nothing done in the lawful exercise of self-defence is an offence. The law justifies it. The law excused it. The law does not go back to punish for what it justifies or excused. It is thus an erroneous view to state that a successful plea of the defence can only ameliorate the punishment as held by the court below.

E The appellant is right; not only did the court below miscalculate the effect of a defence of self-defence under the **Penal Code**, it also failed to factor in the distinction between the provisions in *Chapter II* of the **Penal Code** vis-à-vis provisions in *Chapter XVIII* of the same **Code**.

F Chapter II of the **Penal Code** deals with criminal responsibility. Responsibility means answerability or accountability; it is used in the criminal law in the sense of “criminal responsibility”, which means “*answerability to the criminal law*” – *Black's Law Dictionary, 8th Ed*. The simple moral idea, G incorporated in all legal systems, including the Nigerian criminal law, is that no one should be convicted of a crime, unless some measure of subjective fault can be attributed to him.

Section 59 of the **Penal Code** insists that nothing is an offence, which is H done in the lawful exercise of the “*right of private defence*”. The right of private defence is known in English Law as self-defence, and as the appellant rightly submitted, they mean the same thing and have the same exonerating effect under the Criminal and Penal Code. For instance, in **Uwaekweghinya vs. State** I (*supra*), this court held:

The purport of self-defence is to negative the existence of an offence so that where a person kills another in self-defence, the killing, unlike in provocation as a defence, does not amount to an

A offence but total exoneration of the accused. Thus, the accused is discharged and acquitted of any offence. That is the provision of S. 286 Criminal Code and its proviso.

B In Kwagshir's Case (*supra*), under the Penal Code, this court held:

C It is clear that the 1st appellant acted within his rights in the heat of the moment. The right of private defence availed him in the circumstances to exclude criminal responsibility for causing the death of Abumber Avenda.

D But the said defence operates with certain conditions, by virtue of the enabling provisions in both the Criminal Code and the Penal Code, which place restrictions on the enjoyment of that right. Section 60 of the Penal Code provides that subject to restrictions set out in Sections 62 and 63 of the Code, every person has a right to defend his body and body of another “against any offence affecting the human body”.

E By virtue of Section 62 of the Penal Code, self-defence must be proportional to the harm that is intended to be prevented, otherwise, the use of the right will not be justified, and Section 63 provides that there is no right of private defence in cases in which there is time to have recourse to the protection of public authorities, e.g the police.

F Chapter XVIII of the Penal Code deal with “offences affecting the human body”, and in particular “offences affecting life” which is where Section 223(2) of the Code, which I set out earlier, comes in. S.S. Richardson explained in *Notes on the Penal Code Law* that:

H This sub-section was necessary because a person exercising his right of private defence is not usually in a situation in which he has time to weigh up the niceties of his legal position. Since the law permits the killing of a person in self-defence in specified circumstances and the causing of harm short of death in other cases, there are many occasions when an act falls on the wrong side of what is really on arbitrary line of distinction. In the application of this sub-section, it is essential that the person causing hurt in the *bona fide* exercise of the right of private defence should act without any intention of doing more harm

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J

A than is necessary for the purpose of such defence. The onus of
B proving private defence is on the accused. Where the accused
C sets up the principle of self-defence, the question to consider is
D whether the accused had any reasonable apprehension that he
 would be hurt and particularly in a case where he has caused
 death, whether he was under any reasonable apprehension of
 grievous hurt or death to himself. It is the apprehension that is
 the important point not the actual injuries suffered by him. An
 accused, who is the aggressor, cannot claim the right of private
 defence against the rescuer of his victim. Note especially that a
 finding involving this sub-section does not amount to an
 acquittal because the accused has committed the offence of
 culpable homicide since he has abused his right of self-defence.
 He should, therefore, be punished in such circumstances under
 Section 224 [Section 225 herein].

E In this case, the court below started off wrongly when it held that the defence of
 self-defence will ameliorate but not completely exonerate the guilt of the
 appellant, unlike the effect under the Criminal Code. The correct position is that
 self-defence is a complete defence under the Criminal Code and the Penal Code,
F and a successful defence of self-defence leads to the discharge and acquittal of the
 accused see **Uwaekweghinya vs. State**(*supra*), **Kwaghshir vs. State**(*supra*).

It reinforced that erroneous perception when it further held that the said
Section 223(2) mitigates the charge of culpable homicide punishable with death
G to culpable homicide not punishable with death “*by reason of self-defence*”,
 which is a misapprehension of the law, and a mix-up of principles of self-defence
 or right of private defence.

Simply put, the said right may be exercised against an aggressor, and
H subject to the aforesaid restrictions, it extends to killing where the act being
 repelled is an attack, which causes reasonable apprehension of death or grievous
 hurt. If the right of private defence is exceeded or abused and it has caused death;
 where it is exercised in good faith, without premeditation and without intending
I to do more harm than is necessary, it becomes culpable homicide *NOT* punishable
 with death, and a finding involving this section does not amount to an acquittal.

The court below erred when it held to the contrary and affirmed his
 conviction and the custodial sentence imposed on the appellant.

J

A This appeal succeeds and it is, therefore, allowed. The decision of the court below affirming that of the trial court is hereby set aside. The appellant is found not guilty, and he is acquitted and discharged.

B **Amina Adamu Augie,**
Justice, Supreme Court

Appearances

Miss E.N. Tinosha **with** O.F. Eche, (Esq.) for the **appellant**

C Mrs B.E.T. Surma (PSC 11. MOJ, Benue State) for the **respondent**

RHODES-VIVOUR, (JSC): I have had the advantage of reading in draft the leading judgment of my learned brother, Augie (JSC). So completely do I agree with it that I have hesitated before deciding to add a few words of my own on the defence of self-defence.

I adopt the statement of facts as set out in the draft leading judgment. On self defence the trial court said:

E **“... That is that the defence of self defence avails the accused person. I so hold.”**

F The Court of Appeal affirmed the judgment of the High Court when it was erroneously of the view that self defence is not a complete defence. That court said:

G **“The defence of self defence will only ameliorate but not completely exonerate the guilt of the appellant quite unlike what the effect will be if he had been charged under the criminal code.”**

H Nothing can be further from the truth. There is no difference between the defence of self defence under the Criminal Code and the Penal Code. See *Uwaekweghinya vs. State (2005) 9 NWLR (Pt. 930) p. 227; Kwaghshir & Anor vs. State (1995) 3 NWLR (Pt. 386) p. 65*

I Furthermore a successful defence of self defence is a complete defence. The position of the law under the Criminal Code and the Penal Cde is that a person does not commit an offence by using necessary and reasonable force even if it results in death (to the aggressor) to protect himself or another from unlawful

J

A force of unlawful personal harm. See **A. Famakinwa vs. State (2016) 1-3 SC (Pt. 1) p. 139; Kim vs. State (1992) 4 NWLR (Pt. 233) p. 17.**

Where an unprovoked assault or attack causes the victim reasonable apprehension of grievous harm or death, the victim is entitled to defend himself
B and in defending himself he can use such force as he believes is necessary to preserve himself from harm, even though such force may cause grievous harm or death. In deciding what is reasonable, the objective test is applied and the law insists on the standard of the reasonable man.

C Self defence once established to the satisfaction of the court, unlike provocation which reduces murder to manslaughter is a complete defence resulting in an outright acquittal.

The use of force is not justified if it is not necessary. In this case the use of
D force was necessary, since that was only how the appellant could defend himself from a ferocious attack from the deceased.

The Court of Appeal fell into grave error when it affirmed the decision of the trial court which found that the defence of self defence avails the appellant but
E still imposed a custodial sentence.

It is for this, and the more detailed reasoning in the leading judgment that I allow the appeal.

The appellant is acquitted and discharged.

F

Olabode Rhodes-vivour
Justice Supreme Court

BATA OGUNBIYI, (JSC): I read in draft the lead judgment just delivered by my
G learned brother, **Augie, (JSC)**. I agree that there is merit in this appeal and the appellant should be acquitted and discharged forthwith.

It is unfortunate, I must say that the appellant had to go through the ordeal of conviction and sentence when he should have been a free man as a matter of
H fact. This confirms and re-instates the wisdom in operating the system of hierarchy of courts wherein the appellant is availed the benefit of an appeal.

The main issue for determination in this appeal is whether or not a defence of self defence is a complete defence. By the use of the phrase self defence, it
I signifies admission of a crime by an accused person but with a caveat however that the act was done in self defence. In other words, there must have been a reason for the act which in normal circumstance would not have happened.

It is on record that the trial High Court found as a fact that the defence of
J self defence availed the appellant. Nevertheless and that notwithstanding, it

A proceeded to convict him for culpable homicide not punishable with death and sentenced the appellant to ten years imprisonment without an option of fine.

The penal code law of Benue State under which the appellant was convicted has provided clearly by section 59 as follows:

B

“Nothing is an offence which is done in the lawful exercise of the right of private defence.”

C Section 60 also provides as follows:

“Every person has a right, subject to the restriction hereinafter contained, to defend:

D

- (a) His own body and the body of any other person against any offence affecting the human body**
- (b)**

E Section 62 also provides that:

“The right of private defence in no case extends to inflicting of more harm than it is necessary to inflict for the purpose of defence.”

F

A further reference is also significant to section 63 which provides that:

G

“There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.”

H As rightly submitted by the learned counsel for the appellant, neither the trial court nor the court below found that the appellant exceeded the right accorded to him by the law. No evidence was also adduced by the prosecution to show that the appellant fell short of the expectations as provided per the sections of the Penal

I Code Law under reference supra. It was not shown also that he abused the right of his self- defence. it is safe to say from the record of appeal that the two lower courts are of the same mind that the defence of self-defence availed the appellant. It is obvious that section 59 operates in favour and further defence of the appellant

J and even in the face of repetition, I will again reproduce the section 59 which says:

B It is intriguing that the lower court could have interpreted the said section 59 the way it did. In other words, that the defence of self-defence is not a complete defence under the Penal Code.

D For all intents and purposes and, as rightly submitted by the appellant's counsel, the cumulative effect of the foregoing depicts that the appellant's act is not an offence under section 59 of the Penal Code; it is not also an offence under section 33(2)(a) of the constitution; hence by the provision of section 36(8), the

E appellant should not be held guilty of a criminal offence. The section provides as follows:

G For purpose of further expatiation I will seek to refer to the position took by this court in the case of **Paul Ameh vs. The State (1978) NSCC 373 to 374** in the consideration of section 59 to 65 of the Penal Code on the rights of private defence

H of person or property. It is pertinent to say also that the said provisions of the code apply in the Northern States of Nigeria, Benue State inclusive.

I My learned brother, **Augie, (JSC)** has considered the appeal exhaustively. With the few words of mine and while adopting the lead judgment as mine, I also allow this appeal in terms of the lead judgment, and hereby set aside the judgment of the lower court which affirmed that of the trial court.

The appellant is acquitted and discharged forthwith.

J

A AMIRU SANUSI, (JSC): I read in advance the lead judgment prepared by my learned brother Augie (JSC) just delivered. I find myself in entire agreement with the reasons and conclusion she arrived at that this appeal has merit and I accordingly allow it. However, for purpose of amplification, I wish to make
B these few comments.

In this instant appeal, the accused person now appellant, was arraigned before the Benue State High Court (“the lower court” for short) and tried for the offence of culpable homicide punishable with death. When tried, the trial court
C found him guilty and convicted him under Section 225 of the Penal Code i.e committing culpable homicide but done with the intention of causing hurt or grievous hurt only. The trial court sentenced him to ten years imprisonment. Being dissatisfied with the judgment of the trial court, the appellant appealed to
D the Makurdi division of the Court of Appeal (the court below) which affirmed the judgment of the trial court. He, upon, being dissatisfied with the affirmation of the decision of the trial court by the court below, appealed to this court. At the trial, the appellant posed the defence of private defence. My lords, please permit me to
E say, that under the Penal Code, which is applicable in the northern part of Nigeria the terminology used is “Right of Private Defence” and Not self defence. The latter terminology is only applicable in the southern state of Nigerian even though the two defences could be similar, albeit, with slight difference or differences. In
F his cautionary statement Exhibit 3 the appellant stated that the deceased was fighting with someone else when he turned to him and started fighting him for no justifiable reason. He further stated as follows:

G “It was when the beating was too much and those boys who were there refused to separate the fight. The fight took place at Izele’s (sic) shop and it was there I took the knife on the top of the table and stabbed Oryankwagh on the stomach.
H

Again, while testifying for his defence as DW2, the appellant testified thus:

I “He then started beating me and the people around refused to separate us. Ezra and PW2 were present. When the beating was too much he pushed me to the table and pinned me three. I then took a knife which was on the table and used it on him.”
J

A Now, the trial court after duly considering the appellant's right of private defence, concluded that the defence of right of private defence availed the appellant. After such finding, it then reverted to resort to the provisions of Section 223 of the Penal Code which mitigates or reduces the punishment of culpable homicide punishable with death under Section 221 of the Penal Code with which the accused/appellant was initially charged with. The lower court also fell into the same trap by affirming the decision of the trial court in convicting and sentencing the appellant under Section 225 of the Penal Code.

C I think it will be pertinent at this stage to refer to the preamble of the right of private defence under the Penal Code as provided in Section 59 of the same Code. It reads thus:

D **“Nothing is an offence which is done in the lawful exercise of right of private defence”**

Again the provisions of Section 65 of the Penal Code provides that the right of private defence of a person's body extends to voluntary causing of death of an attacker, provided that the restrictions provided in Sections 62 and 63 of the same code are followed or not abused, but only if the act was done in order to repel an attack by an attacker causing reasonable threat or on apprehension of death or grievous hurt. In the instant case, the trial court without any reservation was convinced that right of private defence availed the accused/appellant in the light of the evidence placed before it. It will therefore mean that in the light of the provisions of Section 59 of the Penal Code, the appellant did not, legally speaking, commit any offence. It is therefore inconceivable and absurd for the trial court to resort to Section 225 of the Penal Code to convict and sentence him of a lesser offence when in true legal sense, no offence was committed by him in the light of the provisions of Section 59 of the Penal Code as reproduced supra.

H Having held that the right of private defence availed the appellant, the appropriate verdict the trial court should have entered is one of 'acquittal' and 'discharge as no offence was actually committed by the appellant.

The lower court as I said earlier, committed the same error with the trial court in affirming the decision of the former or trial court in that regard.

Thus, in view of these few comments of mine and for the fuller and detailed reason given in the lead judgment of my learned brother Augie JSC, I also see merit in this appeal. I accordingly allow it and set aside the judgment of the two lower courts. In their stead, I hereby enter a verdict of acquitted and

A discharge in favour of the appellant herein. Appeal allowed.

Amiru Sanusi
Justice, Supreme Court

B Galinje, (JSC): I have had the privilege of reading in draft the judgment just delivered by my learned brother AUGIE, (JSC) and I agree that the appeal has merit and should be allowed.

The Appellant was arraigned before the High Court of Justice of Benue State, on a one count charge of culpable homicide not punishable with death under Section 222 of the Penal Code Law Cap 124 Revised Edition (Benue State) Law 2004. He pleaded not guilty to the charge.

In order to prove its case, the prosecution called five witnesses and tendered in evidence a total of five exhibits. The father of the appellant testified as the first defence witness and thereafter the appellant gave evidence in his defence as the second defence witness. At the close of parties case, learned counsel representing each party filed written addresses which were subsequently adopted. In a reserved and not so well considered judgment delivered on the 10th April, 2013, KPOJIME J found the appellant guilty of the offence of culpable homicide not punishable with death under Section 225 of the Penal Code and sentenced him to 10 years imprisonment without an option of fine. The appellant was not satisfied with the judgment of the trial court. Being aggrieved he appealed to the Court of Appeal Makurdi, Division. The appeal was heard by a panel of three justices, namely **Omoeye, Danjuma and Ogbuinya JJCA** and in a unanimous judgment delivered on the 28th May, 2014, they dismissed the appeal and affirmed the judgment of the trial court. Once again the appellant is dissatisfied with the judgment of the lower court. Being aggrieved he has further appealed to this court. His notice of appeal dated and filed on the 24th of June, 2014 contains five grounds of appeal.

Parties filed and exchanged briefs of argument. The appellant's brief of argument, is dated 4th August, 2014 and filed on the 13th August, 2014. At page 4 of the said brief of argument Chief Agbo Sunday leading six other counsel, who settled the appellant's brief of argument formulated five issues for determination of this appeal. These issues are hereunder reproduce as follows:

“1. Whether the court below was right when in its judgment it held that the defence of self-defence is not a complete defence of answer to an offence of culpable homicide

- A** punishable with death or not punishable with death under the Panel Code Cap. 124 Laws of Benue State 2004.
- B** 2. Whether the court below was right in affirming the decision of the trial court that the respondent proved beyond reasonable doubt a case of culpable homicide against the appellant when the trial court made a finding of fact that the defence of self-defence availed the appellant who had no intention to kill the deceased.
- C** 3. Whether the court below in its judgment adequately appreciated, considered and or decided on all issues properly raised and canvassed before it by the appellant in arriving at its decision?
- D** 4. Whether the court below was right when it held that the trial court had not wrongly exercised its discretion in sentencing the appellant to 10 years imprisonment without option of fine having regards for the facts and circumstances of the case on appeal.
- E** 5. Whether the court below was right when it held in its judgment that the respondent's brief of argument was not an incompetent process in law and thereby dismissing the appeal.
- F**

The respondent's brief of argument settled by L.M SOKPO with B.E.T SURMA, learned counsel for the respondent is dated 14th January, 2015 and filed on the 9th March, 2015. At page 8 of the said brief one issue is distilled for determination of this appeal. The sole issue reads as follows:

- H** “Whether the court below was right by affirming and upholding the conviction and sentence passed by the trial court on the appellant for the offence of culpable homicide not punishable with death contrary to Section 225 of the Penal Code Law Cap 124 Revised Edition Law of Benue State 2004.”
- I**

The appellant's reply brief is dated 1st April, 2015 and filed on the 7th April, 2015, but deemed filed on the 4th June, 2015.

J

A The five issues formulated by the learned counsel for the appellant, can be subsumed into the sole issue formulated by the respondents, which I think has sufficiently covered the field. I will therefore, adopt the sole issue in the determination of this appeal. However, before I consider the argument canvassed

B by parties' respective counsel in their respective briefs of argument, I wish to set out albeit in brief the facts of this case as reflected in the record of appeal. On or about the 23rd May, 2009, at High Level Area in Makurdi the deceased Aonogunsha Abunku and the appellant were outside the carpentry workshop of

C one **Jamni Akanbi** while the said Jamni Akande was in his workshop. The appellant and the deceased became embroiled in exchange of argument that subsequently degenerated into a fight. While the fighting was going on, no one intervened to separate them. During the fight, the appellant collected a knife on a

D table in the carpenter's workshop and stabbed the deceased on the left hand side of his chest. He was taken to the hospital where he died a few hours later.

In arguing the appeal, learned counsel for the appellant submitted that the lower court was in grave error of law when it affirmed the decision of the trial

E court which notwithstanding making a finding of fact that the defence of self-defence availed the appellant proceeded to convict him for culpable homicide not punishable with death and sentence him to 10 years imprisonment without an option of fine. Learned counsel urged this court to hold that the decision of the

F lower court is not only a misconception of the defence of self-defence under the Penal Code Law as applicable in Benue State but erroneous on the applicable laws, including application of the provision of Penal Code and Criminal Code. In aid learned counsel cited *Section 59, 60, 62, 63, 65, 66 and 67* of the Penal Code

G Law of Benue State. Also cited in aid are *Section 33(2) 36(8)* of the Constitution of the Federal Republic of Nigeria 1999 and the authorities in **Paul Ameh vs. The State (1978) NSCC 373 to 374, Gambo Musa vs. State (2009) ALL FWLR (Pt. 492) 2010; Apugo vs. The State (2007) 2 NCC 30 and Ajunwa vs. The State**

H **(1988) 2 NSCC 15 at 497.**

Learned counsel finally submitted on this segment of argument that the lower court was wrong in affirming the decision of the trial court considering the facts of this case.

I On whether the lower court was right in affirming the decision of the trial court on the ground that the prosecution has proved its case beyond reasonable doubt, learned counsel submitted that the decision of the court that the defence of self-defence avails the appellant and that the prosecution has proved its case

J beyond reasonable doubt is tantamount to pronouncing the appellant guilty and

A innocent at the same time. According to the learned counsel, such a finding is unacceptable in law. In aid learned counsel cited **The State vs. DR. Murtari Kura (1975) 5 UILR; Ameh vs. The State (1978) NSCC 373.**

B For the respondent, it is argued that the lower court was right to have affirmed and upheld the conviction and sentence on the appellant for the offence of culpable homicide not punishable with death under Section 225 of the Penal Code Cap. 124 Revised Edition Laws of Benue State 2004. In a further argument, learned counsel submitted that under the Penal Code the defence of self-defence **C** is not a complete answer to a charge of culpable homicide punishable with death and that all the authorities cited by learned counsel for the appellant are not applicable in the circumstances of this case. In aid learned counsel cited **Silas Sule vs. The State (2009) 38 NSCQR (Pt. 11) 1069; Abara vs. The State (1981) 2 NCR 110.**

D The argument contained in the reply brief of argument on the issue discussed here is a repetition of the argument contained in the brief of argument of the appellant. A reply brief is a reply to the new issues in the respondent's brief of arguments outside the scope of appellant's brief of argument for which the appellant has a duty to explain or debunk to save the court from being misled. It is not meant to further the argument of the appellant and improve his position. See Order 6 Rule 5(3).

E At the trial High Court, the prosecution submitted two issues for determination of the case. The 2nd issue reads thus:

G **Whether the purported defence of the accused person that he stabbed the deceased in self defence can avail him having regard to the circumstances of this case”.**

H In resolving this issue, the learned trial judge at page 163 of his judgment had this to say:

I **“Upon a calm and careful review of the evidence before the court, my answer to issue 2 is in the affirmative. That is that the defence of self-defence avails the accused person. And I so hold.”**

J In its judgment, the lower court upheld the finding of the trial court in the following words:

- A** “Now the castle of the defence of the appellant has been built on self-defence. To my mind, since the trial court has found in favour of the appellant that the defence of self-defence availed him and the respondent is equally at one with this finding
- B** having not appealed against it, what is left for consideration on this subject is, the consequential effect of the said defence on the offence with which the appellant has been charged. What is
- C** more, the trial court also found that there was no ingredient of premeditation on the part of the appellant. This simply means that the appellant, before the time of the commission of the offence charged did not plan to commit the said offence that is the killing of the deceased.... And as rightly held by the learned
- D** trial judge, the appellant could only be convicted under Section 223(2) and sentenced under Section 225, both of the Penal Code. For to use the words of the learned counsel for the respondent, the defence of self defence will only “ameliorate” but not
- E** completely exonerate the guilt of the appellant, quite unlike what the effect will be if he had been charged under the criminal code... I have no iota of doubt in my mind in agreeing with the learned trial judge that, the respondent as prosecution
- F** at the trial court succeeded in proving beyond reasonable doubt that the acts of the appellant fall within the purview of the offence of culpable homicide not punishable with death, by reason of the defence of self-defence for which the trial court
- G** convicted him.”

Section 59 of the Penal Code Law of Benue State provides as follows:

- H** “Nothing is an offence which is done in the lawful exercise of the right of private defence”.

Section 65 of the same code provides thus:

- I**
- J** “The right to private defence of the body extends, under the restrictions mentioned in Section 62 and 63, to the voluntary causing death only when the act to be repelled is of any of the following description namely

A (a) An attack which causes reasonable apprehension of death or grievous hurt!”

B From the provisions of the two Sections of the Penal Code, it is so clear that the lower court misconceived the law applicable to the defence of self-defence. The right of self-defence is based upon the principle that it is the first duty of man to help himself. The lower court and the trial court agreed that the defence of self-defence availed the appellant. I therefore, agree with the learned counsel for the

C appellant that the irresistible conclusion from the concurrent findings of the lower court and the trial court is that the appellant's action in defence of himself is not an offence. A right of private defence can only amount to an offence if an accused exceeds the right of private defence as it provided for under Section

D 222(2) of the Penal Code. This provision reads as follows:

E “Culpable homicide is not punishable with death if the offender, in the exercise in good faith of the right of private defence of persons or properties , exceeds the powers given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for

F the purpose of such defence.”

The lower court and the trial court did not in their judgments state that the appellant exceeded the right of self defence which they said availed him. There is

G no appeal against that finding that the right of self-defence availed the appellant. Where there is no challenge or complaint against the finding of a lower court, such finding remains binding, valid and conclusive. See **Hashe vs. Magaji (2009) ALL FWLR (Pt. 461) 887**. What then is the effect of a successful plea

H self-defence. In **Musa vs. State (2009) ALL FWLR (Pt. 492) 1020 at 1048 Paras B – C**, this court per Adekeye, JSC said.

I “This leads to another question in this appeal which is whether the defence of self-defence was not made out by the appellant. The defence of self-defence if successful is a complete defence or answer to the charge of murder or manslaughter. An accused is required to raise the defence in his plea, leaving the

J prosecution with the burden of showing that the defence was

A not available to the appellant having regard to the circumstance of the case”.

B In *Musa v The State* (supra) the appellant was arraigned and tried for offence of culpable homicide punishable under Section 221(b) of the Penal Code at the Borno State High Court. It is therefore, the law that a successful defence of self-defence is a complete or answer to the charge of culpable homicide or murder under both the Penal Code and the Criminal Code. See **Gabriel vs. State (1989) 5 NWLR (Pt. 122) 457; R vs. Onyemaizu (1958) NRNLR 93; R vs. Oshunbiyi (1961) ALL NLR (Pt. 4) 453; Apugo vs. State (2006) ALL FWLR (Pt. 341) 1253; Ahmed vs. State (1999) 7 NWLR (Pt. 612) 641.**

D The position was made clearer in *Apugo v State* (Supra) where Tobi, JSC (of deceased memory) in his contribution had this to say:

E “Although the Court of Appeal held that the defence of self-defence was available to the appellant, that court convicted him for manslaughter, can the court do that? Is the court right in doing that?... There is a wall of difference between the effect of a successful plea of self-defence and that of provocation. While a plea of self-defence, if successfully raised, completely absolves the offender from criminal responsibility, a plea of provocation if successful, reduces the offence of murder to manslaughter. See *Ajunwa vs. The State* (1988) 4 NWLR (Pt. 89) 380. Let us not mix up the two. They are different”

G In *Ahmed vs. The State* (Supra), the appellant was tried, convicted and sentenced to death under Section 221 of the Penal Code at Lokoja High Court. The accused's story was that at about 11pm in the night of the incidence, a number of people, including the deceased, went to his farm to steal his yams. He claimed that when the thieves saw him they all chased him while one of them was shouting **“kill him, kill him”**. That on hearing that, he turned and fired his gun at his pursuers, and then they all ran back. The deceased who was one of them, was hit and was later found dead on the spot.

I The appellant's appeal to the Supreme Court was allowed and the conviction and sentence were set aside and he was discharged and acquitted. In doing so, the Supreme Court per Fatai Williams said:

J

A “... the learned trial judge would have realized that, on the totality of the evidence, the appellant would have had a perfect defence to the charge by virtue of the provisions of the section referred to above. Furthermore, he would have realized as we

B did having regard to the particular circumstances in which the appellant was the only eye-witness, and to the fact that the incidence, during which those on his farm were shouting “kill him, kill him”, took place around 11pm the appellant did not

C exceed the powers of private defence given by law and could not therefore have committed even the lesser offence of culpable homicide NOT punishable with death provided for in Section 222(2) of the Penal Code”

D Where there is a concurrent finding of fact by two lower courts, this court will not ordinarily interfere with those findings except where there is miscarriage of justice or where those findings of fact are perverse or are in violation of some

E principles of law or procedure. See **Joseph vs. The State (2011) 16 NWLR (Pt. 1273) 226; Wachukwu vs. Owunwanne (2011) 14 NWLR (Pt. 1266) 1; Ibodo vs. Enarofia (1780) 5-7 SC 42.**

F This court will also not interfere with the finding of facts by the lower court, if such finding of fact has not been challenged on appeal. This is so because an appellate court is only concerned with matters that are properly placed before it. It has no jurisdiction over a decision against which there is no appeal to it. See **Abdulkareem vs. Incar Nigeria Ltd (1984) 15 NSCC 603 at 617 paragraph 5.**

G In **Sodeinde vs. Registered Trustees Ahmadiyya Movement in Islam (1982) 2 SCNLR 284 at 326**, this court, per Sowemimo, JSC (as he then was) said:

H “It is not for this court to embark on an investigation to which it has not been called upon to do so. It is the duty of the parties to put their facts before the courts in order for a judicial decision to be pronounced both on the facts and the law involved.”

I Since the respondent did not appeal against the finding that the defence of self-defence availed the appellant, this court cannot go into the issue of whether the finding was justified, as doing so will amount to carrying out investigation into an

J area that is not placed before it. Having affirmed the finding of the trial court that

- A the defence of self-defence availed the appellant, is the Court of Appeal right to also affirm the finding by the trial court that the prosecution has proved its case beyond reasonable doubt upon which the appellant was sentenced to 10 years imprisonment in the same case? I do not think the Court of Appeal is right in its
- B decision. I agree with learned counsel for the appellant on this score that the findings of facts by the trial court concerning the guilt and innocence of the appellant are diametrically opposed to each other and the lower court is wrong to have affirmed that the prosecution has proved its case beyond reasonable doubt as
- C required by law.

To hold that the trial court was right in its finding that the defence of self-defence availed the appellant is clearly admitting that the appellant is innocent of the charge preferred against him. However by also affirming the finding that the

D prosecution had proved against the appellant beyond reasonable doubt, the same charge by the lower court, would amount to a judicial somersault of great proportion. A court of law is not allowed to approbate and reprobate at the same time.

- E In **The State vs. Dr. Kura (1975) 5 UILR** this court is clearly of the view that where in criminal trial the evidence is equivocal, the accused is entitled to a verdict of acquittal. The is what Irikefe (JSC) (as he then was) said:

- F **“In a situation such as this, where the totality of the evidence in a criminal trial is equivocal, in the sense that it is consistent with both the guilt and innocence of the respondent, we fully endorse the action of the learned trial judge in recording a verdict of**
- G **acquittal in his favour on both heads of charge after finding that the prosecution's case had not been proved beyond reasonable doubt.”**

- H On the reason I have set out herein, I resolve the sole issues formulated by me in favour of the appellant. For these reasons I have set out hereinabove and the more detailed reasoning in the lead judgment, I also allow the appeal and endorse all the consequential orders made in the lead judgment of my learned brother.

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

J

**PROF. FESTUS DAVID KOLO
AND
COMMISSIONER OF POLICE (C.O.P)**

SC.10/2015

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

FRIDAY 17TH FEBRUARY, 2017

BEFORE THEIR LORDSHIPS

**OLABODE RHODES-VIVOUR
MUSA DATTIJO MUHAMMAD
CLARA BATA OGUNBIYI
CHIMA CENTUS NWEZE
AMIRU SANUSI**

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

COURT: Concurrent findings of two lower courts – How displaced.

COURT: Findings on intention of the accused – Whether can be inferred from abundant material behaviours therefrom.

CRIMINAL LAW AND PROCEDURE: Accused complains that he did not understand contents of first information – Report – Accused represented by counsel – Presumption thereof.

CRIMINAL LAW AND PROCEDURE: Charge – Purpose.

CRIMINAL LAW AND PROCEDURE: Criminal charge – Accused pleads guilty thereto – Implication of plea.

CRIMINAL LAW AND PROCEDURE: First Information Report – Objection to the contents of First Information Report – Neither accused nor his counsel objected when the contents were read to the accused – Presumption thereto.

CRIMINAL LAW AND PROCEDURE: First Information Report – Where contains the necessary facts to infer the intention of the accused – No objection there to can be sustained.

CRIMINAL LAW AND PROCEDURE: Plea – Whether accused must plead personally to the charge.

CRIMINAL LAW: Offence of enticing a married woman under the Penal Code – Ingredients.

EVIDENCE: Proof – Confessional statement is the best form of evidence.

CRIMINAL LAW AND PROCEDURE: Proof of intention – Whether can be inferred from the conduct of the accused.

CRIMINAL LAW AND PROCEDURE: Proof of Mens rea – Whether can be deduced from the circumstances of the case.

WORDS AND PHRASES: “Intention” – Meaning

Issues for Determination

- 1) Whether the lower court (Appeal Court) was right in dismissing the appellant's appeal when it affirmed the decisions of the courts below (high court and trial magistrate's court) by holding that the intention of the appellant could be inferred from his conducts whereas the FIR with which the appellant was convicted did not state or contain the essential ingredients of the offence of enticing a married woman to the appellant under section 389 Penal Code Law of Jigawa State, to wit: “With intent that she may have illicit intercourse with any person or conceals or detains with that intent any such woman” such as to justify the conviction of the appellant on summary trial procedure? (issue distilled from grounds 1-4).**
- 2) Whether from a dispassionate appraisal or evaluation of the totality of the evidence i.e first information report, before the trial magistrate court, the learned justices of the lower court (Court of Appeal) were right in dismissing the appellant's appeal when the decision of the trial magistrate's court is unreasonable, unwarranted and unsupportable to**

warrant the conviction of the appellant? (issue formulated from ground 5).

Facts of the Matter

This is an appeal against the decision of the appellate session of Jigawa State High Court delivered on 17/09/2013 in appeal No. **JDU/14/CA/2013** which affirmed the judgment of the lower trial magistrate's court Kiyawa, Jigawa State wherein the appellant was convicted summarily for the offence of enticing a married woman contrary to **Section 389** of the **Penal Code** and sentenced to two months term of imprisonment without an option of fine.

Upon his conviction and sentence by the trial magistrate, the appellant was dissatisfied and lodged an appeal before the appellate Division of the Jigawa State High Court.

Briefly the statement of facts leading to this appeal are as follows:

The appellant is a professor and a lecturer at the Ahmadu Bello University Zaria, Kaduna State while the victim (married woman) was his student at the University. He was arraigned before a Chief Magistrate's Court, Kiyawa, some twenty five kilometers from Dutse, for enticing a married woman contrary to **Section 389** of the **Penal Code**.

The appellant was arraigned while in company of his counsel, one Mr. Gausu Esq, and pleaded guilty to the contents of the First Information Report (FIR). It was disclosed on the face of the FIR that the appellant had confessed to the commission of the offence during police investigation.

It was stated clearly on the face of the FIR that the appellant had been sending love messages via his phone number to the married woman through her phone number as contained on the First Information Report. It was stated further on the said report that the appellant had been warned severally by the husband of the woman both face to face and on phone to stay away from her but he refused until when he was caught red handed with the woman in a hotel room; that the appellant had left his place and travelled for up to four hundred kilometers from Zaria, Kaduna State to Dutse, Jigawa State and took the woman to a hotel as contained on the First Information Report.

It was alleged further that the appellant was arrested by the police in the hotel room and later charged to court for enticing a married woman contrary to **section 389** of the **Penal Code**; that when the charge was read over to the appellant in the presence of his counsel, he pleaded guilty thereto presumably on the advise of his counsel. The trial Magistrate convicted and sentenced the appellant to two months imprisonment.

On successive appeals to the High Court and Court of Appeal, both were dismissed and hence the appeal now before the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *There are four ingredients contained in the offence of enticing a married woman*

As rightly enumerated by the lower court in its judgment at page 123 of the record of proceedings, there are four ingredients contained in the offence for which the appellant was convicted as follows:

1. **That the person enticed or taken away is a married woman;**
2. **That the accused knew or had reason to believe that the woman was the wife of another, under the care of her husband or of any other person.**
3. **That the married woman is enticed or taken away from her husband or any person while in the care of her husband or any other person;**
4. **That it is with the intent that she may have illicit intercourse with any person or**
 - a. **be concealed.**
 - b. **detained with the same intent.**

(P 98 paras C–F)

2. *The appellant who was represented by counsel cannot be taken seriously that he did not comprehend the content of First Information Report*

As to whether the particulars were explained to the appellant, the printed record of the trial court at page 20 shows that the First Information Report was read and explained to the satisfactory understanding of the appellant. The appellant said he understood. This fact has not been challenged, indeed it is also worthy to state, that the appellant who is a highly educated person a professor and a lecturer of the Ahmadu Bello University Zaria, should not have difficulty in understanding what was read to him as contained in the First Information Report. It is also worthy of mention that the appellant was represented by counsel at the trial court who found no fault with either the contents of the First Information Report or the conduct of the trial.

It is on record also that the appellant was represented adequately by a counsel at the trial court. In my view and by any stretch of imagination, the appellant, I restate cannot be taken seriously that he did not comprehend the contents of the First Information Report.
(P 300 paras C–F; H–I).

3. *The meaning of the word “intention”*

The word intention is subjective and is within the mind of the very individual possessing it. It is often said that even the devil does not know the state of a person's mind as it is the state of his heart completely within his own knowledge to the exclusion of all else. The *Collins Learner's Dictionary Concise Edition* has defined intention thus:

“An intention that you have is an idea or plan of what you are going to do.”

The word intention being subjective in nature therefore can be inferred from the conduct of a person by manifesting through his action.
(P 301 paras B–E).

4. *Intention may be inferred from the conduct of an accused.*

In other words, the conduct of the appellant as contained in the First Information Report (FIR) when considered against the definition of the word intention, would give an assessment as to whether the lower court was right to have inferred the intention of the appellant from his conduct. This is, especially where the last particular (iv) of the offence was not written in black and white on the face of the First Information Report as alleged by the appellant.

In other words the absence of the phrase:

“With intent that she may have illicit intercourse with any person or conceals or detains with that intent”

In the face of all the facts stated supra, the question to pose is, what could be the intention of the appellant towards the married woman? Even in the absence of the phrase “with intention that she may have illicit intercourse with any person,” there are abundant material reasons from

the appellant's behavior which when the totality are taken together will depict with certainty the intention of the appellant.

(Pp 301; 302 paras E – G; A – C)

5. *Mens rea can be deduced from the circumstances of the case.*

What is more, it is intriguing and most disturbing that the appellant's counsel even in the face of his client having conceded that he was caught red handed in a hotel room with the woman, his learned counsel still argues the absence of mens rea which he submits must co-exist with the actus rea. It will be fools hardy to insist and argue that the totality of all those facts on the First Information Report (which were admitted) do not herein convey the mens rea of the offence or the criminal intention of the appellant.

With all intents and purposes, I cannot agree more with the lower court. In other words, from the cumulative effect of the aggregate of the facts stated on the First Information Report, same have revealed the necessary intention on the part of the appellant. Therefore I hold the view that contrary to the contention put forward by the appellant's counsel, I do not subscribe to his argument that the First Information Report does not disclose or contain the mens rea of the offence.

(P 302 paras C – D; H – I)

6. *Intention in some cases can be inferred from the conduct of the accused*

The law is trite and well settled that intention of an accused person can in certain cases be inferred from the conduct of the person and the surrounding circumstances within which he acts and operates. Proof of intention is usually difficult except by confession or by inference flowing from the manifestation of the person's action. [Arebamen vs. The State (supra) at page 200]

Wherein this court said:

“Intention is of course difficult to prove affirmatively without a confession from the accused and can frequently only be determined by looking at all the surrounding circumstances and deciding therefrom whether the natural inference is that such must be the action or conduct of the accused.” *(P 303 paras A – D)*

7. *The purpose of any charge is to precisely inform the accused of the case.*
As rightly submitted by the counsel for the respondent, the purpose of any charge, be it FIR or information as the case may be is to precisely inform the accused person of the case he is going to face at the trial. [Ndukwe vs. L.P.D.C (2007) 5 NWLR (Pt. 1026) 1]. In the case at hand, the contents of the First Information Report was explicitly clear and it precisely and adequately informed the appellant of the case that he was to face before the trial court. (P 305 paras A – B)
8. *Neither the appellant nor his counsel objected when plea was taken*
Neither the appellant nor his counsel, who was in court, objected to the contents of the First Information Report when it was read and explained to the appellant at the time his plea was taken at the trial court. It is now far too late in the day for the appellant to raise the issue.[State vs. Gwonto & ors (1983)14 NSCC 104]
Wherein this court said:

“I think with all respect, that the point which was missed here is that the importance of the issue of representation lies in the fact that if an accused person is represented by counsel such counsel ought to demand his clients right to interpretation or objection to any irregularity such as lack of interpretation if neither he nor the accused objects the right is lost for all time and certainly cannot be invoked.”

[Essein vs. Commissioner of Police (1996) 5 NWLR (Pt.449) 489 and Otti vs. State (1991) 8 NWLR (Pt. 207) 103 at 119]. (P 306 paras C – G).
9. *Confession is the best form of evidence*
I have stated the position of this court earlier in the course of this judgment wherein it holds that confession is the best form of evidence and an accused person can be convicted on his confessional statement alone. [Nwachukwu vs. State (supra)].(P 307 paras E – F)
10. *Concurrent decisions can be displaced when there is a miscarriage of justice.*
The judgment on appeal now before us is concurrent at the levels of the Magistrate, High Court and Court of Appeal. The law is well settled that a

concurrent decision of the courts below is not ordinarily disturbed unless there is a miscarriage of justice. Micheal vs. The State (2008) 13 NWLR (pt. 1104) 361 at 384; Posu vs. The State (2011) All FWLR (pt. 565) 234 at 249 and Onyejekwe vs. The State (1992) 3 NWLR (pt. 230) 444]. (P 307 paras G–H)

11. *The implication of pleading guilty in a criminal charge*
At the trial the appellant pleaded guilty.

The simple question is what is the effect of a plea of guilty to a criminal charge?

When an accused person represented by counsel is arraigned and the charge read and explained to him in the language he understands, and he pleads guilty the court shall convict him unless there appears to the court sufficient cause why he should not be convicted.
(Pp 313–314 paras I–A).

12. *An accused must plead personally*
A plea is valid only when the accused pleads himself. A trial would be declared a nullity if a plea is made by counsel. It is the duty of defence counsel to guide the accused person on how to plead and the consequences of pleading one way or the other. Once the trial court is satisfied with the plea of guilty the next step is conviction and sentence. (P 314 paras A–B).

Nigerian Cases Cited in this Judgment

Arebamen vs. The State (1973) 7 NSCC 194]
Essein vs. Commissioner of Police (1996) 5 NWLR (Pt. 449) 489
Micheal vs. The State (2008) 13 NWLR (pt. 1104) 361
Ndukwe vs. L.P.D.C (2007) 5 NWLR (Pt. 1026) 1
Ochiba vs. State (2011) 17 NWLR (Pt. 127)
Onyejekwe vs. The State (1992) 3 NWLR (pt. 230) 444.
Otti vs. State (1991) 8 NWLR (Pt. 207) 103.
Posu vs. The State (2011) All FWLR (pt. 565) 234
State vs. Gwonto & Ors (1983) 14 NSCC 104

Nigerian Statutes Cited in this Judgment:

Constitution of Federal Republic of Nigeria 1999 (as amended) – S.36(6)(a)
Criminal Procedure Code – S.156
Criminal Procedure Code – S.206

- A** *Criminal Procedure Law, Laws of Jigawa State, 2012 – S.157*
Penal Code – S.389

Representations

- B** **IBRAHIM IDRIS (Esq.)** with J.E. Udor (Esq.), and S.O. Ogbonna, (Esq.), for the appellant.

- C** **SANI HUSSAINI GARUN GABBAS** Attorney-General of Jigawa State; with Musa M. Iman DPP, Hussaini Abdullahi Asst. Chief S.C., Zakiyau Mohammed PSC; and Muhammad Usman (Esq.) S.S.C for the respondent.

- D** **OGUNBIYI, (JSC) (Delivering the Lead Judgment):** This is an appeal against the decision of the appellate session of Jigawa State High Court delivered on 17/09/2013 in appeal No. **JDU/14/CA/2013** which affirmed the judgment of the lower trial Magistrate Court Kiyawa, Jigawa State wherein the appellant was convicted summarily for the offence of enticing a married woman contrary to **E** **section 389** of the **Penal Code** and sentenced to two months term of imprisonment without an option of fine.

- Upon his conviction and sentence by the trial magistrate, the appellant was dissatisfied and lodged an appeal before the Appellate Division of the Jigawa **F** State High Court and raised a sole issue to wit:

- G** **“Whether or not the lower trial magistrate, “senior magistrate” has jurisdiction to try and determine the offence under section 389 of Penal Code Laws of Jigawa State.”**

- After hearing argument from both sides, the High Court in its reserved judgment delivered on 17/09/2013, dismissed the appeal and held inter alia: **H**

- I** **“We have perused the certified printed record of proceedings and found that there is substantial compliance with section 157 of the Criminal Procedure Code. We therefore have no reasons to temper with same.”**

- Unsuccessful at the High Court, the appellant appealed further to the Court of Appeal (the court below) which in its decision affirmed the judgment of the **J** Jigawa State High Court. Again and being unhappy with the decision of the lower

A court, the appellant is now before us vide his notice of appeal filed on the 22nd December, 2014.

Briefly the statement of facts leading to this appeal are as follows:

B The appellant is a professor and a lecturer at the Ahmadu Bello University Zaria, Kaduna State while the victim (married woman) was his student at the University. He was arraigned before a Chief Magistrate court, Kiyawa, some twenty five kilometers from Dutse, for enticing a married woman contrary to **section 389 of the Penal Code**.

C The appellant was arraigned while in company of his counsel, one Mr. Gausu Esq, and having pleaded guilty to the contents of the First Information Report (FIR). It was disclosed on the face of the FIR that the appellant had confessed to the commission of the offence during police investigation.

D It was stated clearly on the face of the FIR that the appellant had been sending love messages via his phone number to the married woman through her phone number as contained on the First Information Report. It was stated further on the said report that the appellant had been warned severally by the husband of the woman both face to face and on phone to stay away from her but he refused until when he was caught red handed with the woman in a hotel room; that the appellant had left his place and travelled for up to four hundred kilometers from Zaria, Kaduna State to Dutse, Jigawa State and took the woman to a hotel as contained on the First Information Report.

E It was alleged further that the appellant was arrested by the police in the hotel room and later charged to court for enticing a married woman contrary to **section 389 of the Penal Code**; that when the charge was read over to the appellant in the presence of his counsel, he pleaded guilty thereto presumably on the advise of his counsel. The trial magistrate convicted and sentenced the appellant to two months imprisonment. On successive appeals to the High Court and Court of Appeal, both were dismissed and hence the appeal now before us.

G In accordance with the rules of court, briefs were settled and exchanged between the parties. While the appellant's brief was settled by one Ibrahim Idris, Esq. and filed on the 20th April, 2015, that of the respondent was by one Sani Hussaini Garun Gabbas, the Attorney-General of Jigawa State and filed on 18th November, 2015.

I On the 24th November, 2016 when the appeal was heard, both counsel were in court and they adopted, also relied on their respective briefs of arguments. The learned counsel for the appellant adumbrated on his brief and urged that the appeal be allowed while the judgments of the lower courts are to be set aside and

A the appellant should be acquitted and discharged accordingly. The learned Attorney-General for the respondent however, submitted in favour of dismissing the appeal and urged that the conviction and sentence are to be affirmed.

B The two issues formulated for determination by the appellant's counsel are reproduced here under as follows:

- C 3) **Whether the lower court (Appeal Court) was right in dismissing the appellant's appeal when it affirmed the decisions of the courts below (High Court and Trial Magistrate Court) by holding that the intention of the appellant could be inferred from his conducts whereas the FIR with which the appellant was convicted did not state or contain the essential ingredient of the offence of enticing a married woman to the appellant under section 389 Penal Code Law of Jigawa State, to wit: "With intent that she may have illicit intercourse with any person or conceals or detains with that intent any such woman" such as to justify the conviction of the appellant on summary trial procedure? (issue distilled from Grounds 1-4).**
- D
- E
- F 4) **Whether from a dispassionate appraisal or evaluation of the totality of the evidence i.e First Information Report, before the Trial Magistrate Court, the learned justices of the lower court (Court of Appeal) were right in dismissing the appellant's appeal when the decision of the Trial Magistrate court is unreasonable, unwarranted and unsupportable to warrant the conviction of the appellant? (issue formulated from ground 5)**
- G
- H

On behalf of the respondent, a lone issue was formulated as follows:

- I **"Whether the justices of the Court of Appeal (the lower court) were right when they affirmed the decision of the Jigawa State High Court."**

J It is pertinent to restate at this point that the said issue formulated by the respondent's counsel is all encompassing of the two issues formulated by the

A appellant's counsel. Be that as it may for the determination of this appeal, I will deem it appropriate to take together the two issues distilled by the appellant's counsel.

B **1st ISSUE:**

Reproduced earlier and needs no repetition:

On this issue, it is the submission of the learned counsel for the appellant that the Justices of the Court of Appeal, Kaduna Judicial Division ought to have
 C allowed the appellant's appeal when it was clear on the face of the FIR that the essential particular/ingredient of the offence of enticing a married woman, to wit: **“with intent that she may have illicit intercourse with any person or conceals or detains with that intent any such woman”** contrary to **section 389** of the
 D **Penal Code Law of Jigawa State**, was not disclosed or stated on the face of the First Information Report (FIR), to which the appellant pleaded guilty. The learned Counsel considers it appropriate and reproduced **section 389** of the **Penal Code Law of Jigawa State** under which the appellant was convicted and
 E sentenced by the Learned trial magistrate under the summary trial Procedure; that while Ingredients 1 – 3 itemized from the section are contained in the FIR read to the appellant, the 4th and last ingredient was absent. Hence that the appellant could not have pleaded guilty to the offence created under the said **section 389** of
 F the **Penal Code** to warrant his conviction by the magistrate court.

It is the submission of counsel further that the said particular (iv) was concealed from the accused and has occasioned a serious miscarriage of justice in a summary trial procedure. This, counsel submits because the accused was not
 G given the opportunity to know what constitutes its ingredients: that the plea or admission of the accused cannot be regarded as such in law. Counsel cites in support the case of **Abdulatif Ahmed vs. Commissioner of Police (1971) NWLR 48** wherein a court is enjoined to explain all the ingredients of a charge to the accused person and record his replies as clearly as possible in the words used
 H by him before he could be convicted on a plea of guilty under **section 161 CPC**. Other supportive authorities are: **Abele & Ors vs. Tiv N.A. (1965) 425 NMLR** and **Usman Sukale vs. C. O. P. (1969) SCOPE 30**; that section 156 of the CPC
 I imposes on the Magistrate upon arraignment of an accused person to disclose the particulars of the offence on the FIR; that in the absence of such proper disclosure, and explanation to the satisfaction of the accused as to why he was charged of the wrong doing, the appellate court ought to set aside such conviction for want of
 J proper procedure. Cited in support of the submission also is the case of **Garba vs.**

- A C. O. P.** (2007) 16 NWLR (Pt.1060) 378 at 402; that the conduct of the appellant by calling and sending love messages to the woman, travelling from Zaria, Kaduna State to Dutse, Jigawa State to see the woman and the eventual staying together in a hotel room, were not sufficient enough to infer evil intention of enticement;

- B** In continuation further the learned counsel informs that the conduct of the appellant though condemnable, cannot however replace a statutory provision as to the procedure to adopt in this particular circumstance of summary trial. The learned counsel re-iterates that the FIR did not disclose that the ultimate intention of the appellant was to entice the woman with the intent that she may have illicit intercourse with any person; that the omission to state the said essential ingredient in the FIR and which was not brought to the attention of the accused to either admit or deny positively is fatal to the case of the prosecution. Consequently the learned counsel submits that, the lower court ought to have held so by setting aside the judgment of the High court and that of the trial Magistrate Court.

- E** The counsel therefore urges in favour of allowing the appeal as being meritorious on this ground.

2ND ISSUE:

- F** Submitting also in support of the said issue, the appellant's counsel re-echoes that a thorough evaluation of the content of the FIR would reveal clearly that an offence known to law is not shown to have been committed by the appellant. It is also intriguing to state that while the learned counsel concedes the acts by the appellant as condemnable also detestable and frowned at by the society, he however berates the acts as mere allegation in the FIR and no more; that in the absence of a full trial to test those facts through the process of cross examination, the alleged singular acts are not sufficient to constitute an offence known to our criminal justice system. Suffice it to say therefore counsel informs, that the facts were mere allegations and of speculation/suspicion, which the courts have been warned cannot ground a conviction. Cited in support are the cases of **Onah vs. State (1985) 3 NWLR (Pt.12) 236; Bello vs. State (2012) 8 NWLR 207 at 235; also the case of Anyanwu vs. State (2012) 16 NWLR (Pt. 1326) 221 at 270 – 271**; that the use of the phrase “caught red handed” as contained in the FIR is very speculative as it gives room for different interpretations. The phrase, counsel argues raises a question to wit: **Caught red handed doing what?**: that the question can be appreciated and answered in a full trial and not summary trial.
- J** See the case of **Okeke vs. State (1995) 4 NWLR (Pt.392) 676 at 712**, where it

- A** was held that when evidence is capable of two interpretations in a criminal case, the one favourable to the accused person must be adopted; that from the judgments of the courts below and an evaluation of the contents of the FIR, there was a miscarriage of justice in the entire procedure adopted in convicting the appellant
- B** by the trial Magistrate Court. In support of his argument, the learned counsel cites the case of **Ochiba vs. State (2011) 17 NWLR (Pt.127) 663 at 694.**

- In further contention, the learned counsel submits affirmatively that the totality of the evidence, including the content of the FIR, was not sufficient
- C** enough to ground the conviction of the appellant and that the lower court ought to have set aside the judgment of the High Court and also the trial Magistrate Court. Counsel urges that the issue should be resolved also in favour of the appellant.

- On the totality of the two issues raised, the learned counsel urges this court
- D** to allow the appeal by setting aside the judgment of the lower court and also the conviction and sentence of the appellant by the trial High Court as well as the magistrate court; that the appellant should consequently be acquitted and discharged accordingly.

- E** The two issues formulated on behalf of the appellant were taken together as a lone issue in the respondent's brief of argument wherein the counsel raised the following issue:

- F** **“whether the justices of the Court of Appeal (the lower court) were right when they affirmed the decision of the Jigawa State High Court.”**

- G** The learned counsel for the respondent concedes to the appellant's counsel that the conviction and sentence of the appellant was per the Court of Appeal decision held in the case of **Garba vs. C.O.P (2007) 12 NWLR (Pt. 106) 378.** Counsel submits that the appellant did not dispute the fact that the FIR contains particulars
- H** 1 – 3 of the offence of enticing a married woman; that the confirmation of this was contained at page 7 paragraphs 3.1.3 of the appellant's brief of argument. The learned counsel for the respondent therefore centres his submission on the absence or otherwise of the last particular (iv) of the offence on the FIR. The
- I** learned counsel in reproducing the contents of the FIR argues vehemently that the 4th particular of the offence was reflected on the face of the FIR; that it is not in dispute that the appellant had understood the contents of the FIR clearly as evidenced per the pronouncement made by the lower court at page 121 of the
- J** record of appeal.

- A** It is the submission of counsel further that if the appellant had problem with the words used in the First Information Report, particularly the phrase “**love messages**”, he would certainly have asked for clarification or explanation about its meaning; that the appellant by pleading guilty to the contents of the First
- B** Information Report did clearly understood what he was facing at the trial court. It is the submission of counsel further that, if the contents and intendment of the section was not understood by the appellant's counsel, he would not have advised his client (the appellant to plead guilty to the contents as he did; that the conduct of
- C** the appellant as contained in the FIR must be compared viz-a-viz with the definition of the word intention to determine whether the lower court was right to have made the reference as it did; that from the decision of the lower court, the only thing to be inferred from the conduct of the appellant based on the content of
- D** the FIR was that he intended to have illicit relation with the woman. This, learned counsel submits was rightly put by the lower court, in its judgment at page 126 of the record of appeal before us.

- In further submission, the learned counsel drew similarities in the case of
- E** **Arebamen vs. State (1973) 7 NSCC 194** and the case at hand now before us wherein the intention of the appellant was to have illicit intercourse with the woman; that the contents of the FIR was explicit, clear and did inform the appellant adequately of the case that he was to face before the trial court. Pages
- F** 27 28 of the printed record were cited in reference.

- Learned counsel also alluded to a hypothetical situation that even if the FIR was defective with regards to the last particular as alleged by the appellant's counsel, that the defect, if any, is curable by **section 206** of the **Criminal**
- G** **Procedure Code**. The counsel urges this court to resolve the sole issue in the positive as the appellant had woefully failed to tender any reason why the decisions of the courts (Magistrate, High Court and Court of Appeal) should be disturbed. That the decisions are all concurrent and should be allowed to stay.
- H** Counsel urges in favour of dismissing the appeal as lacking merit.

RESOLUTION OF THE TWO ISSUES TAKEN TOGETHER

- The appellant herein was tried, convicted and sentenced in accordance with the summary trial procedure under **section 157** of the **Criminal Procedure Code**
- I** **Cap 19 Laws of Jigawa State 2012**. The conviction and sentence was under **section 389** of the **Penal Code** and the reproduction of the provision reads as follows:

J

- A** **“Whoever takes or entices away any woman, who is and whom he knows or has reason to believe to be the wife of any other man, from that man or from any person having the care of her on behalf of that man with intent that she may have illicit**
- B** **intercourse with any person or conceals or detains with that intent any such woman, shall be punished with imprisonment for a term which may extend to two years or with fine or both.”**
- C** As rightly enumerated by the lower court in its judgment at page 123 of the record of proceedings, there are four ingredients contained in the offence for which the appellant was convicted as follows:
- D** 1. **That the person enticed or taken away is a married woman;**
2. **That the accused knew or had reason to believe that the woman was the wife of another, under the care of her**
- E** **husband or of any other person.**
3. **That the married woman is enticed or taken away from her husband or any person while in the care of her husband or any other person;**
- F** 4. **That it is with the intent that she may have illicit intercourse with any person or**
- a. **be concealed.**
- b. **detained with the same intent.**
- G** From the dispassionate submission by both counsel, it is an established fact that the First Information Report has contained particulars 1 – 3 of the offence of enticing a married woman; paragraph 3.1.3. of the appellant's brief of argument at
- H** page 7 is evident on this. The position of the appellant was recognized by the lower court in its judgment at page 125 of the record which it held and said:
- I** **“With respect to 1st, 2nd and 3rd particulars of the offence, the learned silk concedes that the said particulars are disclosed on the First Information Report, what is vehemently denied is the existence or presence of 4th particulars on the face of the First Information Report.”**
- J**

- A** Following from the foregoing, the ball of contention is centered on the absence or otherwise of the last particular of the offence on the FIR. While the counsel for the appellant submits the absence of the particular on the face of the FIR, the respondent's counsel submits the contrary. The kernel contention of the
- B** appellant's argument therefore is the absence of the following ingredient:

“that it is with the intent that she may have illicit intercourse with any person or;

- C** **(a) Be concealed;**
 (b) Detained with same intent.”

- For a better understanding of the issue in contention between the parties, it is
- D** necessary to reproduce the contents of the First Information Report for ease of reference as follows:

ENTICING OF MARRIAGE (SIC) WOMAN

- E** **“That on the 21/05/2013 at about 1900 hrs one Mohammed Ghali “M” of Yakur site quarters Dutse came to police station and reported that you Professor Festus David Kolo “M”**
- F** **lecturer of A.B.U. Zaria Kaduna State knowing fully that Mrs. Bashira Ghali Mohhamed “F” of the same address is his wife, you (were) have been making advances towards her, enticing her, calling her oftenly, sending her love text, messages using**
- G** **your GSM line number 08039681194 to her GSM line number 08032843927 after being warned severally by the said husband Mohammed Ghali to stay away from his wife both face to face and on phone until when you were caught red handed with his**
- H** **wife at Dan Musa Guest Inn of Rafin Sanyi Quarters Dutse in room 109 on the 21/05/2013 at about 1900 hrs. During police investigation you confessed to have committed the above offence and you thereby committed an offence punishable**
- I** **under section 389 of the Penal Code Law.”**

- At page 121 of the record of appeal, the lower court held the view and was not in any doubt that the appellant had fully understood the contents of the First
- J** Information Report when it said thus:

A “Reading the proceedings of the court as to what transpired at
the trial court on 30/05/2013 as shown at pages 19 and 20
together, it is obvious that the First Information Report was
B read and explained by the magistrate who thereafter asked the
appellant if he understood the contents of the First Information
Report read to him. The accused answered “Yes I do.” The
court went further to ask “is the information contained therein
true or not” the accused answered “the information is true.”

C In further consideration, the lower court also said:

D “As to whether the particulars were explained to the appellant,
the printed record of the trial court at page 20 shows that the
First Information Report was read and explained to the
satisfactory understanding of the appellant. The appellant said
he understood. This fact has not been challenged, indeed it is
E also worthy to state, that the appellant who is a highly educated
person a professor and a lecturer of the Ahmadu Bello
University Zaria, should not have difficulty in understanding
what was read to him as contained in the First Information
F Report. It is also worthy of mention that the appellant was
represented by counsel at the trial court who found no fault
with either the contents of the First Information Report or the
conduct of the trial.”

G As re-iterated rightly by the lower court, the appellant is a highly educated person
being a professor and a lecturer of the Ahmadu Bello University Zaria, and
therefore should not have had any difficulty whatsoever in understanding the
H contents of the First Information Report which was read to him. It is on record
also that the appellant was represented adequately by a counsel at the trial court.
In my view and by any stretch of imagination, the appellant, I restate cannot be
taken seriously that he did not comprehend the contents of the First Information
I Report. Therefore, the lower court was right when it affirmed that point as it did.

The learned counsel for the appellant submits in great detail that the First
Information Report did not disclose that the ultimate intention of the appellant
was to entice the woman for the purpose of having illicit intercourse with any
J person; that making inference from such obvious omission, would be speculative

- A** thereby casting heavy doubt in the mind of every reasonable person as to what was the intention of the appellant. The 4th ingredient, counsel submits was not stated in clear terms to the appellant. It is the submission of counsel in the circumstance therefore that the facts of the case of **Arebamen vs. The State**
- B** (supra) which was relied upon by the respondent is distinguishable from the case at hand.

- It is pertinent to say at this point that the word intention is subjective and is within the mind of the very individual possessing it. It is often said that even the
- C** devil does not know the state of a person's mind as it is the state of his heart completely within his own knowledge to the exclusion of all else. The *Collins Learner's Dictionary Concise Edition* has defined intention thus:

- D** **“An intention that you have is an idea or plan of what you are going to do.”**

- The word intention being subjective in nature therefore can be inferred from the
- E** conduct of a person as manifested through his action. In other words, the conduct of the appellant as contained in the First Information Report (FIR) when considered against the definition of the word intention, would give an assessment as to whether the lower court was right to have inferred the intention of the
- F** appellant from his conduct. This is, especially where the last particular (iv) of the offence was not written in black and white on the face of the First Information Report as alleged by the appellant.

- G** In other words the absence of the phrase:

“With intent that she may have illicit intercourse with any person or conceals or detains with that intent”

- H** It is on record that the appellant, despite the full knowledge of the state of Mrs. Bushira Ghali Muhammed as being the wife of Muhammed Ghali, he still continued to make advances towards her, enticing her, calling her often, sending
- I** love messages to her through his GSM line to her GSM line; the numbers were stated in the First Information Report. There were several warnings by the woman's husband made to the appellant both in person and through phone calls. The appellant refused to heed until he was caught on the 21/05/2013 with the
- J** woman **“Red Handed”** at Dan Musa Guest Inn of Rafin Sanyi Quarter, Dutse in

A Room 109. Also contained on the First Information Report, the appellant on his own volition further confessed to the police during investigation to have committed the offence.

B In the face of all the facts stated supra, the question to pose is, what could be the intention of the appellant towards the married woman? Even in the absence of the phrase **“with intention that she may have illicit intercourse with any person,”** there are abundant material reasons from the appellant's behavior which when the totality are taken together will depict with certainty the intention of the appellant. What is more, it is intriguing and most disturbing that the appellant's counsel even in the face of his client having conceded that he was caught red handed in a hotel room with the woman, his learned counsel still argues the absence of **mens rea** which he submits must co-exist with the **actus**

C **rea**. It will be fools hardy to insist and argue that the totality of all those facts on the First Information Report (which were admitted) do not herein convey the **mens rea** of the offence or the criminal intention of the appellant.

D The lower court on the question of mens rea had this to say at page 127 of the record among others:

F **“It is immaterial that the phraseology used in the penal section, section 389, has not been used in the First Information Report. What is important is that the facts supplied on the First Information Report depict the essential particulars or ingredients of the offence and same are understood clearly by the accused person before admitting to the offence. It is not the**

G **law that the First Information Report must use the words or phraseology used in the provision of the law for the particular of the offence to be therein, disclosed. It is sufficient if the facts so supplied provide and depict the needed particulars of the**

H **offence.”**

I With all intents and purposes, I cannot agree more with the lower court. In other words, from the cumulative effect of the aggregate of the facts stated on the First Information Report, same have revealed the necessary intention on the part of the appellant. Therefore I hold the view that contrary to the contention put forward by the appellant's counsel, I do not subscribe to his argument that the First Information Report does not disclose or contained the **mens rea** of the offence.

J

A The law is trite and well settled that intention of an accused person can in certain cases be inferred from the conduct of the person and the surrounding circumstances within which he acts and operates. Proof of intention is usually difficult except by confession or by inference flowing from the manifestation of the person's action. See the case of **Arebamen vs. The State (supra)** at page 200 wherein this court said:

C **“Intention is of course difficult to prove affirmatively without a confession from the accused and can frequently only be determined by looking at all the surrounding circumstances and deciding there from whether the natural inference is that such must have been the intention. A material factor must be the action or conduct of the accused.”**

The lower court while applying the authority (supra), rightly help at page 128 of the record of appeal and said:

E **“Furthermore, where intention is required to be proved by evidence, (where evidence is taken) same may be inferred from the conduct of the person. It has since been settled through a line of cases that intention of an accused person can in certain cases be inferred from the conduct of the person and the surrounding circumstances within which he acts. Intention is usually difficult to prove except by confession or by inference flowing from the manifestation of the person's action.”**

The court went further to conclude its inference made on the intention of the appellant and said:

H **“In the same vein, I humbly hold that intention can be inferred where from the facts disclosed on the First Information Report and the surrounding circumstances as in the instant appeal, the material inference is that such must have been intended.”**

J As rightly submitted by the learned counsel for the respondent and contrary to the contention put forward by the appellant's counsel, the case of **Arebamen vs. State (supra)** share similarities with the case at hand. In that case, this court did

- A** consider the conduct of the appellant who set fire to a nearby building which led to the burning of the building in issue hence, it inferred that, he (the accused) did intend to burn the building in question; in the present also, the lower court did consider the conduct of the appellant, who had been sending love text messages
- B** and oftenly calling a married woman, (as disclosed on the First Information Report), engaged in a journey of many kilometers from Zaria, Kaduna State to Dutse, Jigawa State and eventually took her to a room in a hotel. The intention of the appellant cannot be other than to have illicit intercourse with the woman, as
- C** rightly submitted by the respondent's counsel. The contents of the First Information Report are very clear and to the point.

It is not surprising therefore that the lower court did not waste any time when at page 126 of the record it said thus:

- D**
- E**
- F**
- “of all places the appellant was seen with the woman in hotel room. This woman he knew not only is someone's wife, but also whom he had been warned to stay clear. They were caught to use the words used in the First Information Report “Red handed.” That was not all, during police investigation, he confessed to the commission of the offence. The section of the offence was cited in the First Information Report as section 389 of the Penal Code.”**

- This court had in plethora of cases held that confession is the best form of evidence and an accused person can be convicted on his confessional statement alone. In the case of **Nwachukwu vs. State (2007) 17 NWLR (Pt. 1062) 31 at 70** for instance, **it was held that:**
- G**

- H**
- “ a confessional statement ... is the best evidence in criminal procedure. It is a statement of admission of guilt by the accused person and the trial court must admit it in evidence unless it is contested at the trial.”**

- I** It is pertinent to restate further that at the appellant's arraignment, the First Information Report which was read to him in the presence of his counsel contained the fact of the oral confession he made to the police during investigation, the facts which he did not deny nor was it contested by his counsel.
- J** He was thereupon convicted and sentenced accordingly in strict compliance with

A summary trial procedure.

As rightly submitted by the counsel for the respondent, the purpose of any charge, be it FIR or information as the case may be is to precisely inform the accused person of the case he is going to face at the trial. **See the case of Ndukwe vs. LPDC (2007) 5 NWLR (Pt. 1026) 46.** In the case at hand, the contents of the First Information Report was explicitly clear and it precisely and adequately informed the appellant of the case that he was to face before the trial court.

B For purpose of re-stating the decision arrived at by the lower court, I seek to draw attention to the provision of **section 206** of the **Criminal Procedure Code** which has been put in place to cure a defect if any on a First Information Report. The section states as follows:

D “No error in stating either the offence or the particulars
E required to be stated in charge and no omission shall be
 regarded at any stage of the case as material, unless the accused
 was in fact misled by such error or omission and it has
 occasioned a failure of justice.”

By arraigning the appellant on First Information Report is nothing more than a charge as it was held in the case of **Suleiman v. Commissioner of Police (2008) 8 NWLR (Pt. 1089) 298 at 320.** The law is also well settled that for the court to consider any defect (if any) in a First Information Report, the appellant must prove that such error or omission has occasioned failure or miscarriage of justice to him. **See the case of Buraima Ajayi & Anor. vs. Zaria N. A. (1964) NNLR 61 at 65.**

F As rightly submitted by the learned counsel for the respondent, in the case at hand, the appellant had failed to show that the alleged error or omission in the First Information Report has occasioned a failure of justice. Also, judicial authorities are firmly established that where the appellant failed to show that a failure of justice has been occasioned as a result of the defective charge, the judgment of the lower court will not be disturbed on appeal. **See the case of Mangai vs. State (1993) 3 NWLR (Pt.279) 108 at 117 and Emenegur vs. State (2010) All FWLR (Pt.511) 884 at 936.**

H Again and as rightly held by the lower court, although the phrase suggesting the intent or mens rea connotation is not stated in black and white on the First Information Report, I re-iterate affirmatively that the question of intention is subjective and could be interpreted from the intervening events,

A circumstances, actions/inactions surrounding the case. The monopoly and secret to a man's heart are known to God and him only. The omnipotent, ominipresent and omniscient God is the searcher of all hidden intentions of a man's heart.

B On the community, consideration of the appellant's conduct, coupled with the entire circumstance of the case as well as the events leading to same, the making of the inference from such obvious behaviours by the appellant cannot be speculative so as to cast any doubt on his intention. Contrary to the submission by the appellant's counsel therefore, no reasonable man could have reasoned otherwise. In other words the appellant's intention was in clear tandem with particular (4) ***“with such intent that the woman may have illicit intercourse with any person or conceals or detains with that intent”***.

D Neither the appellant nor his counsel, who was in court, objected to the contents of the First Information Report when it was read and explained to the appellant at the time his plea was taken at the trial court. It is now far too late in the day for the appellant to raise the issue. **See State vs. Gwonto & Ors (1983)14 NSCC 104** wherein this court said:

E **“I think with all respect, that the point which was missed here is that the importance of the issue of representation had in the fact that either accused person is represented lies in fact that if an**

F **accused person is represented by counsel such counsel ought to demand his clients right to interpretation if neither he nor the accused objects the right is lost for all time and certainly cannot be invoked.”**

G See also the case of **Essein vs. Commissioner of Police (1996) 5 NWLR (Pt.449) 489 and Otti vs. State (1991) 8 NWLR (Pt. 207) 103 at 119** where any error in the First Information Report can be cured by the provision of **Section 206 of the Criminal Procedure Code (Supra)**.

H The learned counsel for the appellant did argue vigorously in his submission that the facts contained in the First Information Report (which were admitted) were mere allegation, speculation and/or suspicion.

I However and that notwithstanding, the said counsel appeared to have missed his bearing when he again described the act of the appellant as condemnable and detestable. The confirmation is at page 16 of the appellant's brief of argument at paragraph 3.2.2 as follows:

J

- A** “The acts of making advances to a married woman or inciting
B her, calling or sending her love text messages, travelling from
 Kaduna to Jigawa and finally being caught “red handed” in a
 hotel, no doubt,(sic) condemnable and detestable acts which
 our society frowns at.”

It is ironical and intriguing that the learned counsel for the appellant, who described the act of his client as condemnable and detestable could, in another
C tone, dismiss the same act simply, “as mere allegation and speculation/
 suspicious.”

For purpose of recapitulation, a critical analyses of the behavioural pattern exhibited by the appellant will give a reasonable assessment of his character and
D intentions. This is well depicted in his persistent refusal to stay away from another
 man's wife despite several warnings by her husband.

In addition to the foregoing, the open confession made by the appellant to the commission of the offence during police investigation is a further reason to
E discountenance the submission put forward by the learned counsel for the
 appellant.

I have stated the position of this court earlier in the course of this judgment wherein it holds that confession is the best form of evidence and an accused
F person can be convicted on his confessional statement alone. Again **see the case
 of Nwachukwu vs. State** (supra).

Consequently, the lower court could not be faulted when it went ahead to affirm the conviction and sentence of the appellant according to strict compliance
G with summary trial procedure by the successive lower courts.

The judgment on appeal now before us is concurrent at the levels of the Magistrate, High Court and Court of Appeal. The law is well settled that a concurrent decision of the court below is not ordinarily disturbed unless there is a
H miscarriage of justice. **See the cases of Micheal vs. The State (2008) 3 NWLR
 (pt. 1104) 361 at 384; Posu vs. The State (2011) All FWLR (pt. 565) 234 at 249
 and Onyejekwe vs. The State (1992) 3 NWLR (pt. 230) 444.**

On the totality of the determination of the two issues raised on behalf of the
I appellant, I am of the firm view that the justices of the Court of Appeal were right
 when they affirmed the decisions arrived at by the successive lower courts in
 dismissing the appellant's appeal. The lower court in other words could not be
 faulted when it affirmed the judgment of the trial court, which in turn also
J endorsed the trial magistrate court.

A The appeal at hand is devoid of any merit and same is hereby dismissed. The concurrent judgments of the lower courts are endorsed while the conviction and sentence of the appellant by the lower court is also affirmed by me.

Appeal is dismissed and the judgment of the lower court is affirmed.

B **Clara Bata Ogunbiyi**
Justice, Supreme Court

RHODES-VIVOUR, (JSC): I have had the benefit of reading in draft the
C leading judgment of my learned brother, **Ogunbiyi, JSC**, and I agree that there is no merit in this appeal. The appellant was charged under **section 389** of the **Penal Code**. It reads:

D “**389. Whoever takes or entices away any woman, who is and**
whom he knows or has reason to believe to be the wife of
any other man, from that man or from any person having
E **the care of her on behalf of that man with intent that she**
may have illicit intercourse with any person or conceals
or detains with that intent any such woman, shall be
punished with imprisonment for a term which may
extend to two years or with fine or with both.

F To succeed the prosecution must prove beyond reasonable doubt that:

G (a) **The woman was married,**
(b) **The accused knew or had reason to believe that she was**
the wife of another man.

True, indeed, my advice to the appellant in this appeal is to “leave the fair hearing
H constitutional provision alone because it is not available to him.”

It is for these, and the more elaborate, reasons in the leading judgment that I too, shall dismiss this appeal. I abide by the consequential orders in the leading judgment.

I **Olabode Rhodes-Vivour**
Justice, Supreme Court

DATTIJO MUHAMMAD, (JSC): I read in draft the lead judgment of my
J learned brother Ogunbiyi (JSC) just delivered. I agree entirely with the reasoning

A and conclusion arrived at therein that the appeal is bereft of merit. In making this contribution, purely for the sake of emphasis, reliance is placed on the summary of the facts of the case that brought about the appeal supplied in the lead judgment.

B The lone issue distilled by the respondent subsumes appellant's two issues and appears more availing for the determination of the appeal. It reads:

C **"Whether the justices of the Court of Appeal (the lower court) were right when they affirmed the decision of the Jigawa State High Court."**

In arguing the appeal, learned counsel for the appellant contends that the First
D Information Report (FIR) on which the appellant was convicted does not contain all the ingredients of the offence of enticing a married woman he stood trial for. **Section 389** of the **Penal Code of Jigawa State** which provides for the offence requires the information to necessarily specify the ingredients of the offence
E which must be brought to the attention of the accused who would be asked to plead thereto. The Information Report read to the appellant and in respect of which the trial court took his plea did not specify that the appellant's intention for concealing or detaining the woman, someone else's wife, was to have illicit
F intercourse with her. Replying inter-alia on **Sukate vs. C.O.P. (1969) SCOPE 30** and **Garba vs. C.O.P. (2007) 16 NWLR (Pt 1060) 378 at 402**, learned appellant's counsel submits that the trial court's non disclosure of the full ingredients of the offence under **Section 389** is a fundamental breach of **Section**
G 156 of the **Criminal Procedure Code** and the lower court's decision discountenancing the breach renders it perverse.

In any event, it is further argued, the paucity of evidence has rendered appellant's conviction unsustainable. Lower court's affirmation of the conviction
H that is not grounded in any evidence being adducedly perverse, it is submitted, by the authority of **Ochiba vs. State (2011) 17 NWLR (Pt 127)** should be set aside.

Learned respondent's counsel vehemently disagrees. He submits that the FIR clearly reflects all the ingredients of the offence the appellant is convicted for
I and from the printed record of the appeal it is glaring that the appellant clearly understood the charge read to him and pleaded thereto. By the clear content of the F.I.R, appellant's conduct alleged to constitute the offence under **Section 389** of the Penal Code is his act of taking along someone's wife with the intention of
J having illicit sexual intercourse with her. Relying on **Arebamen vs. State (1973)**

A 7 NSCC 194 learned respondent's counsel urges that the concurrent findings of the lower court as to appellant's guilt be sustained. The appeal, on the whole, he submits, should be dismissed.

This appeal raises a fundamental constitutional issue that is provided for **B** under **Section 36(6)(a)** of the **1999 Constitution** as amended. The subsection reads:

C (6) Every person who is charged with a criminal offence shall be entitled to:
(a) be informed promptly in the language that he understand and in detail of the nature of the offence. (Underlining mine for emphasis)

D The appellant's contention is that the First Information Report which constitute the charge for which he is convicted and affirmed by the lower court does not contain the required details of the offence punishable under **Section 389** of the **E Penal Code**. If the appellant makes out his complaint he would be establishing a breach by the trial court of **Section 36(6)(a)** of the **Constitution** reproduced supra, a decision the two other courts affirmed. Notwithstanding that the three courts are concurrent in their findings that the appellant is guilty, because the **F** decisions how ensued inspite of the breach of the constitutional requirement would not persist. The lapse is fundamental and has been adjudged, by its occurrence alone, to occasion miscarriage of justice. See **Okeke vs. The State (2003) 15 NWLR (Pt 842) 25 at 72, 74 and Kajubo vs. The State (1988) 1 NWLR (Pt 73) 721.**

G It is instructive to observe that the combined effect of **Sections 156 and 157** of the Jigawa State Criminal Procedure Code, the trial court's adjectival law, is to the effect that conviction of an accused proceeds only where the court has **H** read to him, in a language that he understands, details of the offence he stands trial for and, on being satisfied that the accused understands the allegation against him. The appellant insists that these adjectival provision and indeed **Section 36 (6)(a)** of the **1999 Constitution** have been breached by the trial court and the others that **I** affirmed the former's illegal decision.

The First Information Report, the charge at the trial court reads:

J “That on the 21/05/2013 at about 1900hrs one Mohammed Gali “m” of Yakur Site Quarters Dutse came to Police Station and

A reported that you Professor Festus David Kolo “m” lecturer of
A.B.U. Zaria Kaduna State knowing fully that Mrs Bashira
B **Ghali Mohammed “f” of the same address is his wife, you (were)**
have been making advances towards her, enticing her, calling
her oftenly, sending her love texts, messages using your GSM
C **line number 08039681194 to her GSM line 08032843927 after**
being warned severally by the said husband Mohammed Ghali
to stay away from his wife both face to face and on phone until
D **you were caught red handed with his wife at Dan Musa Guest**
Inn of Rafin Sanyi Quarters Dutse in room 109 on 21/05/2013 at
about 1900hrs. During police investigation you confessed to
have committed the above offence and you thereby committed
an offence punishable under Section 389 of the Penal Code
Law.”

The trial court read the foregoing information to the appellant and on the basis of
E his confession to the facts therein, which facts constitute the offence under
Section 389 of the Panel Code, the appellant was asked if he understood the
 allegation and how he would respond. Appellant, a professor at the A.B.U. Zaria
 and who was represented by counsel told the court he understood the allegation
F read to him and that he committed the offence. On satisfying itself that the
 appellant had understood and admitted having committed the offence in the
 manner outlined in the First Information Report, the trial court invoked its powers
 under **Section 157 of the Criminal Procedure Code** to summarily convict and
G sentence the appellant. Appellant's argument before us is that his conviction and
 sentence by the trial court had proceeded on the basis of the incomplete
 particulars in the First Information Report read and explained to him which
 insufficient facts are incapable of sustaining his conviction under **Section 389 of**
H the Penal Code.

In further affirming the trial court's decision dismissing appellant's appeal
 on grounds similar to those in the instant appeal, the lower court at pages 21-22 of
 the record held:

I “.... The printed record of the trial court at page 20 shows that
the First Information Report was read and explained to the
satisfactory understanding of the appellant. The appellant said
J **he understood. This fact has not been challenged, indeed it is**

A also worthy to state, that the appellant who is highly educated person as a professor and a lecturer of (sic) the Ahmadu Bello University Zaria, should not have difficulty his understanding what was read to him as contained in the First Information Report. It is also worthy of mention that the appellant was represented by counsel at the trial court who found no fault with either the contents of the First Information Report or the conduct of the trial.”

C My lords, my perusal of the record of appeal, particularly the First Information Report, which for ease of reference has been reproduced earlier in this judgment, and the proceedings of the trial court, convinces me that the lower court's affirmation of the trial court's conviction and sentence on the basis of its foregoing findings is unassailable. It is obvious from these findings that in admitting his guilt after the First Information Report had been read to him, the appellant knew why he was on trial and that what he did with someone else's wife indeed constituted the offence for which he had been convicted and sentenced, by the trial court, which decision on a further appeal the lower court affirmed. The lower court's decision the appellant appeals against that is borne out of the evidence on record and not in breach of **Section 36 (6) (a)** of the **Constitution** must persist. I so hold.

F It is for the forgoing and moreso the fuller reasons adumbrated in the lead judgment that I also dismiss the appeal. I abide by the consequential orders reflected in the lead judgment.

Musa Dattijo Muhammad
Justice, Supreme Court

G

CHIME CENTUS NWEZE (JSC): I had the advantage of reading the draft of the leading judgment which my lord, Ogunbiyi (JSC) just delivered now. I, entirely, agree with the reasoning and conclusion.

H In my humble view, the appellant, a university professor, cannot be heard to complain that he did not understand why he was arraigned on the first information report at the court of trial. Thus, his invocation of section 36 (6) (a) of the 1999 Constitution of the Federation (as amended) is unavailing.

I This is a classical example of the sort of situation which this court derided in *Adebayo vs. AG, Ogun State* (2008) LPELR - 80 (SC) 23 - 24. Listen to this:

J

- A** I have seen in recent times that parties who have bad cases embrace and make use of the constitutional provision of fair hearing to bamboozle the adverse party and the Court, with a view to moving the court away from the live issues in the litigation. They make so much weather and sing the familiar song that the constitutional provision is violated or contravened.
- B**
- C** They do not stop there. They rake the defence in most inappropriate eases because they have netting to canvass in their favour in the case. The fair hearing provision in the constitution is the machinery or locomotive of justice; not a spare part to propel or invigorate the case of the user. It is not a casual principle of law available to a party to be picked up at will in a case and force the court to apply it to his advantage. On the contrary, it is a formidable and fundamental constitutional provision *available to a party who is really denied fair hearing because he was not heard or that he was not properly heard in the case*. Let litigants who have nothing useful to advocate in favour of their cases, leave the fair hearing constitutional provision alone because it is not available to them just for the asking. (italics supplied for emphasis)
- D**
- E**
- F**
- G** (c) she was at the time of the offence living under the care of her husband or someone else on his behalf.

The appellant is a professor and lecturer at the Ahmadu Bello University Zaria, while the married woman he is charged with enticing is a student at the University.

- H** He knew that she was married, since he was warned on more than one occasion by the lady's husband to keep away from his wife. He remained defiant and took the lady to a Hotel (not being aware of an apparent set up) where he was arrested in one of the rooms in the Hotel with the lady being present.
- I** At the trial the appellant pleaded guilty. The simple question is what is the effect of a plea of guilty to a criminal charge?
- When an accused person represented by counsel is arraigned and the charge read and explained to him in the language he understands, and he pleads
- J** guilty the court shall convict him unless there appears to the court sufficient cause

A why he should not be convicted.

A plea is valid only when the accused pleads' himself. A trial would be declared a nullity if a plea is made by counsel. It is the duty of defence counsel to guide the accused person on how to plead and the consequences of pleading one

B Way or the other. Once the trial court is satisfied with the plea of guilty the next step is conviction and sentence.

This appeal has its origins in a magistrate's court and has passed through all layers of the appeal system culminating in the top court. The appellant is a professor, a

C highly intelligent person. He was very much aware that the lady was married, since he met her husband on more than one occasion. He pleaded guilty in the Magistrate's court. There is an irrebuttable presumption that he fully understood the charge and the consequences of a plea of guilty. This is so since he never

D complained at the trial court or on appeal that he did not understand the charge or the consequences of entering a plea of guilty. Furthermore he was represented by counsel who was clearly satisfied that his client (the appellant) entered a plea of guilty. The trial magistrate proceeded to sentence the appellant to two months

E imprisonment, a conviction and sentence affirmed by the High Court and Court of Appeal. I am satisfied that this appeal is devoid of merit. For these brief reasons as well as those more fully given by my learned brother Ogunbiyi (JSC). I also would dismiss this appeal. Appeal dismissed.

F

Chime Cletus Nweze
Justice, Supreme Court

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J

**REV. PROF. PAUL EMEKA
AND**

- 1. REV. DR. CHIDI OKOROAFOR**
- 2. REV. DR. J.O. IKONI**
- 3. REV. DR. VINCENT ALAJE**
(Sued for themselves and as representing other members
of the Executive Committee of Assemblies of God, Nigeria
in their individual capacities
- 4. REV. DR. CHARLES O. OSUEKE (RTD)**
- 5. REV. DR. DEME BOT**
- 6. REV. DR. DOUGLAS DAMTE**
- 7. REV. ISAAC C. MPAMUGO (RTD)**
(Sued for themselves and as representing
members of the nine-man panel of investigation
Purportedly set up to investigate allegations against
the Appellant
- 8. BARR. EYO IDOERIN**
(Sued herself and as representing members of
the eleven-man Constitution Review Committee)
- 9. BARR. P.C. ABUKA**
- 10. PROF. I.U. KALU**
- 11. DAVID J. UDOH**
- 12. EVANS OVIA**
- 13. ELDER L.A. UWAKWE**
- 14. V.C 1GBOKWE**
- 15. DR. MIKE O. OKORO**
- 16. PROF. B. O. ESONU**
- 17. OZIOMA KANU**
- 18. DR. EMMA IROEGBU**
- 19. E.O.N. UCHE**

RESPONDENTS

SC. 396/2015

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

FRIDAY 24TH FEBRUARY 2017

BEFORE THEIR LORDSHIPS

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

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

ACTION: Fundamental rights action – Breach of principles of fair hearing – Enforcement of right of fair hearing under Chapter IV of the Constitution of Federal Republic of Nigeria 1999 – The alleged breach or violation must be in respect of proceedings before a court or tribunal established by law and not before domestic or standing ad hoc tribunals.

*ACTION: Fundamental rights action – Nature of rights cognizable under **Section 46 of the Constitution of Federal Republic of Nigeria 1999 (as amended)**.*

ACTION: Fundamental rights action – Relief against the wrongful dismissal of plaintiff as the main claim – Whether cognizable under fundamental – Rights – Procedure Rules.

ACTION: Fundamental rights action – Where main relief deals with dismissal of plaintiff and other injunctive reliefs – Secondary reliefs deal with issues of fair hearing – Whether plaintiff's claims cognizable under fundamental rights action.

ACTION: Fundamental rights proceedings – Issues within its purview – Need to distinguish between main and secondary claims of the plaintiff.

*ACTION: Fundamental rights proceedings – Nature of **Section 46 of the Constitution of Federal Republic of Nigeria 1999 (as amended)** – Matters cognizable therein.*

ACTION: Service of originating process – Condition precedent to competency of action – Fundamental nature thereof.

*APPEAL: Where a party fails to appeal against a specific finding made against him
Implication.*

*CONSTITUTIONAL LAW: Failure to serve a named party – Whether breach of his
fundamental right of fair hearing – **Section 36 of 1999 Constitution (as
amended)** – Consideration thereof.*

*CONSTITUTIONAL LAW: Fundamental rights action – Principles of fair hearing –
Whether apply only where breach occurred in the proceedings of a court or
tribunal.*

*CONSTITUTIONAL LAW: Principles of fair hearing – **Section 36 of the
Constitution of Federal Republic of Nigeria 1999 (as amended)** – Whether
applies to administrative bodies which determine rights of persons.*

*COURT: Evaluation of evidence – Documentary evidence – Whether appellate
court has the same power as a trial court thereto.*

COURT: Competency – Relevant consideration thereto.

*COURT: How to determine jurisdiction – Plaintiff's claim relevant – Whether
defendant's opposition is also relevant.*

*EVIDENCE: Presumption of regularity – **Section 168 of Evidence Act 2011** –
Presumption of the regularity of affidavit of service filed.*

*EVIDENCE: Presumption of regularity of affidavit of service – Whether rebuttable A
defendant who wants to challenge affidavit of service – Procedure thereto.*

EVIDENCE: Proof – Filing of further affidavit – Whether necessary in all cases.

*EVIDENCE: Witness gives contradictory evidence on the same issue on oath –
Implication.*

*PRACTICE AND PROCEDURE: Conflicting evidence before court – Need for oral
evidence to resolve – Whether court can pick and choose without oral
evidence.*

PRACTICE AND PROCEDURE: Objection to mode of service – Party allegedly served appears under protest – Implication.

PRACTICE AND PROCEDURE: Party not properly served with the originating process – Party appears in protest – Whether his appearance can waive the issue of improper service.

PRACTICE AND PROCEDURE: Where a defendant is irregularly served with originating process – Who wants to object – Procedure thereto.

SERVICE OF PROCESS: Fundamental nature – Failure to serve a named party – Effect.

SERVICE OF PROCESS: Importance of.

SERVICE: Failure to properly serve the originating process – Whether jurisdiction of court eroded in the circumstance – Court cannot validly make any further findings.

SERVICE: Order of substituted service – Bailiff must carry out service as directed by court – Failure to do so – Effect.

SERVICE: Order of substituted service – Service not in accordance with order – Effect – Bailiff served contrary to the specific mode of service as ordered without obtaining fresh order from court.

SERVICE: Order of substituted service – Where affidavit of service contradicts the terms of order – Effect.

SERVICE: Proof of service – Affidavit of Service – Whether prima Facie proof of the service.

SERVICE: Service of originating summons – Failure to serve properly – Effect on jurisdiction of court.

Issues for Determination

1. **Whether the Court of Appeal was right when it set aside the service of the originating processes on the respondents on the ground that the service was not in accordance with the order of the High Court. (Grounds 3 and 4)**
2. **Whether the reliefs sought by the appellant at the High Court was (sic) competent and rightly brought under Fundamental Rights Enforcement Procedure. (Ground 2).**
3. **Whether the Court of Appeal was right when in its judgment it pronounced on the constitutionality of the powers of the CJN vis-a vis Section 46(1), which was not an issue before it. (ground 1)**
4. **Whether subsequent findings made by the Court of Appeal after it had held that Suit No. E/202M/2014 a nullity, is proper and valid in law. (Grounds 5 and 6)**
5. **Whether the Court of Appeal was right when in seemingly considering the propriety of the damages awarded by the High Court, it went into a fact finding mission on issues which were not before it. (Grounds 8, 9 and 10)**
6. **Whether the Court of Appeal was right when in its judgment it made findings of fact and pronouncements against persons who were not parties to the suit and who were not heard. (Ground 7)**

Facts of the Matter

In November 2010, the appellant was elected General Superintendent of the Assemblies of God Church for a term of four years. During the course of his tenure, he was alleged to have committed various acts inimical to his oath of office involving alleged breaches of the church's Constitution and by-laws. The 9th – 19th respondents wrote a petition (Exhibit PE2), which was circulated to all leaders of the church at various levels and was also published on the internet, social media and in the electronic and print media.

The appellant addressed the allegations made against him in a letter (Exhibit Pe3).

In the meantime, certain members of the church instituted a suit at the Enugu State High Court in Suit No, E/82/2014 to forestall the holding of the meeting scheduled for 6th March 2014, which was perceived to be a move by the respondents to remove the appellant from office. The appellant was not a party to that suit.

The meeting held nonetheless. Upon the conclusion of deliberations by the special session of the General Committee, the appellant's appointment as General Superintendent of the church was terminated. He was also suspended from membership of the church. He contended that his right to fair hearing had been breached in the circumstance. The action dismissing the appellant and some other members of the church was taken during the pendency of Suit No. E/82/2014. It was the appellant's contention that notwithstanding this order, the respondents took steps to actualize their decision by ostracizing him by writing to members of the church and threatening to suspend or dismiss anyone who had dealings with him. It was the appellant's further contention that as a consequence of the meeting of 6/3/14 he had been deprived of his remuneration/means of livelihood and that his public image had been tarnished, It was for all these reasons that he filed the application for the enforcement of his fundamental rights at the trial court.

The appellant by a motion on notice applied to the High Court of Enugu State, for the enforcement of his fundamental rights. The application was brought pursuant to **Order 2 Rules 1, 2 and 3 of the Fundamental Rights (Enforcement Procedure) Rules, 2009; Sections 6 (6), 36 (i) (2), (4) & (5), 38 (1), 9 (1) & (2) and 42 (1) of the 1999 Constitution of the Federal Republic of Nigeria and under the African Charter on Human and Peoples' Rights.** The application was supported by a statement setting out the names, address and description of the applicant, the reliefs sought and the grounds for seeking the reliefs. It was also supported by an 85-paragraph affidavit of facts with several exhibits attached thereto and a written address.

On 25/4/2014, the respondents filed an application seeking the following orders:

- a. Setting aside the service of the originating process and order in this suit effected by the bailiff of this honourable court at No, 5 Mbannano Street, Independence Layout, Enugu, Enugu State contrary to the definite address at Evangel House, Plot R8 Ozubulu Street, Independence Layout, Enugu, Enugu State whereat the honourable court ordered that service to be effected;
- b. Setting aside the injunctive and restraining orders made ex-parte against the respondents on record in this suit; and
- c. Striking out this suit for want of competence.

The application was supported by a 12-paragraph affidavit deposed to by the 1st respondent with two exhibits annexed thereto being the statement of claim in respect of Suit No. E/82/2014, a sister suit pending between the parties in the same court and

a copy of the proceedings of 13/3/2014, in the said suit. The application in essence challenged the service of the court processes on the respondents. The 1st respondent in addition deposed to a counter affidavit in reaction to the affidavit of service deposed to by the bailiff of the court. The bailiff also filed an affidavit in reaction to the 1st respondent's counter affidavit. The parties duly filed and exchanged written addresses in respect of the application. The substantive application was heard on 23/10/2014. After considering the various processes before it and the submissions of learned counsel, the learned trial Judge in a considered ruling delivered on 11/12/2014 refused the application to set aside the service of the originating processes. He also overruled the objection challenging the incompetence of the suit and granted the appellant's reliefs. Cost were awarded against the respondents and in favour of the appellant.

The respondents were dissatisfied with the ruling and appealed against it to the Court of Appeal, Enugu Division. The Court of Appeal allowed the appeal and set aside the judgment of the trial court for being a nullity. The court granted the application filed on 25/4/2014 and set aside the service of the ex-parte order and the substantive motion on notice. The court also considered the merit of the appeal. Ultimately the appeal was allowed and the suit before the trial court was struck out. The appellant herein is aggrieved by this decision and has further appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *The law governing service of originating processes*

The settled position of the law was clearly stated by His lordship, Musdapher, (JSC) (as he then was) in Kida vs Ogunmola (2006) 6 SCNJ 165 @ 174 thus:

“....service of process on a party to an action, particularly an originating process, is crucial and fundamental. See Auto Import Export vs. Adetayo (2000) 18 NWLR (Pt.799) 554; S.G.B.N. vs. Adewunmi (2003) 10 NWLR ('Pt. 829) 526, Mbadinuju vs. Ezuka (1994) 8 NWLR (Pt.364,) 535, Failure to serve process where service of process is required is a fundamental vice. It deprives the trial court of the necessary competence and jurisdiction to hear the suit, In other words the condition precedent to the exercise of the court's

jurisdiction was not fulfilled.”

To underscore the importance of service, His Lordship continued at page 175 lines 57 (supra):

“confining myself to the fundamental issue of service in this matter, I need not even consider the argument of counsel since where there is no service there is no valid trial.”

The principle was re-stated in the recent decision of this court in Ihedioha vs. Okorochoa (2016) 1 NWLR (Pt. 1492) 148 @ 179 D F by Okoro, (JSC):

“...I agree that it is not every non-compliance with the rules of court that should vitiate the proceedings. However, where the non-compliance robs the court of its jurisdiction, the processes and the proceedings must be set aside. I must emphasize that service of process is an important aspect of the judicial process. Failure to serve a named party with court process offends Section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)..... Any breach of this principle [of fair hearing] renders the proceedings a nullity. See *Chime vs. Onyia* (2009) ALL FWLR (Pt. 480) 673 @ 730 – 731 paras. H-B; (2009) 2 NWLR (Pt. 1124) 1.”

See also: Skenconsult (Nig.) Ltd. vs Ukey (1981) 1 SC 6; Obimonure vs. Erinoshio (1966) 1 ALL NLR 250; Craig vs. Kanseen (1943) K.B. 256; National Bank (Nig.) Ltd. vs. Guthrie (Nig.) Ltd. (1993) 3 NWLR (Pt. 284) 643. (Pp 354–355 paras I–I).

2. *Service is a condition precedent to the exercise of the court's jurisdiction.*
It is therefore settled beyond dispute that the service of an originating process on a party to an action is a condition precedent to the exercise of the court's jurisdiction, as any party against whom a suit or process is filed has the right to know that a suit had been instituted against him, what the claims are and an opportunity to defend himself, if he has a defence thereto. (Pp 355–356 paras I–A)

3. *Affidavit of service is prima facie evidence of service*
Section 168 (1) of the Evidence Act, 2011 provides for the presumption of regularity of official acts. It provides thus:

“(1) Where any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with.”

The law is trite that an affidavit of service deposed to by the bailiff of a court stating the fact, place, mode and date of service and describing the process or document served shall be *prima facie* proof of the matter stated in the affidavit. See: *Schroder vs. Major* (1989) 2 NWLR (Pt. 101) 1 @ 11 E – H; *Okoye vs. Centre Point Merchant Bank Ltd.* (2008) 15 NWLR (Pt. 1110) 335; *Idisi vs. Ecodril (Nig.) Ltd.* (2016) LPELR – 40438 (SC). (P 362 paras A–D)

4. *How to displace presumption in an affidavit of service.*
The law is equally settled that the presumption of regularity in this regard is rebuttable. A defendant who intends to challenge the affidavit of Service deposed to by the bailiff must file an affidavit denying service and detailing specific facts, which show that he could not have been served on the date, or at the time, or at the place or in the manner deposed to. It would then be for the court to determine whether or not the party complaining was indeed served accordingly. (P 362 paras D–F)
5. *The power of appellate court to evaluate documentary evidence.*
An appellate court would ordinarily not interfere with the findings of a trial court where that court has carried out its duty of evaluating the evidence before it and ascribing probative value thereto. However, where the evidence is documentary, an appellate court is in as good a position as a trial court to evaluate same, where there is a complaint that the finding of the court is not supported by the evidence before it. See: *Afolayan vs. Ogunrinde* (1990) 1 NWLR (P. 127) 369 @ 385 C; *Obineche vs. Akujobi* (2010) 12 NWLR (Pt. 1208) 383 @ 416 H. (P 362 paras F–H).
6. *Where a process was not served in accordance with order of service*
A careful perusal of the relief sought in the motion ex-parte and the averments in support thereof shows, as held by the lower court, that the 1st

respondent was to be served personally while the 2nd – 19th respondents were to be served through the 1st respondent. In other words the 1st respondent was to act as their agent for the purpose of service. There was no request for service to be effected either on the 1st respondent or his agent. Also evident from the application is that Evangel House, Plot R8 Ozobulu Street, Independence Layout, Enugu was the address supplied by the appellant as the 1st respondent's address for service. The word “whose” is used to identify the person or entity to whom or which something belongs. By the application filed by the appellant, the person to be served with the processes had been removed from the realm of uncertainty with the specific request that the processes be served on all the respondents by delivery to the 1st respondent at Evangel House.

(P 364 paras D–G)

7. *Bailiff must carry out the order of service as directed by order of court.*
As rightly pointed out by Chief Agabi, (SAN), once the order was made, the bailiff had a duty to carry it out according to its terms, He had no discretion in the matter. This is not an issue of technicality but compliance with an order of court. I am unable to agree with learned trial Judge that the words 'whose address for service is Evangel House, Plot R8 Ozobulu Street, Independence Layout, Enugu', could mean anything other than that the processes were to be served at that address. *(P 364 paras G–H)*
8. *Service must be served in accordance with an order for substituted service*
It is the usual practice when applying for substituted service to specify the manner in which service is to be effected, the person on whom it is to be effected and where. The applicant chooses the location where he believes the processes are most likely to come to the attention of the person to be served. He may also request a particular mode of service, such as pasting at the party's last known abode or place of business, by handing it to a named adult at a particular address or by publication in a widely circulating newspaper. The order would be made in accordance with the request. Having sought and obtained such a specific order, it cannot be open to a bailiff effecting service to do so at any other address or by any other means without a fresh order obtained from the court.
(Pp 364–365 paras I–B)

Per Kekere-Ekun (JSC):

“The bailiff purportedly effected service of the processes on the 1st respondent on 16/4/14 and deposed to an affidavit of service the following day, 17/4/14. In the affidavit of service deposed to he averred inter alia, that he effected service “by delivering same personally to 1st respondent through Shedrack Lawrence at 5 Mbanano Street Independence Layout. Before the day I served the motion on notice I did not know Shedrack Lawrence personally, but after he was pointed out to me by Richard Akwoh I asked him if he were Shedrack Lawrence and he said that he was. I had earlier reproduced the analysis of this affidavit by the lower court as found at pages 752 – 753 of the record. I am in full agreement with the lower court that there were many questions begging for answers in the said affidavit] as to how the purported service of the processes at an address other than the one contained in the order of court came about. With due respect to the learned senior counsel for the appellant, the standard format of an affidavit of service does not preclude the bailiff from deposing to specific facts where he has not effected service in accordance with the order of court. There was no reference in the order to any Shadrack Lawrence or to No. 5 Mbanano Street, therefore the averment that he did not know Shadrack Lawrence personally was immaterial, since he was not ordered by the court to serve Shadrack Lawrence with any process nor was he ordered to serve any process at No. 5 Mbanano Street. On the importance of a bailiff carrying out his statutory duty in accordance with the rules or order of court, I refer to *Odutola vs. Kayode* (1994) 2 NWLR (Pt. 324) 1 @ 19 20 G-A, where Olatawura, (JSC) (of blessed memory) stated thus:

“This case has brought out clearly the statutory and honest duties required of a bailiff: to serve in accordance with order of court. Where personal service is ordered, he must serve that person personally. Where a substituted service either by pasting at the last known abode of the person required to be served, or by publication in a newspaper is ordered, any other service

which is not in accordance with the clear and unambiguous language of the court is ineffectual.

Bailiffs are officers of the court. Any dereliction of duty in the discharge of their duties will cause unnecessary delay in the administration of justice. A false return of service on the part of the bailiff may lead to an attempt to deceive the court. This in itself is an abuse of that order". (Pp 365 – 366 paras B – B)

9. *Where Affidavit of Service contradicts the terms of the order for substituted service*

The initial affidavit of service deposed to by the bailiff clearly showed on its face that service was not effected in the manner stated in the order of court. The 1st respondent deposed to facts purporting to show that the affidavit of service was false. He also averred that at 4.20 pm when the processes were allegedly served on Shadrack Lawrence he was at Evangel House. The bailiff on the other hand in his further affidavit averred that the 1st respondent was not available at Evangel House when he went there to effect service; that he and the pointer, one Mr. Richard Akwoh were informed that the 1st respondent had left for the day and had gone home, which was why he went to serve the processes at 5 Mhanano Street.

I agree with the lower court that having regard to the material conflicts in the affidavits deposed to on either side, the learned trial judge was not at liberty to pick and choose which averments to believe without calling for oral evidence to resolve same. The 1st respondent averred categorically in paragraph 16 of his counter affidavit to the affidavit of service of the bailiff that he was prepared to call witnesses to rebut the averments therein. (P 366 paras C – F)

10. *When filing of further affidavit is unnecessary*

In the circumstances of this case, the non-filing of a further affidavit to challenge the averments in the second affidavit sworn to by the bailiff, was not fatal. The 1st respondent had already sworn to facts stating his whereabouts at the time and on the day the processes were allegedly served on him and how the processes eventually got to his notice. No useful purpose would have been served by a further repetition of the same facts. (P 366 paras F – G)

11. *The appearance of the respondents were under protest
Per KekereEkun (JSC):*

“It has been argued that as long as the processes came to the respondents' attention and they appeared in court and were represented by counsel, it would amount to enthroning technicalities on the altar of substantial justice to contend that service was not proved. With due respect to learned senior counsel, the issue here is that at the behest of the appellant, a particular mode of service was ordered by the court. On the first day the mater came up for hearing i.e. on 17/4/2014, learned senior counsel for the 1st respondent, D.C. DENWIGWE, (SAN) challenged the mode of service, as the processes were dropped at Mbanano Street, two buildings away from the 1st respondents' residence and not at the address provided in the order of court. Thus, his appearance at that stage was under protest Having challenged the mode of service and compliance with the order of court, the onus shifted to the appellant, and by extension, the bailiff of the court to prove that service was effected in compliance with the order of court. As observed earlier, the learned trial judge could not have determined the issue without oral evidence to resolve the conflicts in the affidavit evidence on either side. I therefore agree with the lower court that service of the originating processes was not proved”.
(Pp 366–367 paras H–B)

12. *It is the claim of plaintiff that determines jurisdiction of trial court*
It is settled law that it is the plaintiff or claimant's claim that determines the jurisdiction of the court to entertain a cause or matter. See: Inakoju vs Adeleke (2007) 4 NWLR (Pt. 1025) 423 @ 588 589 H C; Elabanjo vs. Dawodu (2006) 15 NWLR (Pt. 1001) 76; Adeyemi vs. Opeyori (1976) 9 10 Sc 31; Tukur vs. Governor Gongola State (1989) 4 NWLR (Pt. 117) 517.
(P 370 paras G–H)
13. *When is a court competent*
It was held in: Madukolu vs. Nkemdilim (1962) 2 SCNLR 341; (1962) 1 ALLNLR 587 at 594 that a court is competent when:

- a. **it is properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for one reason or the other;**
- b. **the subject matter of the case is within 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”.**

See also: **Skenconsult (Ng.) Ltd. vs. Ukey (1981) 1 S.C. 6 at 62; Inakoju vs. Adeleke (Supra) @ 588 F. (Pp 370–371 paras H–B)**

Per Kekere-Ekun (JSC):

“The issue under consideration is to determine whether the application for the enforcement of the appellant's fundamental rights was initiated by due process of law and upon the fulfillment of any condition precedent to the exercise of the court's jurisdiction.”

Section 46 (1) of the 1999 Constitution (as amended) provides:

“46. (1) Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to the High Court in that State for redress.”

It is the appellant's contention that his fundamental rights, as guaranteed by **Section 36 (1), 38 (1), 40 and 42 of the Constitution** had been and/or were being violated by the respondents. Since it is the appellant's claims that will determine whether the suit was initiated by due process of law, it is immaterial at this stage that the respondents did not file a counter affidavit. **See: Inakoju vs. Adeleke (supra) @ 588 – 589 H-A.** The court below held that the principal reliefs do not pertain to the enforcement of the appellant's fundamental rights but are ancillary thereto. It is for this court to determine whether the lower court was right. The importance of this consideration is elucidated in several decisions of this court.

Relying on the authority of **Sokoto Local Government vs. Amale (2007) 8 NWLR (Pt.714) 224 @ 240 – 241. G A**, learned senior counsel for the appellant argued that the procedure of filing different suits emanating from the same facts is permissible and has received judicial endorsement. It is noted that being a decision of the Court of Appeal, it is of persuasive authority only. Be that as it may, it was held in that case that the case before the court was not for a breach of or threat to the respondent's fundamental right but a claim in respect of land. The court held that the only option open to the respondent in the circumstances was to take out a writ of summons. Reference was made to the decision of this court in **Tukur vs. Govt. of Taraba State (1997) 6 NWLR (Pt. 510) 549** where it was held that in an application for the enforcement of fundamental rights it is a condition precedent that the enforcement of the fundamental right should be the main claim and not an accessory claim. It was further held per Ogundare, (JSC) at **576 – 577 H-F (supra)** that where the main or principal claim is not the enforcement or securing the enforcement of a fundamental right, the jurisdiction of the court cannot be properly invoked, as the suit would be incompetent.

Interestingly, in Tukur's case, the main relief was for an order quashing the appellant's deposition as the Emir of Muri by the Taraba State Government. Some of the grounds for seeking reliefs under the Fundamental Rights (Enforcement Procedure) Rules were that his right to fair hearing had been breached because he was not given an opportunity of being heard before the order to depose him was given; that he was not given any notice of misconduct pertaining thereto; that the decision did not comply with the conditions precedent to the exercise of powers of deposition by the Military Governor under Section 6 of the Chiefs (Appointment and Deposition) Law Cap. 20 Vol. 1 Laws of Northern Nigeria 1963, applicable to Gongola State and was therefore null and void and of no effect. The appellant sought other reliefs including damages. The trial High Court held that it lacked jurisdiction to entertain some of the reliefs including relief provided for in Decree No. 48 of 1992, was not followed. This court found and held that the real cause of action in the suit was wrongful dismissal from employment, which belongs to the common law class of claims, while an action for contravention or threatened contravention of a fundamental right belongs to a constitutional class of action specifically provided for and that the proper procedure must be adopted in each class of action. This court reiterated its earlier position in **Tukur vs. Govt. of a Gongola State (1989) 4 NWLR Pt.117 517 – 548 and**

Tukur vs. Govt c Taraba State (supra) to the effect that where the main or principal claim is not the enforcement or protection of a fundamental right, the fundamental right procedure is not appropriate. The case of **F.R.N. vs. Ifegwu (supra)** relied upon by learned senior counsel for the appellant in fact supports the position of the respondent that for the enforcement of a fundamental rights procedure be applicable, the principal relief must be for the enforcement of a fundamental right. (*Pp 371–372 paras C–I*)

14. *The claims of the appellant do not come within the purview of fundamental Rights enforcement.*

I shall now apply the above principles to the facts of the instant case. I have carefully examined the 15 reliefs sought by the appellant. I agree entirely with the learned justices of the court below that the main issues in controversy in Suit No. E/202M/2014 are the appellant's dismissal as a minister of the Assemblies of God Church and his suspension as a member of the church; the unlawfulness of the meeting of the General Committee of the church, which was not convened and constituted in accordance with the provisions of the constitution of the church; the illegal nature of the body (purportedly the General Committee of the church), which met on 6/3/2014, which was not composed of legitimate members of the General Committee of the church. I also agree with the court below that the complaints relating to the appellant's right to fair hearing as regards the meeting held on 6/3/14; his right to freedom of association, movement and freedom from discrimination as regards the letter written to unit heads directing them not to associate with him as General Superintendent of the church, are all complaints arising from and incidental to his dismissal and suspension. In other words they are secondary to the main complaint. The learned senior counsel for the appellant has laboured gallantly to convince the court that there is a difference between the remote and the proximate events that gave rise to the suit before the trial court and that what is in issue is the action taken by the respondents even after the appellant's dismissal and suspension and in defiance of the order in Suit No. E/82/2014 to maintain the status quo ante be//urn. I find myself unable to agree with this line of argument. (*Pp 372–373 paras I–E*)

15. *Distinction between principal and incidental reliefs*
His lordship, AGIM, JCA who wrote the leading judgment of the court below, at pages 768 – 772 of the record undertook an in-depth analysis of all the reliefs sought. I agree with him that reliefs 1, 8, 13 and 14 are the principal reliefs in the suit and that they stem from the main complaint that the appellant was wrongly dismissed and suspended from his positions as General Superintendent and member of the church respectively. All the other reliefs are incidental to this complaint. I also agree with the court below that the right to the peaceful exercise of the appellant's duties as the General Superintendent of the church is not one of the fundamental rights guaranteed under Chapter IV of the 1999 Constitution. The appellant's right under Section 6 (6) of the 1999 Constitution, whatever it may be, is not one of the fundamental rights guaranteed under Chapter IV of the Constitution. I equally agree with the lower court that reliefs 13 and 14 do not fall within the aforesaid fundamental rights guaranteed by the Constitution. (P 374 paras F–I)

16. *The application of principle of fair-hearing*
Section 36 (1) of the Constitution provides:

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

All administrative bodies, even though they are not courts, are bound to observe the rules of natural justice and fairness in their decisions, which affect the rights and obligations of citizens, See: Bakare vs. L.S.C.S.C. (1992) 8 NWLR (Pt. 262) 641 @ 699 H. (Pp 374–375 paras J–C).

17. *Breach of fair hearing must be in respect of judicial proceedings*
In order to seek to enforce his fundamental right to fair hearing provided for under Chapter IV of the constitution, the alleged violation must be in respect of proceedings before a court or tribunal established by law and not before domestic or standing ad hoc tribunals. See: Ekunola vs. C.B.N. (2013) 15 NWLR (1377) 224 @ 262 – 263 H A. In Bakare vs. L.S.C.S.C.

(supra) @ 700 A – B, this court, per Nnaemeka-Agu, (JSC) had this to say:

“The courts in exercise of their power of judicial review are constantly called upon to scrutinize the validity of instruments, laws, acts, decisions and transactions. In the exercise of the jurisdiction, the courts can declare them invalid or ultra vires and void, not because they are unconstitutional in terms of Section 33 of the constitution [now Section 36 of the 1999 constitution], but because they offend against the rules of natural justice of *audi alteram partem* or *nemo judex in causa sua*, or offends against the rules of fairness, or otherwise offends the rule of natural justice. All these are in the realm of administrative and not constitutional law..... The great divide is that Section 33 deals with judicial bodies and does not necessarily extend to all bodies not judicial but all the same deciding on rights and obligations.”

Thus, while the appellant may contend that he has not been treated fairly by the respondents, since they or the Assemblies of God Church are not a court or tribunal established by law, his remedy does not lie under Chapter IV of the 1999 Constitution (as amended). The right to be a member of a particular church or the right to worship at a particular church or to be a minister of a particular church is not a right cognizable under Chapter IV of the 1999 Constitution. (*Pp 375–376 paras C–A*).

18. *Right to be enforced must be constitutional right*

In the instant case, having agreed with the court below that the appellant's principal complaints are his dismissal as General Superintendent and his suspension as a member of the Assemblies of God Church, the fact that learned counsel has drafted the reliefs as seeking the enforcement of the appellant's fundamental rights, does not make his complaint a constitutional one, His Lordship, Niki Tobi, (JCA) (as he then was) had this to say in *Peterside vs I.M.B.* (1993) 2 NWLR (Pt. 278) 712 @ 718–719:

“It has now become a fashion or style for parties to push or force the provisions of Chapter IV into most actions which cannot in law be

accommodated by the Chapter. Parties at times take undue advantage of the general and at times nebulous provisions of the Chapter and try to tailor in their actions even when the size of the 'cloth' does not fit into it. The provisions of Chapter IV though appear omnibus and large both in their character and context are chained here and there by constitutional gadgets by way of safeguards.

..... Counsel by his professional calling and expertise may dexterously frame a claim or relief to have the semblance of a breach of a constitutional right as contained in Chapter IV of the constitution. He does this to give the matter a higher status in the litigation process..... But where an action does not have a constitutional flavor in the sense that the provisions of the constitution are not breached or in the process of being breached, it cannot be elevated to the status of a constitutional wrong. A trial judge should in such a circumstances, be able to apply the eyes of an eagle to scrupulously examine the character and context of the claim with a view to removing the chaff from the grain and come to grips with the camouflage or disguise in the action. He has to unveil the pretentious legal phraseology of the action and take an appropriate decision.” (P 376 paras A–I).

19. *Implication of appearance under protest*

The position is not changed by the appearance in court of the respondents as once there is no jurisdiction of court, the appearance of the protesting party would not confer the jurisdiction as the long stated issue of putting something on nothing and expecting it to stand would apply. See *Macfoy vs. UAC Ltd* (1961) 3 ALLER 1169. (P 388 paras G–H)

20. *Improper service of originating process affects the jurisdiction of court*

Also to be said is that since there is no jurisdiction in the court, there is no vires on which the court can make a finding on whether by the improper service the respondents had suffered a miscarriage of justice. Indeed this is not one of those instances where technical justice is not applied and so the case of *Egolum vs. Obansanjo* (1999) 7 NWLR (Pt. 5110) 233 at 413 does not apply to aid the appellant. This is because what is at play here is

fundamental, goes to the root of the jurisdiction of the court and the situation cannot be ignored. (P 388 paras H–J)

21. *How to object to irregular process*

When a defendant desires to object to regularity of proceedings by which the plaintiff seeks to compel his appearance, he may, by leave of court, enter a conditional appearance or an appearance under protest and then apply to the court to set aside the said plaintiffs proceedings or he may, without entering an appearance, move to set aside the service of the writ.” See **Nwabueze vs Obi-Okoye (1998) 4 NWLR (Pt. 91) 664. (P 386 paras H–I)**

22. *Service not in accordance with order of court is not proper*

In **Odutola vs. Kayade (1994) 2 NWLP. (Pt. 324) 1 at 19 - 20 paras G – A**, this court had this to say:

“Since the lower court ordered a personal service on the defendant, any other service not in accordance with the order of court was not a proper service. This case has brought out clearly the statutory and honest duties required of a bailiff: to serve in accordance with the order of court. Where a personal service is ordered, he must serve that person personally. Where a substituted service whether by pasting at the last known abode of the person required to be served, or by a publication in a newspaper is ordered, any other service which is not in accordance with the clear and unambiguous language of the court is ineffectual.

Further at page 21 para F of **Odutola vs. Kayode** (supra), this court continued:

“To effect personal service of court process on a party, the bailiff or any officer of court entrusted with the task should satisfy himself that he has found the right man. It is not enough to leave a court process with a person who works in the same office with the defendant, as was done in this case, even if the latter undertakes to convey it to the appellants.”
(P 387 paras B–G)

23. *Improper service affects jurisdiction*

What I see as the long and short of the situation is that even if in the ordinary course of events, personal service would have been considered good service, the intervention of the court order for the service to be effected on the respondents through the 1st respondent by substituted service, that order took precedence over all else including the relevant rules of court on how service in the quest for enforcement of fundamental rights is to be made. Therefore, it is by that substituted means along the provided routes in order no more no less that is obedience to the order to the letter. Anything other than that would translate to no service of the originating process as in this case and that being so, the competence of an process is impaired and the result is that the jurisdiction of the court of trial cannot be activated.

The position is not changed by the appearance in court of the respondents as once there is no jurisdiction of court, the appearance of the protesting party would not confer the jurisdiction as the long stated issue of putting something on nothing and expecting it to stand would apply. See **Macfoy vs. UAC Ltd (1961) 3 ALLER 1169**. (P 388 paras D–H)

24. *A court that lacks jurisdiction does not have the vires to make findings*

Also to be said is that since there is no jurisdiction in the court, there is no vires on which the court can make a finding on whether by the improper service the respondents had suffered a miscarriage of justice. Indeed this is not one of those instances where technical justice is not applied and so the case of **Egolum vs. Obansanjo (1999) 7 NWLR (Pt. 5110 233 at 413** does not apply to aid the appellant. This is because what is at play here is fundamental, goes to the root of the jurisdiction of the court and the situation cannot be ignored. (P 388 paras H–J).

25. *A party cannot invoke S. 36 against a non judicial body*

The implication of the above is that, there would be no case of infringement of the right to fair hearing under Section 36(1) of the 1999 Constitution when the decision alleged to have violated one's constitutional right to fair hearing is that of a non-judicial body. In **Bakare vs. L.S.C.C. (1992) 8 NWLR (Pt. 266) 641 at 699 - 700**. Paras H B, this court had this to say of section 33(1) of the 1979 Constitution, a provision impari material with Section 36 (1) of the 1999 Constitution:

“The courts in exercise of their power of judicial review are constantly called upon to scrutinize the validity of instruments, laws, acts, decisions and transactions. In the exercise of the jurisdiction, the courts can declare them invalid or *ultra vires* and void not because they are unconstitutional in terms of Section 33 of the constitution but because they offend against the rules of natural justice of *audi alterem partem*, or *nemo iudex in causa*, or offend against the rules of fairness, or otherwise offend against the rules of natural justice. All these are in the realm of administrative and not constitutional law. The court can by its power of judicial review set them aside - The great divide is that section 33 deals with judicial bodies and does not naturally extend to bodies not judicial but all the same deciding on rights and obligations.”

(Pp 391–392 paras G–C.

26. *Where complaint of violation of fair hearing is made against a non judicial body*

There would be no case of infringement of the right to fair hearing under Section 36(1) of the 1999 Constitution when the decision alleged to have violated one's constitutional right to fair hearing is that of a non-judicial body. See **Bakare vs. L.S.C.S.C. (1992) 8 NWLR (Pt. 266) 641; Ekuola vs. CBN (2013) 15 NWLR (Pt. 1377) 224 at 262.** The complaint of lack of fair hearing by the appellant was made against the General Committee of the Assemblies of God Church which investigated the complaints against the appellant, deliberated over the same and terminated his appointment as Superintendent of the Church and also suspended him from the membership of the Church. The General Committee is not a Tribunal set up by any law or the Constitution of the Church. Reliefs 2, 3, 4, 5, 6 and 7 could not be entertained under the Fundamental Rights (Enforcement Procedure) Rules on the grounds that the alleged breach of appellants right to fair hearing is charged against a non-judicial body. *(P 399 paras C–F)*

27. *The significance of Affidavit of service*

The purport of affidavit of service sworn on oath is that the bailiff, the deponent, who effected the service of the process on the party or parties as directed by court order or in his normal course of duty, as the deponent, binds himself to the truth of the facts deposed to therein. Oaths have reverence.

Subscribing to oath is one of the methods of establishing the truth of a fact. See **ONYENAE vs. EBERE (2004) 13 NWLR (pt.889) 20; (2004) 18 NSCQR 789**. A man who makes his statement or declaration on oath undertakes that his statement or declaration on oath is true and he is bound by his words of declaration. See S.C. **CHUKWUMA vs. ANTHONY EZECHINWOYE & ORS. (2009) LPELR 4997 (CA)**. (*P 402 paras D–F*)

28. *Where specific findings are not challenged*

The finding of the court below that the two affidavits deposed to by the chief bailiff are contradictory has not been challenged nor appealed. The rule is: facts not disputed or challenged are taken as admitted and therefore need no further proof. And the law is trite that specific findings of fact by a court that are neither challenged nor appealed are taken as acceptable to the parties and, therefore conclusive and forever binding between the parties. (*P 405 paras A–B*).

29. *The need to call for oral evidence where there is conflicting affidavit*

The court below found that the affidavit evidence of the 1st respondent materially contradicted the mutually contradictory evidence of the chief bailiff. Ordinarily, and in the normal circumstance, the trial court ought to have called for oral evidence to resolve the conflicts. As submitted by Chief Kanu Agabi, SAN, for the respondents; and I agree, the appellant also conceded that the trial court was in error when it failed to resolve the conflict in the affidavits before it. The court below took it from there and held, correctly in my view, that the trial court was wrong to have believed and relied on the bailiff's mutually conflicting affidavits without calling for further evidence. (*P 405 paras B–D*)

30. *When not to believe a witness*

The law is settled that a witness who has two materially inconsistent pieces of evidence on oath by him on the same issue or point of fact does not deserve to be believed or given the honour of credibility. He also does not deserve to be described as truthful. See **AYANWALE vs. ATANDA (1988) 1 NWLR (Pt.86) 22; MONOPRIX (NIG) LTD. vs. OKONWA (1995) 3 NWLR (Pt. 383) 325; BAYO AREMU vs. DANIEL GEORE CHUKWU (2011) LPELR 3862 (CA)**. A person who speaks differently from two corners of his mouth on oath and on the same matter is a perjurer who does not deserve to be credited with any honour. (*P 405 paras D–F*).

31. *Court cannot pick and choose*

The bailiff had gone out to deliberately insubordinate the explicit court order and thereafter went out to desecrate his office by filing blatantly false affidavits of service. The court, in the circumstance, cannot pick and choose which of the two affidavits to believe or disbelieve. See **BOY MUKA vs. THE STATE (1976) 10 SC 305 ALFRED ONYEMENA vs. THE ESTATE (1974) ALL NLR 523**. It would be perverse for the court to hold that the materially conflicting affidavits of service of the bailiff had proved or established that the bailiff did the service of the originating processes as demanded of him by law or the court order. Orders of court are meant to be obeyed or carried out, anyway.

In my view the bailiff's resort to deliberate falsehood in his affidavits of service leads to one conclusion. That is, that he lied to cover up not only his insubordination to the clear order of the trial court, but also his dereliction of duty. I say this on authority of the old English case of **CLARKE vs. MOLYNEUX (1897) 3 QB. 237 at 247** where it was stated:

“If a man is proved to have stated that which he knew was false no one needs to enquire further; Every body assumes from thenceforth that he was malicious, that he did a wrong thing for some wrong motive”

The ulterior motive of the bailiff and whoever took him to the purported residence of the 1st respondent to serve originating processes at the time the 1st respondent was at the address the court order directed them to for the service is this obvious: to pervert the course of justice by the wrong service and the false affidavit of service. (*Pp 405 – 406 paras F – C*).

32. *The cardinal role of bailiffs in the service of processes*

This cannot be good service .by the bailiff on whom the foundation of the imperativeness of service of court process, being condition precedent for fair hearing, is laid. *Audi alteram partern* and service of originating process are imperatives of the justice ministry as directed by Section 36(1) of the Constitution, as amended. Without them justice is nothing but a hoax. The bailiff and/or the parties in litigation must never be allowed to do this in desecration of the hallowed temple of justice.

The purported service of the originating process in this suit on the 1st

respondent, as ordered by the trial court on 16th April, 2014, either by their dumping at a nearby house or delivery to one Shedrack Lawrence, has been seriously discredited. Accordingly, it cannot be the basis for the plea of presumption of regularity under Section 168(1) of the Evidence Act, 2011; the act or conduct of the bailiff having been shown to have been done: in a manner substantially irregular. (*P 406 paras C–F*).

36. *The appearance of the appellants in court was under protest and does not amount to waiver.*

Chief (Mrs) A.J. Offiah, (SAN) had submitted, on authority of **JIKANTORO vs. DANTORO (2004) ALL FWLR (pt.216) 390 at 414**, that the respondents had waived their right to complain about the wrong service of the originating processes on them by the fact of their presence at the trial court in obedience to the processes. The respondents appeared in protest and had taken formal steps for the service of the processes on them to be set aside. That was not the situation in **JIKANTORO vs. DANTORO (supra)** where the rules of waiver and estoppel by conduct were held to be applicable against the defendant who, in the face of defective service of process, still submitted to the jurisdiction of the trial court. **JIKANTORO vs. DANTORO (supra)** followed the principle in **EZOMO vs. OYAKHIRE (1985) 1 NWLR (Pt.2) 195** where at page 203 Aniagolu, (JSC), who read the lead judgment of this court had stated:

“By contesting the case to the full on the merit, without earlier taking preliminary objection before trial, the appellant must be deemed to have waived whatever right he had under” (*P 406–407 paras G–A*)

Nigeria Cases Cited:

Adeyemi vs. Opeyori (1976) 9 – 10 Sc 31;
Afolayan vs. Ogunrinde (1990) 1 NWLR (P. 127) 369;
Auto Import Export vs. Adetayo (2000) 18 NVVLR (Pt.799) 554;
Bakare vs. L.S.C.C. (1992) 8 NWLR (Pt. 266) 641.
Chime vs. Onyia (2009) ALL FWLR (Pt. 480) 673 (2009) 2 NWLR (Pt. 1124) 1. ”
Egolum vs. Obansanjo (1999) 7 NWLR (Pt. 5110) 233
Ekunola vs. C.B.N. (2013) 15 NWLR (1377) 224.
Elabanjo vs. Dawodu (2006) 15 NWLR (Pt. 1001) 76;

Idisi vs. Ecodril (Nig.) Ltd. (2016) LPELR – 40438 (SC).
Ihedioha vs. Okorocho (2016) 1 NWLR (Pt. 1492) 148
Inakoju vs. Adeleke (2007) 4 NWLR (Pt. 1025) 427;
Kida vs. Ogunmola (2006) 6 SCNJ 165.
Madukolu vs. Nkemdilim (1962) 2 SCNLR 341; (1962) 1 ALL NLR 587
Mbadinuju vs. Ezuka (1994) 8 NWLR (Pt. 364,) 535,
National Bank (Nig.) Ltd. vs. Guthrie (Nig.) Ltd. (1993) 3 NWLR (Pt. 284) 643.
Obineche vs. Akujobi (2010) 12 NWLR (Pt. 1205) 383 @ 416 H.
Obiomonure vs. Erinosho (1966) 1 ALL NLR 250;
Odutola vs. Kayode (1994) 2 NWLR (Pt. 324) 1
Okoye vs. Centre Point Merchant Bank Ltd. (2008) 15 NWLR (Pt. 1110) 335;
Peterside vs. I.M.B. (1993) 2 NWLR (Pt. 278) 712;
S.G.B.N. vs. Adewunmi (2003) 10 NWLR (Pt. 829) 526,
Schroder vs. Major (1989) 2 NWLR (Pt. 101) 3;
Skenconsult (Nig.) Ltd. vs. Ukey (1981) 1 SC 6;
Sokoto Local Government vs. Amale (2007) 8 NWLR (Pt. 714) 224
Tukur vs. Governor Gongola State (1989) 4 NWLR (Pt. 117) 517.
Tukur vs. Govt. of Taraba State (1997) 6 NWLR (Pt. 510) 549

Foreign Cases Cited

Craig vs. Kanseen (1943) K.B. 256;
Macfoy vs. UAC Ltd (1961) 3 ALL ER 1169.

Nigerian Statute Cited

African Charter on Peoples and Human Rights
Fundamental Rights Enforcement Rules 3009 Or. 2 Rules 1, 2 and 3.
The 1979 Constitution of Federal Republic of Nigeria – Ss. 33(1), S. 36(1), 6(6), 38 and 40, 42
The Evidence Act, 2011- S. 168(1)

Representation

CHIEF (MRS) A. J. OFFIAH (SAN) and S. I. Ameh, (SAN) for the Appellant with J.U. Ajii (Esq.), R.O. Agama (Esq.), Ikechukwu Onuoma (Esq.) and C.S. Nwaubani (Mrs.), I. O. Peter (Esq.), Shehu Michael (Esq.), Lovette Chukwukaire (Mrs), L.N. Dike (Esq.), A.U.E Oboi (Esq.), R.O. Adakole (Esq.), C.O. Sabo (Miss) and R.O. Mohammed (Miss).

- A CHIEF KANU AGABI, (SAN)** for the Respondent with E.C.N. Igbokwe (Esq.) Johnny Asoluka, (Esq.), A.E. Okwara (Mrs.), Bob James (Esq.), Ayo Akam, (Esq.), A.A. Onyeji Esq., Joel EJiofor (Esq.), J.O. Udensi (Esq.), Izeubigie lyobosa (Esq.), Mary-Frances Orji (Miss), A.C. Akwuete (Esq.), Peter Erivwode **B** (Esq.), Uchenna Ede (Mrs.), Emmanuel Bisong Otinyia (Esq.), Anthony Odule (Esq.), Opara Maxwell C. (Esq.).

KEKERE-EKUN, (JSC) (Delivering the Lead Judgment): The appellant **C** herein, by a motion on notice filed on 15/4/2014, applied to the High Court of Enugu State, Enugu Judicial Division, holden at Enugu, for the enforcement of his fundamental rights. The application was brought pursuant to Order 2 Rules 1, 2 and 3 of the Fundamental Rights (Enforcement Procedure) Rules, 2009; **D** Sections 6 (6), 36 (i)/ (2), (4) & (5), 38 (1), 9 (1) & (2) and 42 (1) of the 1999 Constitution of the Federal Republic of Nigeria and under the African Charter on Human and Peoples' Rights. The application was supported by a statement setting out the names, address and description of the applicant, the reliefs sought and the **E** grounds for seeking the reliefs. it was also supported by an 85-paragraph affidavit of facts with several exhibits attached thereto and a written address. The reliefs sought, as contained at pages 29 32 of the record, are as follows:

- F** 1. A DECLARATION that the meeting held by the respondents on 6th March, 2014, purportedly as a meeting of the General Committee of the Assemblies of God, Nigeria, at the National Secretariat of Assemblies of God, to determine allegations made against the applicant was illegal and unconstitutional, the same not having been properly convened and **G** constituted in accordance with the provisions of the Constitution and Bye-laws of the Assemblies of God, Nigeria, 2002 and in contravention of the rights of the applicant to peaceful exercise of the duties of his office as General Superintendent of the Assemblies of God, Nigeria enshrined in the 1999 Constitution of the Federal Republic of Nigeria (as amended). **H**
2. A DECLARATION that the proceedings and decisions of the said purported meeting of the General Committee of the Assemblies of God, Nigeria culminating in a purported dismissal and suspension of the **I** applicant is null and void, the proceeding 'having been conducted and the decisions having being reached in contravention of the Rules of Natural Justice and the applicant's rights under Section 36 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).
- J** 3 A DECLARATION that the applicant's alleged dismissal from the

- A** ministry and suspension as a member of the Assemblies of God, Nigeria is in contravention of the applicant's right to fair hearing as secured under Section 36 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).
- B** 4. A DECLARATION that the chairing of the purported General Committee meeting of 6th March, 2014 by the 4 respondent and the participation of 11 members of the Executive Committee of the Assemblies of God, Nigeria and 9tR to 19th respondents, who are members of the Body of Ambassadors of the Kingdom, who had made the allegations against the applicant amounts to being a judge in their own cause and was in contravention of the applicant's right to fair hearing secured under Section 36 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).
- C**
- D** 5. A DECLARATION that the letter dated 6 March, 2014 signed by the 1st, 2nd and 3rd respondents prohibiting the free association by the applicant with All Units, All Ministers, All Presbyters, All General Council Directors/ Coordinators and All members in general of the Assemblies of God, Nigeria is in breach of the applicant's fundamental rights enshrined and secured under Sections 40 and 42 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).
- E**
- F** 6. A DECLARATION that the purported suspension of the applicant as a member of the Assemblies of God, Nigeria with the threatened implication of ex-communicating him from the Church is a contravention of the applicants' right to freedom of religion and worship in community with others and right to freedom of association secured under Sections 38 (1) and 40 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).
- G**
7. A DECLARATION that the purported dismissal and suspension of the applicant allegedly for the reason, inter alia, that the applicant sued the respondents to court is in contravention of the applicant's right of access to court and fair hearing as enshrined in Sections 6 (6) and 36 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).
- H**
8. A DECLARATION that the decision to dismiss and suspend the applicant was *ultra vires* the body which met on 6th March, 2014 purportedly as the General Committee of the Assemblies of God, Nigeria, the same not being constituted of legitimate members of the General Committee and thus contravenes the applicant's rights under Section 6 (6) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).
- I**
- J**

- A** 9. A DECLARATION that the “Body of Ambassadors of the Kingdom” and the “Consultative Assembly” are not persons authorized or organs cognizable under the extant 2002 Constitution and Bye-laws of the Assemblies of God, Nigeria and have no functions thereunder; no powers
- B** to try, investigate or discipline the applicant for any alleged misconduct and especially for any alleged criminal offences and their conduct therefore contravenes the applicant's rights enshrined under Section 36 (4) and (5) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).
- C** 10. AN ORDER OF INJUNCTION restraining the 5th, 6th and 7th respondents and other members of the 9-man Panel of investigation set up to investigate allegations against the applicant, their privies, agents, cohorts, servants and any other person(s) whomsoever from taking any steps, actions or doing anything whatsoever purportedly for the purposes of trying, questioning or investigating the applicant for any matters relating to allegations made against him by the respondents or by any other person(s) whomsoever or in respect of any other matter whatsoever relating to his actions or omissions as a member, Minister and or General Superintendent of the Assemblies of God, Nigeria.
- D**
- E** 11. AN ORDER OF INJUNCTION restraining the 2nd, 3rd and 8th respondents and other members of the Eleven-man Constitution Review Committee purportedly set up at a supposed Emergency meeting of the Executive Committee of the General Council of the Assemblies of God, Nigeria on 18/3/2014 from doing any act or taking any steps whatsoever for the purposes of revising, altering, re-drafting, amending, repealing, reviewing or in any manner whatsoever dealing with the extant 2002 Constitution and Bye-laws of Assemblies of God, Nigeria, or bringing into existence or operation any other rules or regulations for purposes of managing, organizing, administering and running of the affairs of the Assemblies of God, Nigeria.
- F**
- G**
- H** 12. AN ORDER declaring null and void any document in the nature of a constitution, bye-laws, rules, regulations or any directives howsoever called or described intended to have any effect in the organization, administration, management and running of the affairs of the Assemblies of God, Nigeria other than the 2002 Constitution and Bye-laws of Assemblies of God, Nigeria.
- I**
- J** 13. AN ORDER OF INJUNCTION restraining the 1st respondent by himself,

- A** or through his servants, agents, privies, cohorts or any person(s) whomsoever, from parading himself or being paraded as the Acting General Superintendent of the Assemblies of God, Nigeria.
- B** 14. AN ORDER OF INJUNCTION restraining the respondents, their servants, agents, privies, cohorts by themselves or through any person(s) whomsoever, from interfering with or obstructing the applicant in the peaceful performance of the duties, functions and obligations of his office as General Superintendent of the Assemblies of God, Nigeria and the enjoyment of all the rights, privileges, benefits, remunerations and perquisites of the said office, or from exercising his rights as a minister and member of the Assemblies of God, Nigeria.
- C** 15. AN ORDER for N500,000,000.00 general damages to the applicant against the respondents jointly and severally for various breaches and threats of breaches of the applicant's fundamental rights.
- D**

E The appellant filed an ex-parte application along with the motion on notice, seeking various reliefs, including the following:

- F** 1. An order of interim injunction restraining the respondents, their servants, agents, privies, co-operators, collaborators, assigns, representatives, allies, surrogates and any other person or persons whosoever and howsoever described from taking any further steps in connection with or in relation to all matters arising from or in any way connected to the subject of the substantive application pending the hearing and determination of the said application on notice.
- G** 5. An order granting the applicant leave to serve the substantive application for the enforcement of his fundamental right and all other processes relating to the said application, on all the respondents by substituted means, to wit: by delivering same to the 1st respondent whose address for service is Evangel House, Plot R8 Ozobulu Street Independence Layout Enugu.
- H**

I The above stated reliefs, among others, were granted on 16 April, 2014 and the substantive application was adjourned to the following day, 17th April, 2014 for hearing.

On 25/4/2014, the respondents filed an application seeking the following orders:

J

- A A. Setting aside the se, vice of the originating process and order in this suit effected by the bailiff of this honourable court at No, 5 Mbannano Street,. Independence Layout;, Enugu, Enugu State contrary to the definite address at Evangel House, Plot R8 Ozubulu Street, Independence Layout, Enugu, Enugu State whereat the honourable court ordered that service be effected;**
- B b. Setting aside the injunctive and restraining orders made ex-parte against the respondents on record in this suit; and**
- C c. Striking out this suit for want of competence.**

The application was supported by a 12-paragraph affidavit deposed to by the 1st respondent with two exhibits annexed thereto being the statement of claim in respect of Suit No. E/82/2014, a sister suit pending between the parties in the same court and a copy of the proceedings of 13/3/2014 in the said suit. The application in essence challenged the service of the court processes on the respondents. The 1st respondent in addition deposed to a counter affidavit in reaction to the Affidavit of Service deposed to by the bailiff of the court. The bailiff also filed an affidavit in reaction to the 1st respondent's counter affidavit. The parties duly filed and exchanged written addresses in respect of the application. The substantive application was heard on 23/10/2014. After considering the various processes before it and the submissions of learned counsel, the learned trial Judge in a considered ruling delivered on 11/12/2014 refused the application to set aside the service of the originating processes. He also overruled the objection challenging the incompetence of the suit and granted the appellant's reliefs. N30 Million costs were awarded against the respondents and in favour of the appellant.

The respondents were dissatisfied with the ruling and appealed against it to the Court of Appeal, Enugu Division (henceforth referred to as the lower court) vide a Notice of Appeal filed on 22/12/2014. On 14/4/2015, the lower court allowed the appeal and set aside the judgment of the trial court for being a nullity. The court granted the application filed on 25/4/2014 and set aside the service of the ex-parte order and the substantive motion on notice on the respondents on the ground that service of the originating processes on the respondents was not proved. The court further set aside the ex-parte orders made on 16/4/2014 and held that the appellant's suit No. E/220m/2014 is incompetent and that the trial court lacks jurisdiction to entertain it, as the Fundamental Rights Enforcement

- A** procedure was not the proper procedure to have been employed by the appellant in seeking redress of his claims. Not being the final court, after making these findings, the lower court also considered the merit of the appeal. Ultimately the appeal was allowed and the suit before the trial court was struck out. The
- B** appellant herein is aggrieved by this decision and has further appealed to this court.

The parties before us duly filed and exchanged their respective briefs of argument in compliance with the rules of this court. At the hearing of the appeal

C on 29th November, 2016 CHIEF (MRS) A.J. OFFIAH, (SAN) and S.I. AMEH, (SAN) leading a team of learned counsel adopted and relied on the appellant's brief filed on 4/2/2016, the reply brief filed on 11/5/2016 and the list of authorities filed on 9/11/2016 and urged the court to allow the appeal. She emphasized the

D fact that the dispute in this case is not between the appellant and the Assemblies of God Church but a specific dispute between the appellant and the respondents in their individual capacities. CHIEF KANU AGABI, (SAN), also leading a team of learned counsel adopted and relied on the respondents' brief filed on 29/3/2016

E and urged the court to dismiss the appeal. He submitted that the fundamental rights enforcement procedure is not the appropriate procedure for seeking the reliefs the appellant claims. He also submitted that the appeal has become academic, as the tenure of office in issue expired in 2014.

- F** The following six issues were distilled for the determination of this appeal in the appellant's brief:

1. Whether the Court of Appeal was right when it set aside the service of the originating processes on the respondents on the ground that the service
- G** was not in accordance with the order of the High Court. (Grounds 3 and 4)
2. Whether the reliefs sought by the appellant at the High Court was (sic) competent and rightly brought under Fundamental Rights Enforcement Procedure. (Ground 2).
- H** 3. Whether the Court of Appeal was right when in its judgment it pronounced on the constitutionality of the powers of the CJN vis-a vis Section 46(1), which was not an issue before it. (Ground 1)
4. Whether subsequent findings made by the Court of Appeal after it had held
- I** that Suit No. E/202M/2014 a nullity, is proper and valid in law. (Grounds 5 and 6).
5. Whether the Court of Appeal was right when in seemingly considering the propriety of the damages awarded by the High Court, it went into a fact
- J** finding mission on issues which were not before it. (Grounds 8, 9 and 10)

A 6. Whether the Court of Appeal was right when in its judgment it made findings of fact and pronouncements against persons who were not parties to the suit and who were not heard. (Ground 7)

B The respondents also formulated six issues for determination, which are similar in all material respects with the appellant's issues. I do not deem it necessary to reproduce them.

C Before delving into the merits of the appeal, I consider it appropriate at this stage to set out briefly the facts that gave rise to the appeal, as can be gleaned from the record of appeal and the briefs filed.

D In November 2010, the appellant herein was elected General Superintendent of the Assemblies of God Church (henceforth referred to as the church) for a term of four years. During the course of his tenure, he was alleged to have committed various acts inimical to his oath of office involving alleged breaches of the church's constitution and by-laws. The 9th – 19th respondents wrote a petition (Exhibit PE2) dated 24th September, 2013, which was circulated to all **E** leaders of the church at various levels and was also published on the internet, social media and in the electronic and print media. At the time the petition was written the appellant was also the Chairman of the Executive Committee of the Church, which committee is charged with responsibility for disciplinary matters, **F** The appellant addressed the allegations made against him in a letter dated 8/10/2013 (Exhibit PE3). According to the appellant, as a result of his response to the allegations, he received a vote of confidence from the pastors, presbyters and other members of the church. It was his contention that the 9th – 19th respondents **G** were not pleased with this state of affairs and wrote a further petition accusing him of corruption and breach of the church's Constitution. In an attempt to resolve the impasse, the appellant scheduled a meeting of the Executive Committee. It is however contended that after the meeting, the 1st – 3rd respondents and other **H** members of the Executive Committee began to hold separate meetings in the home of the 4th respondent. On 6th March 2014, they convened a special session of the General Committee, the body which considers appeals from decisions of the Executive Committee, to consider the petitions. The appellant was invited but **I** he declined to attend on grounds of non compliance with the church regulations governing the convening and composition of a special session of the General Committee.

J In the meantime, certain members of the church instituted a suit at the Enugu State High Court in Suit No, E/82/2014 to forestall the holding of the

A meeting scheduled for 6th March 2014, which was perceived to be a move by the respondents to remove the appellant from office. The appellant was not a party to that suit.

The meeting held nonetheless. Upon the conclusion of deliberations by the special session of the General Committee, the appellant's appointment as General Superintendent of the church was terminated. He was also suspended from membership of the church. He contended that his right to fair hearing had been breached in the circumstance. The action dismissing the appellant and some other members of the church was taken during the pendency of Suit No. E/82/2014. On 13/3/2014, parties in that suit were ordered to revert to the status quo ante bellum. It was the appellant's contention that notwithstanding this order, the respondents took steps to actualize their decision by ostracizing him by writing to members of the church and threatening to suspend or dismiss anyone who had dealings with him. It is also his contention that the reason given for his suspension from the church and the termination of his appointment as General Superintendent was that he had instituted an action against the church, whereas he was not a party to Suit No. E/82/2014. It was the appellant's further contention that as a consequence of the meeting of 6/3/14 he had been deprived of his remuneration/means of livelihood and that his public image had been tarnished, It was for all these reasons that he filed the application for the enforcement of his fundamental rights at the trial court.

The respondents did not file a counter affidavit in respect of the appellant's application for the enforcement of his fundamental rights but challenged the issuance and service of the ex-parte orders on them, service of the originating processes and the propriety of the procedure adopted by the appellant to seek redress.

Issue 1

- H **Whether the Court of Appeal was right when it set aside the service of the originating processes on the respondents on the ground that service was not in accordance with the order of the High Court.**
- I Arguing this issue, learned senior counsel for the appellant, Chief (Mrs.) A.J. Offiah, SAN, contended that in granting the appellant leave to serve the substantive application and all other processes on the respondents by delivering same to the 1st respondent “whose address for service is *Evangel House, Plot R8 Ozubulu Street, Independence Layout, Enugu*” the learned trial Judge did not

- A** order that service must be effected specifically at that address. She submitted that the given address is only an indication of a location where the 1st respondent could be found for the purpose of effecting service on him so as not to leave his whereabouts at large. She argued that this does not exclude the possibility of
- B** finding him at a different location and legitimately delivering the processes to him. She submitted that what is of essence is the fact that the processes have been delivered to the person to be served. She argued that it is the spirit of the order that is of paramount consideration. In support of this contention she relied on several
- C** authorities and urged the court not to be swayed by mere legal technicalities. **See: INEC vs Musa (2003) 3 NWLR (Pt. 806) 72; Ibrahim vs JSC (1998) 14 NWLR (Pt. 584) 1; Egolum vs. Obasanjo (1999) 7 NWLR (Pt. 511) 255 @ 413.** She submitted that the respondent having admitted that he received the
- D** processes at his residence at No. 5 Mbanano Street, Independence Layout, Enugu, cannot complain of improper service. She submitted further that the service was in accordance with the Fundamental Rights (Enforcement Procedure) Rules (henceforth referred to as the rules) particularly Order V Rules 2-and 7 thereof.
- E** She submitted that Order V Rule 7 of the Rules represents a paradigm shift from the usual strict requirements regarding service of originating processes and that the main consideration is the reasonable probability that the process served
- F** would, in the normal course of business, come to the attention of the person to be served. Referring to the 1st respondent's affidavit at page 434 of the record, she contended that he admitted service by deposing to the circumstances in which the processes came to his knowledge i.e. that the processes were dropped in front of a neighbour's gate, two buildings away from his, and that the said neighbor brought
- G** them to him on the night of 16/4/2014. She submitted that the initial affidavit of service deposed to by the bailiff of the trial court was in the standard format of proofs of service and could therefore not accommodate full details of how the process was served and that the said bailiff was able to depose to fuller facts in
- H** reaction to the 1st respondent's counter affidavit challenging service. She submitted that the learned trial judge correctly evaluated the affidavit evidence and drew the correct conclusion that the respondents were duly served. She argued that the trial court having duly carried out the duty of ascribing probative
- I** value to the affidavit evidence, the lower court was wrong to have embarked on a fresh assessment of the evidence, even if it would have reached a different conclusion She cited several authorities in support of this submission. She submitted that the 1st respondent did not file a further affidavit to refute the
- J** averments in the bailiff's response to the appellant's counter affidavit. She

- A** observed that upon being served with the processes the respondents briefed counsel who represented them in court on 17/4/2014, not to challenge service but to ask for time to file their defence. Relying on the case of **Okesuji vs. Lawal (1991) 1 NWLR (Pt. 170) 661**, she submitted that there is no better proof of
- B** service of an originating process than the appearance in court of the person served.

- She submitted that the affidavit of Service sworn to by the bailiff is prima facie evidence of proper service and that the onus is on the person who denies
- C** service to produce evidence in rebuttal. She maintained that contrary to the finding of the lower court, the two affidavits deposed to by the bailiff were not contradictory nor was the second affidavit an afterthought. She argued further that the trial court, which made the order for substituted service was the best court
- D** to interpret its own order and that the lower court ought to have accepted the interpretation given by the learned trial judge and his finding that service was effected in the manner prescribed by the said order. She submitted that alleged improper or irregular service of an originating process, as distinct from non-
- E** service goes to the procedural jurisdiction of the court, which can be waived either by the parties or by the court, whereas the substantive Jurisdiction of the court cannot be waived. She referred to: **Jikantoro vs. Dantoro (2004) ALL FWLR (Pt. 216) 390 @ 414**. She argued that in any event the respondents were
- F** not shown to have suffered any miscarriage of justice as a result of the striking out of their preliminary objection by the trial court. She submitted that the lower court erred in setting aside service of the originating processes on the respondents when there was evidence that they had actual notice of the processes by virtue of service
- G** thereof on the 1st respondent's agent, one Shadrack Lawrence, at No. 5 Mbanano Street, Independence Layout, Enugu. She submitted that to decline jurisdiction to hear the substantive application for the enforcement of the appellant's fundamental rights in the circumstances of this case would amount to enthrone
- H** technicality over substantial justice. See referred to: **Adelusola vs. Akinde (2004) 12 NWLR (Pt. 887) 29**.

- In reaction to the above submissions, learned senior counsel for the respondents, CHIEF KANU AGABI, (SAN), submitted that the basis for the
- I** setting aside of the service of the originating processes by the lower court was the appellant's failure to prove that service was effected on the respondents in accordance with the order of the court. He submitted that the lower court did not base its findings on non-compliance with the provisions of the Fundamental
- J** Rights (Enforcement Procedure) Rules and that such contention does not arise

A from the judgment appealed against.

He submitted that the court having made an order that service be effected in a particular manner, the provisions of the Fundamental Rights (Enforcement Procedure) Rules, particularly Order V Rules 2 and 7 thereof could no longer
B apply to regulate the manner in which service was to be effected. He submitted that the order for substituted service took precedence over other rules of court that might have been applicable and automatically suspended the provisions of the Fundamental Rights (Enforcement Procedure) Rules. He argued that there were
C two components to the order: (i) personal service on the 1st respondent and (ii) substituted service on 2nd – 19th respondents by delivering the processes to the 1st respondent personally. He submitted that since the court ordered service on the 2nd – 19th respondents through the 1st respondent, the alleged service on one
D Shedrack as agent of the 1st respondent could not amount to service in accordance with the order of court. He noted that the appellant failed to appeal against the finding of the lower court to the effect that the depositions in the bailiff's Affidavit sworn to on 17/4/2014 did not prove that the originating processes in the suit were
E served on the 1st respondent. He submitted that he is deemed to have accepted the finding. He contended that what the appellant has appealed against is the consequential decision of the lower court after finding that service had not been proved. He argued that having impliedly conceded that service was not proved, he
F is not permitted to approbate and reprobate.

Learned senior counsel submitted that service on one Shedrack Lawrence, said to be one of the 1st respondent's workers, did not amount to compliance with the specific order to effect service on the 1st respondent personally. He submitted
G further that the 1st respondent did not need to file a further affidavit in response to the bailiff's second affidavit because the averments in the two affidavits deposed to by him were contradictory, as found by the court below at pages 753 – 754 of the record. He relied on the case of: **Folorunsho vs Shaloub (1994) 3 NWLR**
H **((Pt. 333) 413 @ 421 A-B.** He reproduced the finding of the lower court in this regard and highlighted a portion thereof, which he contended has not been appealed against. He noted that it was because of the inconsistency in the two Affidavits deposed to by the same bailiff that the lower court held that it lacked
I the power to choose which version to believe. He submitted that the inconsistency between the two affidavits was fatal as they cancelled each other out. He submitted further that there is no appeal against the finding of the lower court that the trial court ought to have called for oral evidence to resolve the conflict as to the

J

- A** whereabouts of the 1st respondent at the time the processes were allegedly delivered to Shedrack Lawson, nor is there any appeal against the finding at page 751 of the record to the effect that the learned trial Judge did not properly consider the affidavit: which the bailiff deposed to shortly after the purported service and
- B** the averments in paragraphs 3, 4, 5 and 16 of the 1st respondent's counter affidavit. He contended that failure to appeal against the findings amounted to a concession by the appellant that the findings were correct.

Learned senior counsel submitted that the initial Affidavit of service

C deposed to by the bailiff on 17/4/2014, one day after service was allegedly effected, suffered from several defects, to wit:

- D**
 - i.** **No endorsement as to who received the originating process and its accompanying processes.**
 - ii.** **No explanation as to why the copy of the processes allegedly served on the 1st respondent did not bear the endorsement of Shedrack Lawrence who was alleged to have received them.**
 - E** **iii.** **No explanation as to why the processes were not served on 1st respondent at the prescribed address for service but purportedly delivered to Shadrack Lawrence at a different address.**
- F**

He submitted that it was only in the further affidavit sworn to on 3/6/14 that an attempt was made to explain the lapses. He argued that the inference to be drawn from this is that the facts deposed to were not in existence at the time the original affidavit of service was sworn to and that the averments contained in the said affidavit amounted to an afterthought and were therefore not credible. He relied on: **Oghenevweta vs The State (1982) 1 – 2 SC (Reprint) 62; Ndidi vs. The State (2007) 5 SC 175; Olatidayo vs. The State (2010) LPELR – 9079 (CA).**

H He urged the court to reject the attempt to account for the failure to depose to all the material facts in the initial affidavit by blaming it on the standard format of a bailiff's affidavit of Service. He also urged the court to discountenance the

I contention that it was sufficient that the processes came to the respondents' knowledge and that they appeared and were represented in court by counsel. He submitted that in the circumstances of this case, having sought and obtained an order for substituted service on the 2nd – 19th respondents by delivering the

J processes to the 1st respondent at a particular address, the appellant was bound to

A prove that the processes were served as stipulated in the order. Relying on the case of: **Odutola vs. Kayode (1994) 2 NWLR (Pt. 324) 1 @ 19 – 20**, he submitted that delivery of the processes to Shedrack Lawrence, even if conceded, rendered the service ineffectual for non-compliance with the order of court.

B On the importance of the defendant's address for service on an originating process he cited the recent decision of this court in **Ihedioha vs. Okorochoa (2016) 1 NWLR (Pt. 1492) 147 @ 176 D – H**. He argued that the order for substituted service does not give the bailiff a discretion as to where to effect service.

C With regard to the submission that the appearance of the respondents in court was sufficient proof that the processes came to their notice and the reliance on **Jikantoro vs. Dantoro (supra)** and **Okesuji vs Lawal (supra)**, Chief Agabi, **D** SAN distinguished the facts of those two authorities from the facts of this case on the ground that in the instant case, the respondents appeared under protest and applied by motion to set aside the service of the originating processes on the 1st respondent, whereas, in the cases referred to, the defendants did not appear under protest but submitted to the court's jurisdiction.

E He further submitted that the issue as to whether or not the respondents suffered a miscarriage of justice by the striking out of their preliminary objection, is a departure from Issue 1 under consideration and does not arise from grounds 3 and 4 upon which the issue is predicated. In the circumstances, he urged the court to strike out paragraphs 4.46 – 4.54 of the appellant's brief. He argued that where there has been improper service of an originating process the questions that arise are whether the court has jurisdiction to proceed with the matter and whether, in the circumstances of this case, the service on Shedrack Lawrence instead of the 1st respondent was effectual. He maintained that an order of court must be obeyed according to its specific terms. He submitted that the implication of the finding of the court below that the bailiff's affidavit of service does not show that the processes were served, is that a condition precedent to the exercise of the court's jurisdiction has not been fulfilled and the issue as to whether a miscarriage of justice was occasioned thereby does not arise. He urged the court to resolve this issue in the respondent's favour.

I In her reply brief, Chief (Mrs.) Offiah, SAN, reacted to the submission that compliance with the Fundamental Rights (Enforcement Procedure) Rules was not an issue that arose before the lower court and should be discountenanced, submitted that the court is bound by its records. After reproducing a portion of the judgment relating to the issue, she referred to the notice of appeal, particularly

- A** Ground 3 thereof on page 828 of the records where the decision was challenged. On the need to controvert specific averments in the further affidavit of the bailiff, she cited the case of: **Danladi vs. Dangiri & Ors. (2014) LPELR – 204020 (SC)** and submitted that a general traverse does not meet the standard of rebuttal
- B** required by law in a counter affidavit. :She contended that, having regard to the specific averment in the aforesaid affidavit, the onus shifted to the 1st respondent to show that the bailiff was lying. She also referred to **Ahmed vs. Ahmed & Ors. (2013) LPELR – 211143 (SC).**
- C** In reaction to the contention that the appellant did not appeal against the finding that the depositions in the affidavit of service did not prove that service was effected, she referred to grounds 3 and 4 of the notice of appeal and submitted that the purpose of a ground of appeal is to isolate and accentuate for attack the
- D** basis of the court's reasoning and that it is the grounds of appeal that give life, meaning and content to the issues raised in the appeal for determination. She cited several authorities including: **John Holt Ventures Ltd. vs. Oputa (1996) 9 NWLR (Pt. 470) 214** and **Sadiku vs. A.G. Lagos State (1994) 7 NWLR (Pt. 355) 235** and submitted that having complained that the lower court erred in setting aside service of the originating processes on the respondents, the appellant was on the right track in fully canvassing the issue of service along with the reasoning, which formed the basis of the courts findings. She submitted that it
- F** was a misconception for learned senior counsel for the respondents to isolate the court's reasoning from the eventual decisions and contend that the appellant failed to appeal against them. She referred to: **Iwuoha vs. NIPOST Ltd. (2003) 8 NWLR ((Pt. 822) 308,** and argued that the respondents have not been misled in
- G** any way. She also submitted that a ground of appeal must be a challenge to the ratio of the decision and not every statement made by the court in reaching its verdict. She cited **Ikweki vs. Ebele (2005) 11 NWLR (Pt. 936) 397.** In paragraphs 2.21 – 2.25 of the reply brief she sought to distinguish the facts in
- H** **Odutola vs. Kayode (supra)** and **Ihedioha vs. Okorochoa (supra)** from the facts of this case.

My lords, I deem it appropriate to commence the resolution of these issues by considering, briefly, the law governing the service of originating processes.

- I** The settled position of the law was clearly stated by His lordship, Musdapher, (JSC) (as he then was) in **Kida vs. Ogunmola (2006) 6 SCNJ 165 @ 174** thus:

- J** “....service of process on a party to an action, particularly an originating process, is crucial and fundamental. See Auto

- A** **Import Export vs. Adetayo (2000) 18 NWLR (Pt.799) 554; S.G.B.N. vs. Adewunmi (2003) 10 NWLR ('Pt. 829) 526, Mbadinuju vs. Ezuka (1994) 8 NWLR (Pt.364,) 535, Failure to serve process where service of process is required is a**
- B** **fundamental vice. It deprives the trial court of the necessary competence and jurisdiction to hear the suit, In other words, the condition precedent to the exercise of the court's jurisdiction was not fulfilled.”**
- C** To underscore the importance of service, His lordship continued at page 175 lines 5 7 (supra):
- D** **“confining myself to the fundamental issue of service in this matter, I need not even consider the argument of counsel since where there is no service, there is no valid trial.”**
- E** The principle was re-stated in the recent decision of this court in **Ihedioha vs. Okorochoa (2016) 1 NWLR (Pt. 1492) 148 @ 179 D – F** by Okoro, (JSC):
- F** **“...I agree that it is not every non-compliance with the rules of court that should vatiatie the proceedings. However, where the non-compliance robs the court of its jurisdiction, the processes and the proceedings must be set aside. I must emphasize that service of process is an important aspect of the judicial process.**
- G** **Failure to serve a named party with court process offends Section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)..... Any breach of this principle [of fair hearing] renders the proceedings a nullity. See Chime Vs Onyia (2009) ALL FWLR (Pt. 480) 673 @ 730 – 731 paras. H-B; (2009) 2 NWLR (Pt. 1124) 1.”**
- H**
- See also: **Skenconsult (Nig.) Ltd. vs. Ukey (1981) 1 SC 6; Obimonure vs. Erinoshio (1966) 1 ALL NLR 250; Craig vs. Kanseen (1943) K.B. 256; National Bank (Nig.) Ltd. vs. Guthrie (Nig.) Ltd. (1993) 3 NWLR (Pt. 284) 643.**
- I**
- J** It is therefore settled beyond dispute that the service of an originating process on a party to an action is a condition precedent to the exercise of the

A court's jurisdiction, as any party against whom a suit or process is filed has the right to know that a suit had been instituted against him, what the claims are and an opportunity to defend himself, if he has a defence thereto.

Now, in the matter at hand, the issue is whether the originating processes
B were served on the respondents and if not, what is the consequence? The issues in contention are: whether service of the originating processes on the 1st respondent in any manner or at any place other than in accordance with the order for substituted service was proper service and whether notice of the processes,
C however that knowledge was acquired, cures any defect in service on all the respondents. It is the contention of learned senior counsel for the appellant that since the 1st respondent admitted that he received the processes at his residence at No. 5 Mbanano Street, Independence Layout, Enugu, he, and by extension, the 2nd
D - 19th respondents could not be heard to complain of improper service. Learned senior counsel for the respondents, on the other hand, argues, firstly that the lower court was right when it held that from the affidavits deposed to by the bailiff, service had not been proved and secondly that the bailiff was bound to effect
E service of the originating processes on the 1st respondent in strict compliance with the terms of the order for substituted service, and that he had no discretion in the matter.

In order to better appreciate the submissions of learned senior counsel on
F either side, I deem it appropriate at this stage to reproduce relevant paragraphs of the affidavits and counter affidavits deposed to by the bailiff of the trial court and by the 1st respondent. The first affidavit is the affidavit of service deposed to by the bailiff of the trial court on 17/4/2014, one day after service, which can be found at
G page 213 of the record. It reads thus:

H **“I Emmanuel L Ugwu Chief Bailiff of High Court Enugu make**
oath and say that on the 16th day of April 2014 at 4.20pm
o'clock I served upon 1st – 19th respondents ex parte order,
motion on notice, statement and address upon the complaint of
I Rev. Prof Paul Emeka by delivering same personally to 1st
respondent through Shedrack Lawrence at 5 Mbanano Street
Independence Layout. Before the day I served the motion on
notice I did not know Shedrack Lawrence personally, but after
he was pointed out to me by Richard Akwoh I asked him if he
were Shedrack Lawrence and he said that he was. Sworn at
J High Court Enugu this 17th day of April 2014.”

A In the 1st respondent's Affidavit in support of the application to set aside service, deposed to on 25/4/14, he averred in paragraphs 1, 2, 3, 4, 5, 6 & 9 thus:

- B “1. That in the night of 16/4/2014 a neighbour who stays next
two buildings from my residence brought a bundle of
documents which according to him was dropped outside
their gate with a stone placed on top of it and informed
me that he noticed that my name was written on the
document hence he brought it to me.
- C 2. That I never saw or met any person who dropped the
documents at all. No such person handed the said
documents to me.
- D 3. That I was shocked to hear that an affidavit of service
was sworn to and filed in the court to the effect that the
bailiff of the court handed any court process to me on the
said 16/4/2014. No bailiff of the court handed the court
process to me.
- E 4. The said affidavit of the said Bailiff is an intentional
falsehood.
- F 5. That I have never been an agent to any other respondent
on record in this suit.
- G 6. That the applicant – Prof. Paul Emeka has never had
any difficulty in accessing me or other respondents in
this suit and I verily believe that his option for
substituted service of the court processes in this suit is a
ploy by him to take us unawares so that we will not be
prepared to defend ourselves against him.
- H 9. That I am objecting to the purported service of process
alleged against me and the competence of this alleged
fundamental right application.”
- I 11. That it was then that the attention of the court was
drawn to the fact that the address where the bailiff
claimed to have effected service on me is not the address
at which the court ordered service.
- J 12. That I have never met the said bailiff of this court and he
never met me. No officer or bailiff of this court or any
lawyer at all gave any process or order of this court to me

- A** on 16/4/2014.
- B** 13. That the applicant had filed Suit No. E/82/2014 against myself and in this court which is still pending before His lordship Hon. Justice AC. Onovo. The applicant never had any difficulty in effecting service of the court processes in that suit.
- C** 16. That the facts to which the bailiff deposed in his purported affidavit of proof of service are intentional lies told by him to deceive the court and distort the records. No service of the court process in this suit was effected on me on 16/4/2014 by any bailiff of the court. I am objecting to and disputing that alleged service and I am prepared to call witnesses to show that I was not at the address and at the time when he claimed to have handed the processes or order to me.”
- D**
- E** The bailiff deposed to another affidavit on 3rd June, 2014. He averred in paragraphs 1 to 16 thus:
- F** “1. That I am a chief bailiff in the Enugu Judiciary, attached to High Court of Enugu State, Enugu Judicial Division.
- G** 2. That on 2nd June, 2014, I was shown Rev. Dr. Chudi Okoroafor's 'counter affidavit against the bailiff's affidavit of proof of service” in Suit No. E.202m/2014.
- H** 3. That I have read the same counter-affidavit and paragraphs 2, 3, 4, 5, 6, 12 and 16 of it is false. They are lies.
- I** 4. That in the course of my duty as chief bailiff on 16/4/2014 at about 305pm, I was given 19 copies of the ex-parte order of court and 19 copies of motion on notice, supporting Statement, affidavit with exhibits and written address for service on the respondents through the first respondent, Rev. Dr. Chidi Okoroafor.
- J** 5. That before then I did not know Rev. Dr. Chidi Okoroafor and I went with a pointer, Mr. Richard Akwah to Evangel House, Plot R8 Ozubulu Street, Independence Layout, Enugu.

- A** 6. That because it is very near the High Court we reached there quick[y Mr. Richard Akwah asked some staff there for Rev. Dr. Chidi Okoroafor in my presence, and the staff told us that he has just driven out to his house and will not come back to the office that day.
- B**
- C** 7. That we immediately turned and drove to Rev, Dr Chidi Okoroafor's house at No. 5 Mbanano Street, Independence Layout where we met 3 security men wearing uniform of ALFA Security Nigeria Limited at the gate. I came out from the car and told them that I am a bailiff of the High Court and I want to serve court processes on Rev. Dr. Chidi Okoroafor.
- D** 8. That one of them told me that oga has just come back from work and he gave me visitor's book to write and sign. I signed and he asked me to wait, He took the visitor's book to Rev. Okoroafor inside the house. So I waited at the gate with the other 2 security men and the pointer who was inside the car.
- E**
- F** 9. That after about 5 minutes the security man did not come out, I got Rev. Dr. Chidi Okoroafor's phone number 0810 027 3333 from Mr. Richard Akwah and call him with my cell phone no. 0805 242 2559.
- G** 10. That he picked the phone, I told him that I am chief bailiff from High Court Enugu and I have order of court with motion on Notice to serve him.
- H** 11. That he said ok and instructed me to give the court process to his security man, Mr. Shedrack Lawrence who gave me the visitor's book to sign.
- I** 12. That immediately after this, the same security man came out of the house, and I asked him if his name is Shedrack Lawrence. He confirm (sic) that his name is Shedrack Lawrence and his oga said I should give him the court order and court processes to bring inside the house for him.
- J** 13. That I gave all the 19 copies of the court order and 19 copies of the court processes to Mr. Shedrack Lawrence. I asked him to sign my dispatch book and he declined. He

- A** **said that oga told him only to receive the documents, not to sign any paper.**
- B** **14. That this was around 4.20pm by the lime I delivered the 19 copies of the order and the motion on notice etc to Mr. Shedrack Lawrence on instruction of Rev. Dr. Chidi Okoroafor and we drove away.**
- C** **15. That it is not true that I dumped the court order and court processes in the front of a gate at the no address along Mbanano Street and went away. That I chief bailiff of High Court not a mad man, and I am familiar with service of court processes.**
- D** **16. That my affidavit of service sworn to on 17/4/2014 is nothing but the truth. That the counter affidavit against me is false and a lie.”**

E After considering the various affidavits, the learned trial Judge found as a fact that the processes were not served on the 1st respondent at Evangel House, Plot R8 Ozubulu Street, Independence Layout, Enugu, the address contained in the order for substituted service, but at No. 5 Mbanano Street, Independence Layout. He preferred and believed the facts deposed to by the bailiff and held at page 559 of the record:

G **“When one considers the two affidavits the court bailiff and the 1st respondent, it would be clear that the 1st, respondent has something to hide. Who is the faceless neighbour who lives two buildings away from his residence? Does the neighbour have any name? Is it the one living on the left or the right of his residence? Such a vague description in the face of a full, positive and affirmative chronicling of the events leading to the service of the processes leaves much to be desired and a sour taste in the mouth.”**

I Relying on Order V Rule 7 of the Fundamental Rights (Enforcement Procedure) Rules, 2009, the learned trial judge noted that service could be effected by handing over the processes to an adult or to someone who, for the purposes of service is regarded as an agent of the party to be served. He stated that the rule

J provides for delivery of the process to an adult or some other person at the usual or

- A last known place of abode of the party to be served if it is proved that there is reasonable probability that the document would, in the ordinary course, through the agent or that other person, come to the knowledge of the party sought to be served. He held that service was properly effected on the 1st respondent at his residence through his agent. He also held that the order for substituted service did not direct that service must be effected at Evangel House but that the address described where the 1st respondent could be contacted. He held further that the processes were duly served on the 1st respondent in the manner prescribed by the order.

As the learned trial judge raised questions regarding the affidavits deposed to by the 1st respondent, so did the lower court *actually considered the content of the said affidavit filed by the bailiff shortly after he effected service of the*

- D *processes.*

- E **The state of the depositions of the bailiff said affidavit of proof of service sworn on 17/4/2014 gave credence to the 1st appellant's denial of service of the processes on him and his explanation in his counter affidavit of how the processes were brought to him by his neighbour residing two buildings away from his residence, The counter affidavit depose (sic) that the processes were not taken to or served at No. 5 Mbanano Street, but rather that they were dumped in front of the gate of a residence two buildings away from No. 5 Mbanano Street, Independence Layout; Enugu.**

- G The lower court proceeded to examine and identify contradictions in the two affidavits deposed to by the bailiff and held that in the circumstances the depositions were not credible and that it was not open to the court to choose which of the two versions to believe. The court also held that the trial court ought not to have relied on the irreconcilable conflicts in the affidavits of the bailiff and the 1st respondent, particularly as regards whether the 1st respondent was at Evangel House or at his residence between 3.05 pm and 7 pm, the period during which the bailiff alleged that the 1st respondent was not found at Evangel House, without resolving the conflict by calling on the parties to adduce further evidence. The court held that the appearance of the respondents or their counsel in court could not activate the jurisdiction of the court to entertain the matter where

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A service of the originating process was not in accordance with the rules of court or the order of the court.

Section 168 (1) of the Evidence Act, 2011 provides for the presumption of regularity of official acts. It provides thus:

B

“(1) Where any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with.”

C

The law is trite that an affidavit of service deposed to by the bailiff of a court stating the fact, place, mode and date of service and describing the process or document served shall be *prima facie* proof of the matter stated in the affidavit. See: **Schroder vs Major (1989) 2 NWLR (Pt. 101) 3 @ 11 E H; Okoye vs Centre Point Merchant Bank Ltd. (2008) 15 NWLR (Pt. 1110) 335; Idisi vs Ecodril (Nig.) Ltd. (2016) LPELR – 40438 (SC).** The law is equally settled that the presumption of regularity in this regard is rebuttable. A defendant who intends to challenge the affidavit of service deposed to by the bailiff must file an affidavit denying service and detailing specific facts, which show that he could not have been served on the date, or at the time, or at the place or in the manner deposed to. It would then be for the court to determine whether or not the party complaining was indeed served accordingly. Earlier in this judgment I reproduced the two affidavits comprehensively deposed to by the 1st respondent.

An appellate court would ordinarily not interfere with the findings of a trial court where that court has carried out its duty of evaluating the evidence before it and ascribing probative value thereto. However, where the evidence is documentary, an appellate court is in as good a position as a trial court to evaluate same, where there is a complaint that the finding of the court is not supported by the evidence before it. See: **Afolayan vs. Ogunrinde (1990) 1 NWLR (P. 127) 369 @ 385 C; Obineche vs. Akujobi (2010) 12 NWLR (Pt. 1205) 383 @ 416 H.**

Learned senior counsel for the appellant relied on Order V Rule 7 of the Fundamental Rights (Enforcement Procedure) Rules in support of the contention that the processes purportedly served on one Shedrack Lawrence an agent of the 1st respondent, at his residence at No, 5 Mbanano Street, Independence Layout, Enugu, was proper in the circumstances of this case. Whether or not the said rules were applicable to this case is one of the issues in contention in this appeal. This issue will be addressed anon. However, assuming the rules are applicable, do they

A enure in the appellant's favour? The relevant provisions of Order V Rule 7 for the purposes of this appeal are sub-rules (a) and (b), which provide as follows:

“Order V

B **Rule 7. Where it appears to the court, either after or without an attempt at personal service of the court processes that for any reason, personal service cannot be conveniently effected, the court may order that service be effected either**

C (a) **By delivery of the document to an adult person at the usual or last known place of abode or business of the party to be served; or**

D (b) **By delivery of the documents to some person being an agent of the party to be served, or to some other person, on it being proved that there is reasonable probability that the document would in the ordinary course, through that agent or the person, come to the knowledge of the party to be served, ...“ (Emphasis mine).**

In prayer 5 of the appellant's motion ex-parte filed on 15/4/2014, he sought the following relief:

F **“An order granting the applicant leave to serve the substantive application for the enforcement of his fundamental right and all other processes relating to the**

G **said application, on all the respondents by substituted means,, to wit: *by delivering same to the 1st respondent whose address for service is Evangel House Plot R8 Ozobulu Street, Independence Layout, Enugu.*”**

H **(Emphasis supplied by me)**

In paragraphs 5 and 6 of the affidavit in support of the motion ex-parte, the appellant personally deposed to the following facts:

I **“5. That the respondents reside in different parts of this country and some of them move about in pursuit of their various daily activities. That it will take quite some time**

J **and tedious effort for the bailiff of this court to track**

- A** **them down and serve the substantive application on notice on each and every one of them personally.**
- 6.** **That it will be impossible to reach and individually serve all the respondents. That as all the respondents are**
- B** **members of the Assemblies of God Church and is in touch with the 1st Respondent, *it will be more effective that the processes be served on them by delivering same to the 1st respondent whose address is Evangel House Plot R8, Ozubulu Street, Independence Layout, Enugu, as it will easily come to their notice.*". (Emphasis mine)**
- C**

D It was on the basis of the above representation that the order was made, I have considered the views expressed by the learned trial Judge and the court below on the interpretation to be given to the order made. A careful perusal of the relief sought in the motion ex-parte and the averments in support thereof shows, as held by the lower court, that the 1st respondent was to be served personally while the 2nd

E 19th respondents were to be served through the 1st respondent. In other words the 1st respondent was to act as their agent for the purpose of service. There was no request for service to be effected either on the 1st respondent or his agent. Also evident from the application is that Evangel House, Plot R8 Ozobulu Street,

F Independence Layout, Enugu was the address supplied by the appellant as the 1st respondent's address for service. The word "whose" is used to identify the person or entity to whom or which something belongs. By the application filed by the appellant, the person to be served with the processes had been removed from the realm of uncertainty with the specific request that the processes be served on all

G the respondents by delivery to the 1st respondent at Evangel House. As rightly pointed out by Chief Agabi, SAN, once the order was made, the bailiff had a duty to carry it out according to its terms, He had no discretion in the matter. This is not

H an issue of technicality but compliance with an order of court. I am unable to agree with learned trial Judge that the words 'whose address for service is Evangel House, Plot R8 Ozobulu Street, Independence Layout, Enugu', could mean anything other than that the processes were to be served at that address.

I It is the usual practice when applying for substituted service to specify the manner in which service is to be effected, the person on whom it is to be effected and where. The applicant chooses the location where he believes the processes are most likely to come to the attention of the person to be served. He may also

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- A** request a particular mode of service, such as pasting at the party's last known abode or place of business, by handing it to a named adult at a particular address or by publication in a widely circulating newspaper. The order would be made in accordance with the request. Having sought and obtained such a specific order, it
- B** cannot be open to a bailiff effecting service to do so at any other address or by any other means without a fresh order obtained from the court.

- The bailiff purportedly effected service of the processes on the 1st respondent on 16/4/2014 and deposed to the affidavit of service the following day,
- C** 17/4/14. In the affidavit of service deposed to the averred *inter alia*, that he effected service “*by delivering same personally to 1st respondent through Shedrack Lawrence at 5 Mbanano Street Independence Layout. Before the day I served the motion on notice I did not know Shedrack Lawrence personally, but*
- D** *after he was pointed out to me by Richard Akwoh I asked him if he were Shedrack Lawrence and he said that he was.* I had earlier reproduced the analysis of this affidavit by the lower court as found at pages 752 753 of the record. I am in full agreement with the lower court that there were many questions begging for
- E** answers in the said affidavit as to how the purported service of the processes at an address other than the one contained in the order of court came about. With due respect to the learned senior counsel for the appellant, the standard format of an affidavit of service does not preclude the bailiff from deposing to specific facts
- F** where he has not effected service in accordance with the order of court. There was no reference in the order to any Shadrack Lawrence or to No. 5 Mbanano Street, therefore the averment that he did not know Shadrack Lawrence personally was immaterial, since he was not ordered by the court to serve Shadrack Lawrence
- G** with any process nor was he ordered to serve any process at No. S Mbanano Street. On the importance of a bailiff carrying out his statutory duty in accordance with the rules or order of court, I refer to **Odutola vs. Kayode (1994) 2 NWLR (Pt. 324) 1 @ 19 20 G-A**, where Olatawura, JSC (of blessed memory) stated
- H** thus:.

- I** **“This case has brought out clearly the statutory and honest duties required of a bailiff: to serve in accordance with order of court. Where personal service is ordered, he must serve that person personally. Where a substituted service either by pasting at the last known abode of the person required to be served, or by publication in a newspaper is ordered, any other**
- J** **service which is not in accordance with the clear and**

A unambiguous language of the court is ineffectual.

B Bailiffs are officers of the court. Any dereliction of duty in the discharge of their duties will cause unnecessary delay in the administration of justice. A false return of service on the part of the bailiff may lead to an attempt to deceive the court. This in itself is an abuse of that order”

C The initial affidavit of service deposed to by the bailiff clearly showed on its face that service was not effected in the manner stated in the order of court. The 1st respondent deposed to facts purporting to show that the affidavit of service was false. He also averred that at 4.20 pm when the processes were allegedly served on Shadrack Lawrence he was at Evangel House. The bailiff on the other hand in his further affidavit averred that the 1st respondent was not available at Evangel House when he went there to effect service; that he and the pointer, one Mr. Richard Akwoh were informed that the 1st respondent had left for the day and had gone home, which was why he went to serve the processes at 5 Mhanano Street. I agree with the lower court that having regard to the material conflicts in the affidavits deposed to on either side, the learned trial judge was not at liberty to pick and choose which averments to believe without calling for oral evidence to resolve same. The 1st respondent averred categorically in paragraph 16 of his counter affidavit to the affidavit of service of the bailiff that he was prepared to call witnesses to rebut the averments therein. In the circumstances of this case, the non-filing of a further affidavit to challenge the averments in the second affidavit sworn to by the bailiff, was not fatal. The 1st respondent had already sworn to facts stating his whereabouts at the time and on the day the processes were allegedly served on him and how the processes eventually got to his notice. No useful purpose would have been served by a further repetition of the same facts.

H It has been argued that as long as the processes came to the respondents' attention and they appeared in court and were represented by counsel, it would amount to enthrone technicalities on the altar of substantial justice to contend that service was not proved. With due respect to learned senior counsel, the issue here is that at the behest of the appellant, a particular mode of service was ordered by the court. On the first day the matter came up for hearing i.e. on 17/4/2014, learned senior counsel for the 1st respondent, D.C. DENWIGWE, SAN challenged the mode of service, as the processes were dropped at Mbanano Street, two buildings away from the 1st respondent's residence and not at the address

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- A** provided in the order of court. Thus, his appearance at that stage was under protest. Having challenged the mode of service and compliance with the order of court, the onus shifted to the appellant, and by extension, the bailiff of the court to prove that service was effected in compliance with the order of court. As observed
- B** earlier, the learned trial judge could not have determined the issue without oral evidence to resolve the conflicts in the affidavit evidence on either side. I therefore agree with the lower court that service of the originating processes was not proved.
- C** This issue is accordingly resolved against the appellant.

Issue 2

- Whether the reliefs sought by the appellant at the High Court was (sic)**
- D competent and rightly brought under the Fundamental Rights Enforcement Procedure.**

- In arguing this issue, Chief (Mrs.) Offiah, SAN submitted that even though Suit
- E** No. E/82/2014 had already been filed challenging the validity of the meeting of 6/3/2014 and an order to revert to status quo had been made therein, the said suit did not address the infringement of the appellant's rights arising from the continued acts of the respondents after the order to revert to status quo had been
- F** made. She submitted that this is the gravamen of Suit No. E/202M/2014 that gave rise to this appeal. She submitted that the procedure of filing different suits though emanating from the same set of facts has received judicial endorsement in the case of: **Sokoto LG vs Amale ((2007) 8 NWLR (Pt. 714) 224 @ 240 – 241 G**
- G – A.** On the constitutionality of the fundamental rights of citizens in Nigeria she referred to Chapter IV of the 1999 Constitution and the following authorities: **Chief (Dr.) O. Fajemirokun vs Commercial Bank Nig. Ltd. & Anor. (2009) 2 SCM 55 @ 71; (2009) 37 NSCQR 1 @ 27; (2009) 5 NWLR (Pt. 1132) 588;**
- H Anuka Comm. Bank vs Olua (2000) 12 NWLR (Pt. 682) 64.**

- Learned senior counsel drew the court's attention to certain paragraphs of the affidavit in support of the application to enforce the appellant's fundamental rights and some of the exhibits annexed thereto to illustrate the fact that the
- I** appellant had established several breaches of his fundamental rights. She referred particularly to the fact that the respondents had prohibited all members of various units of the church from associating with him including denying him the right to worship in communion with them, Referring to the finding of the lower court that
- J** the appellant could not seek relief for the said infringement under Section 6 (1) of

- A** the constitution, she submitted that there was no counter-affidavit to challenge the appellant's averments that his right to fair hearing guaranteed by Section 36 (1) of the constitution had been breached. That in the circumstances the averments are deemed admitted. She referred to: **Amgbare vs. Sylva (2007) 18 NWLR (Pt. 1065) 1 @ 30 -31**. She submitted that the procedure for seeking redress for the said infringements is provided for under Section 46 (1). She argued that the court erred grievously in discounting all the proximate facts that led to the filing of the application. She submitted that the lower court was wrong when it held that the
- C** basis of the appellant's claim was his dismissal and suspension. She referred to Exhibits PE 19(m), PE20 (m), PE21 (m) and PE22 (m), which she contended, persisted even after his dismissal and suspension. She submitted that the lower court failed to dissociate the remote facts that gave rise to Suit No.E/82/2014 from
- D** the proximate facts that gave rise to the present application.

- She submitted that it is the reliefs sought in an application for the enforcement of fundamental rights rather than the facts in support that determine the jurisdiction of the court. She contended that the facts are not the determinant
- E** factor although they may serve as a guide. She submitted that the respondents intentionally trampled on the appellant's rights with impunity. She relied on the case of: **Agbai vs. Okagbue (1991) 7 NWLR (Pt. 204) 391** where this court deprecated such conduct. She urged the court to resolve this issue in the
- F** appellant's favour.

- In reaction to the above submissions, Chief Kanu Agabi, SAN submitted that contrary to the stand of learned senior counsel for the appellant, this case is not a fundamental rights enforcement action, as the office claimed by the
- G** appellant in the action is not a fundamental right nor is the membership of the church a fundamental right enforceable by the court. He submitted that the learned trial judge appreciated this fact when he opined at page 533 of the record that the application relates to a previous suit (E/82/2014) in respect of the crisis
- H** rocking the Assemblies of God Church. On the true purport of the finding of the court below on whether the appellant could come under Section 46 (1) of the Constitution, he submitted, referring to page 771 of the record, that the finding of the court was that although a complaint that the proceedings of the General
- I** Committee violates the rules of natural justice is proper and cognizable in law, redress cannot be sought under Section 46 (1) of the Constitution but under other procedures provided in the High Court (Civil Procedure) Rules. He submitted that the said finding reproduced at length in paragraph 4.07 of his brief) did not
- J** amount to a finding that the appellant's right to fair hearing had been infringed but

A was a mere statement that the procedure employed by him was wrong.

He submitted that it is only when the main or principal complaint in an application is the enforcement or securing of the enforcement of a fundamental right that the court would exercise jurisdiction to entertain the application under the Fundamental Rights (Enforcement Procedure) Rules. He submitted that where the main claim is not for the enforcement of fundamental rights, it is of no moment that ancillary claims allege the violation or threatened violation of fundamental rights. He relied on: **Tukur vs. Govt. of Taraba State (1997) 6 NWLR (Pt. 510) 549; University of Ilorin & Anor. vs. Oluwadare (2006) 6-7 SC 154; Jack vs. University of Agriculture (2004) 1 Sc (Pt. II) 100**. He submitted that in this case, the appellant's main complaint is his dismissal as a minister of the church and the suspension of his membership by the General Committee of the Church. He urged the court to hold that the alleged breaches of his fundamental rights were merely ancillary to his principal complaint and that the proceedings by way of Fundamental Rights Enforcement were inappropriate.

Relying on several decisions of this court, he submitted that the breach of fundamental rights under Section 36 (1) of the Constitution only arises where the allegations are against a court or tribunal established by law. In other words that a complaint based on breach of Section 36 (1) does not extend to non-judicial bodies and therefore the appellant's application did not fall within the purview of Section 46 (1) of the Constitution. See: **Ekunola vs. C.B.N. (2013) 15 NWLR (Pt. 1377) 224 @ 262 G – H; Bakare vs. L.S.C.S.C. (1992) 8 NWLR (Pt. 262) 641 @ 699 – 700 H – B**. On this premise, he submitted that the lower court was right when it held that reliefs 2, 3, 4 and 7, which relate to the decisions of the General Committee of the church, not being a judicial body, could not be entertained. He submitted further that the lower court was also right when it held that the said reliefs 2, 3, 4 and 7 as well as reliefs 5 and 6 were all secondary reliefs arising from decisions taken at the meeting of 6/3/2014 and actions taken pursuant to those decisions. He agreed with the lower court that reliefs 9, 10, ii, 12 and 15 are also secondary, ancillary and additional reliefs. He submitted that there is no appeal against the finding of the court in respect of reliefs 2, 3, 4, 5, 6, 7, 9, 10, 11, 12 and 15.

I Learned senior Counsel distinguished the case of **Peterside vs. IMB (Nig.) Ltd. (1993) 2 NWLR (Pt. 278) 712** relied upon by learned senior counsel for the appellant on the ground that in that case, Niki Tobi, JCA (as he then was), in his lead judgment held that the Fundamental Rights Enforcement procedure is

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A limited to the enforcement of rights listed in Chapter IV of the Constitution and does not extend to the enforcement of a right to remain in employment. He argued that it was immaterial that the respondents did not file a counter affidavit, as this fact did not preclude the court from determining whether the reliefs sought in the

B application satisfied the requirement of the law. He contended further that the law is settled that in determining the court's jurisdiction it is the plaintiff's claim that would be examined and that the lower court properly examined the appellant's claims and facts deposed to in support thereof before reaching its conclusion. He

C referred to **Ahmed vs. Ahmed (2013) 15 NWLR (Pt. 1377) 274 @ 310**. He submitted finally that the appellant did not appeal against the finding of the lower court that his principal claims do not seek the enforcement of his fundamental rights.

D In reaction to the contention that the instant case does not challenge the validity of the meeting of 6/3/14, he submitted that the argument is untenable so long as the principal claims do not seek the enforcement of the appellant's fundamental rights. He argued further that by reliefs 1, 8, 13 and 14 the appellant

E sufficiently challenged the validity of the meeting of 6/3/14 and urged the court to so hold.

In reply on points of law, learned senior counsel for the appellant submitted that having regard to the finding of the lower court that there exists a

F complaint that the proceedings and decision of the meeting of the General Committee violated the appellant's right to fair hearing, the mode by which the appellant approached the court is immaterial. She referred to: **F.R.N. vs Ifegwu (2003) 15 NWLR ((842) 11**. She referred to the preamble to the 1999

G Constitution (as amended) and submitted that it recognizes the fact that good governance and the welfare of all citizens of this country is anchored on the principle of freedom, equality and justice.

It is settled law that it is the plaintiff or claimant's claim that determines the

H jurisdiction of the court to entertain a cause or matter. See: **Inakoju vs. Adeleke (2007) 4 NWLR (Pt. 1025) 427 @ 588 – 589 H – C; Elabanjo vs. Dawodu (2006) 15 NWLR (Pt. 1001) 76; Adeyemi vs. Opeyori (1976) 9 – 10 Sc 31; Tukur vs. Governor Gongola State (1989) 4 NWLR (Pt. 117) 517**. It was held

I in: **Madukolu vs. Nkemdilim (1962) 2 SCNLR 341; (1962) 1 ALL NLR 587 at 594** that a court is competent when:

a. it is properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for one reason or the

J other;

- A b. the subject matter of the case is within 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
- B jurisdiction”.

See also: **Skenconsult (Nig.) Ltd. vs. Ukey (1981) 1 S.C. 6 at 62; Inakoju vs. Adeleke (Supra) @ 588 F.**

- C The issue under consideration is to determine whether the application for the enforcement of the appellant's fundamental rights was initiated by due process of law and upon the fulfillment of any condition precedent to the exercise of the court's jurisdiction.

- D Section 46 (1) of the 1999 Constitution (as amended) provides:

- E **“46. (1) Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to the High Court in that State for redress.”**

- F It is the appellant's contention that his fundamental rights, as guaranteed by Section 36 (1), 38 (1), 40 and 42 of the Constitution had been and/or were being violated by the respondents. Since it is the appellant's claims that will determine whether the suit was initiated by due process of law, it is immaterial at this stage that the respondents did not file a counter affidavit. **See: Inakoju vs Adeleke (supra) @ 588-589 H-A.** The court below held that the principal reliefs do not pertain to the enforcement of the appellant's fundamental rights but are ancillary thereto. It is for this court to determine whether the lower court was right. The importance of this consideration is elucidated in several decisions of this court.

- H Relying on the authority of **Sokoto Local Government vs Amale (2007) 8 NWLR (Pt.714) 224 @ 240 – 241. G A**, learned senior counsel for the appellant argued that the procedure of filing different suits emanating from the same facts is permissible and has received judicial endorsement. It is noted that
- I being a decision of the Court of Appeal, it is of persuasive authority only. Be that as it may, it was held in that case that the case before the court was not for a breach of or threat to the respondent's fundamental right but a claim in respect of land. The court held that the only option open to the respondent in the circumstances
- J was to take out a writ of summons. Reference was made to the decision of this

- A** court in **Tukur vs. Govt. of Taraba State (1997) 6 NWLR (Pt. 510) 549** where it was held that in an application for the enforcement of fundamental rights it is a condition precedent that the enforcement of the fundamental right should be the main claim and not an accessory claim. It was further held per Ogundare, (JSC) at **B 576 – 577 H – F (supra)** that where the main or principal claim is not the enforcement or securing the enforcement of a fundamental right, the jurisdiction of the court cannot be properly invoked, as the suit would be incompetent.

- Interestingly, in Tukur's case, the main relief was for an order quashing the **C** appellant's deposition as the Emir of Nun by the Taraba State Government. Some of the grounds for seeking reliefs under the Fundamental Rights (Enforcement Procedure) Rules were that his right to fair hearing had been breached because he was not given an opportunity of being heard before the order to depose him was **D** given; that he was not given any notice of misconduct pertaining thereto; that the decision did not comply with the conditions precedent to the exercise of powers of deposition by the Military Governor under Section 6 of the Chiefs (Appointment and Deposition) Law Cap. 20 Vol. 1 Laws of Northern Nigeria **E** 1963, applicable to Gongola State and was therefore Muri and void and of no effect. The appellant sought other reliefs including damages. The trial High Court held that it lacked jurisdiction to entertain some of the reliefs including relief provided for in Decree No. 48 of 1992, was not followed. This court found and **F** held that the real cause of action in the suit was wrongful dismissal from employment, which belongs to the common law class of claims, while an action for contravention or threatened contravention of a fundamental right belongs to a constitutional class of action specifically provided for and that the proper **G** procedure must be adopted in each class of action. This court reiterated its earlier position in **Tukur vs. Govt. of Gongola State (1989) 4 NWLR (Pt.117) 517 @ 548 and Tukur vs. Govt c Taraba State (supra)** to the effect that where the main or principal claim is not the enforcement or protection of a fundamental right, the **H** fundamental right procedure is not appropriate. The case of **F.R.N. vs. Ifegwu (supra)** relied upon by learned senior counsel for the appellant in fact supports the position of the respondent that for the enforcement of fundamental rights procedure to be applicable, the principal relief must be for the enforcement of a **I** fundamental right.

- I shall now apply the above principles to the facts of the instant case. I have carefully examined the 15 reliefs sought by the appellant. I agree entirely with the learned Justices of the court below that the main issues in controversy in Suit No. **J** E/202M/2014 are the appellant's dismissal as a minister of the Assemblies of God

- A** Church and his suspension as a member of the Church; the unlawfulness of the meeting of the General Committee of the Church, which was not convened and constituted in accordance with the provisions of the constitution of the Church; the illegal nature of the body (purportedly the General Committee of the Church),
- B** which met on 6/3/2014, which was not composed of legitimate members of the General Committee of the Church. I also agree with the court below that the complaints relating to the appellant's right to fair hearing as regards the meeting held on 6/3/14; his right to freedom of association, movement and freedom from
- C** discrimination as regards the letter written to unit heads directing them not to associate with him as General Superintendent of the Church, are all complaints arising from and incidental to his dismissal and suspension. In other words they are secondary to the main complaint. The learned senior counsel for the appellant
- D** has laboured gallantly to convince the court that there is a difference between the remote and the proximate events that gave rise to the suit before the trial court and that what is in issue is the action taken by the respondents even after the appellant's dismissal and suspension and in defiance of the order in Suit No.
- E** E/82/2014 to maintain the status quo ante bellum. I find myself unable to agree with this line of argument.

For purpose of illustration, I shall reproduce once again, at the risk of prolixity, reliefs 1, 8, 13 and 14 of the appellant's application:

F

1. **A DECARATION that the meeting held by the respondents on 6th March 2014, purportedly as a meeting of the General Committee of the Assemblies of God, Nigeria, at the National Secretariat of Assemblies of God, to determine allegations made against the applicant was illegal and unconstitutional, the same not having been properly convened and constituted in accordance with the provisions of the Constitution and Bye-laws of the Assemblies of God, Nigeria, 2002 and in contravention of the rights of the applicant to peaceful exercise of the duties of his office as General Superintendent of the Assemblies of God, Nigeria enshrined in the 1999 Constitution of the Federal Republic of Nigeria (as amended),**

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H

I

8. **A DECLARATION that the decision to dismiss and suspend the applicant was *ultra vires* the body which met**

J

- A** on 6th March, 2014 purportedly as the General
B Committee of the Assemblies of God, Nigeria, the same
 not being constituted of legitimate members of the
C General Committee and thus contravenes the applicant's
 rights under Section 6 (6) of the 1999 Constitution of the
 Federal Republic of Nigeria (as amended).
- D** 13. AN ORDER OF INJUNCTION restraining the 1st
 respondent by himself, or through his servants, agents,
 privies, cohorts or any person(s) whomsoever, from
 parading himself or being paraded as the Acting General
 Superintendent of the Assemblies of God, Nigeria.
- E** 14. AN ORDER OF INJUNCTION restraining the
 respondents, their servants, agents, privies, cohorts by
 themselves or through any person(s) whomsoever, from
 interfering with or obstructing the applicant in the
 peaceful performance of the duties, functions and
 obligations of his office as General Superintendent of the
 Assemblies of God, Nigeria and the enjoyment of all the
 rights, privileges, benefits, remunerations and
 perquisites of the said office, or from exercising his rights
 as a Minister and member of the Assemblies of God,
F Nigeria.

- His lordship, AGIM, JCA who wrote the leading judgment of the court below, at
G pages 768 - 772 of the record undertook an in-depth analysis of all the reliefs
 sought. I agree with him that reliefs 1, 8, 13 and 14 are the principal reliefs in the
 suit and that they stem from the main complaint that the appellant was wrongly
 dismissed and suspended from his positions as General Superintendent and
H member of the church respectively. All the other reliefs are incidental to this
 complaint. I also agree with the court below that the right to the peaceful exercise
 of the appellant's duties as the General Superintendent of the Church is not one of
 the fundamental rights guaranteed under Chapter IV of the 1999 Constitution.
- I** The appellant's right under Section 6 (6) of the 1999 Constitution, whatever it
 may be, is not one of the fundamental rights guaranteed under Chapter IV of the
 Constitution. I equally agree with the lower court that reliefs 13 and 14 do not fall
 within the aforesaid fundamental rights guaranteed by the Constitution.
- J** Section 36 (1) of the Constitution provides:

- A “36. (1) In the determination of his civil rights and obligation, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or**
- B other tribunal established by law and constituted in such manner as to secure its independence and impartiality.”**
(Emphasis supplied)
- C** All administrative bodies, even though they are not courts, are bound to observe the rules of natural justice and fairness in their decisions, which affect the rights and obligations of citizens, **See: Bakare vs L.S.C.S.C. (1992) 8 NWLR (Pt. 262) 641 @ 699 H.** However, in order to seek to enforce his fundamental right to fair
- D** hearing provided for under Chapter IV of the Constitution, the alleged violation must be in respect of proceedings before a court or tribunal established by law and not before domestic or standing ad hoc tribunals. **See: Ekunola vs. C.B.N. (2013) 15 NWLR (1377) 224 @ 262 - 263 H.A.** In **Bakare vs L.S.C.S.C. (supra) @ 700**
- E A - B**, this court, per Nnaemeka-Agu, JSC had this to say:
- F “The courts in exercise of their power of judicial review are constantly called upon to scrutinize the validity of instruments, laws, acts, decisions and transactions. In the exercise of the jurisdiction, the courts can declare them invalid or ultra vires and void, not because they are unconstitutional in terms of**
- G Section 33 of the constitution [now Section 36 of the 1999 constitution], but because they offend against the rules of natural justice of *audi alteram partem* or *nemo judex in causa sua*, or offends against the rules of fairness, or otherwise**
- H offends the rule of natural justice. All these are in the realm of administrative and not constitutional law..... The great divide is that Section 33 deals with judicial bodies and does not necessarily extend to all bodies not judicial but all the same**
- I deciding on rights and obligations.”**
- J** Thus, while the appellant may contend that he has not been treated fairly by the respondents, since they or the Assemblies of God Church are not a court or tribunal established by law, his remedy does not lie under Chapter IV of the 1999 Constitution (as amended). The right to be a member of a particular church or the

A right to worship at a particular church or to be a minister of a particular church is not a right cognizable under Chapter IV of the 1999 Constitution.

In the instant case, having agreed with the court below that the appellant's principal complaints are his dismissal as General Superintendent and his suspension as a member of the Assemblies of God Church, the fact that learned counsel has drafted the reliefs as seeking the enforcement of the appellant's fundamental rights does not make his complaint a constitutional one, His Lordship, Niki Tobi, JCA (as he then was) had this to say in **Peterside vs I.M.B. (1993) 2 NWLR (Pt. 278) 712 @ 718 - 719:**

D “It has now become a fashion or style for parties to push or force the provisions of Chapter IV into most claims which cannot in law be accommodated by the Chapter. Parties at times take undue advantage of the general and at times nebulous provision of the Chapter and try to tailor in their actions even when the size of the 'cloth' does not fit into it. The provisions of Chapter IV though appear omnibus and large both in their character and context are chained here and there by constitutional gadgets by way of safeguards.

E

F Counsel by his professional calling and expertise may dexterously frame a claim or relief to have the semblance of a breach of a constitutional right as contained in Chapter IV of the Constitution. He does this to give the matter a higher status in the litigation process..... But where an action does not have a constitutional flavor in the sense that the provisions of the Constitution are not breached or in the process of being breached, it cannot be elevated to the status of a constitutional wrong. A trial Judge should, in such circumstances, be able to apply the eye of an eagle to scrupulously examine the character and context of the claim with a view to removing the chaff from the grain and come to grips with the camouflage or disguise in the action. He has to unveil the pretentious legal phraseology of the action and take an appropriate decision.”

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I am of the considered view that the court below was properly guided in light of the above admonition. The appellant has not shown why this court should

A interfere. In conclusion I answer issue 2 in the negative and resolve it against the appellant.

Having resolved issues 1 and 2 against the appellant, I am of the view that no useful purpose would be served by considering the remaining issues. The

B failure to prove that the respondents were served with the originating processes in compliance with the order for substituted service renders the service ineffectual and liable to be set aside. I also agree with the court below that the Fundamental Rights Enforcement Procedure was inappropriate in the circumstances of this

C case and affected the competence of the trial court to hear the suit. The proceedings therefore amounted to a nullity and were rightly held to be so by the lower court. See: **Madukolu vs. Nkemdilim (1962) 2 SCNLR 341**. Having upheld the reasoning of the court below in this regard, it follows that all other

D findings of the court on the merit of the application were made obiter. The finding of the court below that the suit is incompetent is upheld. I therefore hold that the appeal lacks merit and is hereby dismissed. The application for the enforcement of the appellant's fundamental rights in Suit No. E/202M/2014 is hereby struck

E out for being incompetent.

There shall be no order for costs.

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

F

PETER-ODILI, (JSC): I agree with the judgment just delivered by my learned brother, Kudirat Motonmori Kekere-Ekun (JSC) and to underscore my support I shall make some comments on the reasoning.

G This appeal has arisen from the decision of the Enugu Division of the Court of Appeal dated 14th April 2015 in which that court set aside the judgment of the High Court of Enugu State.

Until the issues giving rise to this appeal, the appellant was a Minister of

H the Assemblies of God Church and was elected General Superintendent of the Church in November 2010 for a term of four years which would end by November 2014. The appellant continued to hold onto the office until the problems that threw up the suit leading to this current appeal. The appellant had at

I the court of first instance sought the reliefs stated hereunder:

1. A declaration that the General Committee which examined the allegations against the appellant Was unconstitutional and was a contravention of the rights of the appellant to peaceful exercise of the duties of his office.
- J** 2. A declaration that the decision dismissing the appellant from office and

- A** suspending him as a member of the church was null and void, the proceedings having been conducted and the decisions having been reached in contravention of the rules of natural justice and the appellant's rights under Section 36 of the 1999 Constitution.
- B** 3. A declaration that the, purported dismissal of the appellant from office violated his right to fair hearing under Section 36 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).
4. A declaration that the members of the General Committee which ordered the suspension of the appellant were judges in their own cause in that they were both accusers and judges thus violating the appellants right to fair hearing secured under Section 36 of the 1999 Constitution.
- C**
5. A declaration that prohibition of the appellant from associating with all units, all ministers, all Presbyters, all General council directors/ coordinators and all members in general of the assemblies of God, Nigeria is breach of the appellant's fundamental rights.
- D**
6. A declaration that the purported suspension of the appellant from membership of the church is a contravention of the appellant's right to freedom of religion and worship in community with others and right to freedom of association.
- E**
7. A declaration that the purported dismissal and suspension of the appellant on the ground that he had instituted action against the respondents was a violation of the appellant's right of access to court and fair hearing.
- F**
8. A declaration that the decision to dismiss and suspend the appellant was ultra vires the General Committee the same not being constituted of legitimate members of the General Committee.
- G**
9. A declaration that the "Body of Ambassadors of the Kingdom" and the Consultative Assembly are not persons authorized to try the appellant and had no jurisdiction to try, investigate or discipline the appellant for any alleged misconduct and especially for any alleged criminal offences.
- H**

The trial court granted the said reliefs and the respondents herein appealed and the Court of Appeal, Enugu. Division allowed the appeal and set aside the ruling of the trial court which created the dissatisfaction on which the appellant has based the appeal to the Supreme Court.

- I**
- The background facts are well captured in the lead judgment and I see no need to go into them, here except as to utilizing any excerpts therefrom as the need arises.
- J**

- A** Chief (Mrs.) A. J. Offiah SAN on the date of hearing, 29th day of November 2016 adopted appellant's brief of argument filed on 4/2/2016 and a reply brief filed on 11/8/16. In the brief of argument, six issues were identified for the determination of the appeal which are thus:
- B** 1. Whether the court below was right when it set aside the purported service of the originating processes on the respondents on the ground that the service was not in accordance with the order of the trial court.(Arising from Grounds 3 and 4 of the grounds of appeal.
- C** 2. Whether the court below was right when it held that reliefs sought by the appellant did not qualify as fundamental rights enforceable under section 46 of the 1999 Constitution and the Fundamental Rights (Enforcement Procedure) Rules (arising from Ground 2 of the notice of appeal).
- D** 3. Whether the court below was right when it held, on the issue of damages, that the Chief Justice of Nigeria acted ultra vires his powers under 46(3) of the 1999 Constitution when he made rules to include redress for violations or threatened violations of African Charter on Human and Peoples Rights (Arising from Ground 1 of the notice of appeal.)
- E** 4. Whether having held that the Suit No. E/202M/2014 was incompetent and that the trial court lacked jurisdiction to determine it, the court below, not being the apex court was still within its duty to consider or pronounce on other issues before the court and, if so whether the appellant has made out a case to warrant the setting aside of any of the findings made by the court below in the exercise of that duty. (Arising from Grounds 7, 9 and 10 of the notice of appeal.)
- F**
- G** 5. Whether it was competent for the court below I consider the propriety of the damages awarded by the trial court (Arising from Ground 7, 9 and 10 of the notice of appeal.)
- 6 Whether the court below made findings of fact and pronouncement in its judgment against persons who were not parties to the suit and who were not heard. (Arising from Ground 8 of the notice of appeal.)
- H**

I Learned counsel for the respondents, Kanu G. Agabi (SAN) adopted the brief of arguments of the respondents filed on the 29/3/16 and also adopted the issues as crafted by the appellant.

ISSUE ONE

- J** Whether the court below was right when it set aside the purported service of the

A originating processes on the respondents on the ground that the service was not in accordance with the order of the trial court.

Learned senior counsel, Mrs. Offiah for the appellant submitted that the service of the originating process was proper, valid and in tandem with the order of the court and the relevant provisions of the Fundamental Rights Enforcement Procedure Rules (FREP). That from the plain words of the order and the prayers in the ex-parte application it is clear that the court did not order that service be effected or must be effected on the respondents at Evangel House, Plot R8 Ozobulu 5street, Independence Layout, Enugu.

C That what was ordered is that service be effected on the respondents through the 1st respondent WHOSE address for service is Evangel House Plot R8 Ozobulu Street, Independence Layout, Enugu. That the issue raised on the different location of service is a mere legal technicality and an angle the court's have departed from. He cited **Egolum vs. Obasanjo (1999) 7 NWLR (Pt. 511) 255 at 413.**

Learned counsel for the appellant contended that the originating process had come to the knowledge of the respondents and so the stipulations of Order 5 Rule 7 of the FREP Rules were satisfied. That the trial court holding so was correct and the court below in error to have interfered with that finding. The cases of **Bello vs National Bank of Nigeria (1992) 6 NWLR (Pt. 246) 206; Okesuji vs. Lawal (1991) 1 NWLR (Pt. 170) 66** were relied upon. That the respondents have not shown how a miscarriage of justice had been visited on them.

Kanu Agabi (SAN), learned counsel for the respondents stated that none of the grounds of appeal allege that the court below was wrong in setting aside the service of the originating processes on the ground that it was not in accordance with the provisions of the Fundamental Rights (Enforcement Procedure) Rules and so the appellant is approaching the appeal from a ground that did not arise from the judgment of the court below. Also that the trial court had ordered that the service of the processes be effected in a particular manner and so the appellant cannot call in aid service effected under Order 5 Rules 2 and 7 of the FREP as good service with the intervening court order on substituted service having been made.

I That upon the proper evaluation of the affidavit evidence, the court below had found that the affidavit of proof of service deposed to by the bailiff on the 17/4/2014 did not prove that the originating processes had been served on the 1st respondent which finding appellant did not appeal against which therefore had the effect that the appellant conceded to the judgment of the court below which

A remains binding on him. He cited **Ukpong vs. Commissioner for Finance and Economic Development (2006) 19 NWLR (Pt. 1013) 187 at 216.**

Chief Agabi (SAN) of counsel further submitted that the fact that the respondents submitted themselves to the hearing of the matter at the trial court
B albeit under protest did not take away their right to protest the defective service nor would it cure that defect or confer jurisdiction where the defective service has robbed the court of the vires to hear and determine the matter. He relied on **Adegoke Motors Ltd vs. Adesanya & Anor. (1989) 3 NWL (Pt. 109) 250;**
C Nwobueze vs. Obi-Okoye (1998) 4 NWLR (Pt. 91) 664.

That once the court below found that the affidavit of service does not show that the processes were served the implication was that a condition precedent to the exercise of the court's jurisdiction had not been fulfilled and so the court does
D not concern itself with whether or not a miscarriage of justice had been occasioned on the respondents.

The thrust of the question herein raised is hinged on the fact that the appellant, by a motion ex-parte filed on 15/4/2015 prayed the trial High Court
E among other things for substituted service of the substantive application for the enforcement of his fundamental rights on all the respondents by serving same on the 1st respondent. The High Court in granting the application, ex-parte ordered as follows:

F
“An Order granting the applicant leave to serve the substantive motion of his fundamental right and all other processes relating to the said application, on all the respondents by substituted means, i.e. by delivering same to the 1st respondent whose address for service is Evangel House, Plot R8 Ozobulu Street, Independence Layout, Enugu.”
G

H The respondents at the trial court challenged the service of the originating processes and interim order on them stating that the said processes were dumped in front of a neighbour's gate two houses from his, and that the said neighbor, seeing his name on the processes, brought them to him whereupon he briefed
I counsel to handle the case.

The appellant's position is that the processes having got to the respondents as they did through the neighbor as kept at the neighbour's gate by the bailiff fulfilled the conditions for proper service and Order V, Rule 2 and Order V. Rule. 7
J had been complied with. I shall quote the provisions of the said Rules hereunder

A for ease of reference thus:

Order V, Rule 2 of the Fundamental Rights Enforcement Procedure Rules provides that:

B **“The application must be served on all the parties directly, so long as a service duly effected on the respondent's agent will amount to personal service on the respondent.”**

C Notwithstanding the above typical provision, and precisely because of the peculiar nature of proceedings relating to enforcement of fundamental rights, the FREP Rules make other provisions for substituted service of processes. Order V.

D Rule 7 provides that:

E **“Where it appears to the court, either after or without an attempt at personal service of the court processes that for any reason personal service cannot be conveniently effected, the court may order that service be effected either**

F (a) **By delivery of the document to an adult person at the usual or last known place of abode or business of the party to be served; or**

G (b) **By delivery of the document to some person being an agent of the party to be served, or to some other person, on it being proved that there is reasonable probability that the document would in the ordinary course, through that agent or person, come to the knowledge of the party to be served.”**

H The learned trial Judge considering the affidavit of the appellant and the respondents made the following findings thus:

I **“The bailiff of the court, Emmanuel Ugwu, has sworn to an affidavit to the effect that when he received the 19 copies of court process for service on the respondents, he went with Mr. Richard Akwah to the Evangel House office of the 1st respondent to serve the processes on the 1st respondent. He was**

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A told by the staff there that the 1st respondent had gone to his House at No. 5 Mbanano Street where he saw security men on duty. One of them told him the 1st respondent had just come back. He was asked to and did sign the visitors book which was

B taken by the security man to the 1st respondent. While the security man was inside, Mr. Akwah gave him the phone number of the 1st respondent and he called him and disclosed his mission. The 1st respondent asked him to hand same over to

C the security man which he did but none of them agreed to sign to acknowledge the receipt of the processes. When one considers the two affidavits of the court bailiff and the 1st respondent, it would be clear that the 1st respondent had something to hide. Who is the faceless neighbor who lives two building away from his residence? Does the neighbor have any name? Is it the one living on the left or the right side of his residence? Such a vague description in the face of a full, positive and affirmative, chronicling of the events leading to the service of the processes leaves much to be desired and a sour taste in the mouth”.

F At page 561, the trial court concluded thus:

“The service is lawful, it is legal and proper. It lived up to its bidding. It cannot therefore be set aside.”

G On appeal, the court below held thus:

H “The bailiff on 3/6/2014 deposed to another affidavit detailed explanations of how he conducted service of the originating process on the, 1st appellant. This further affidavit was obviously meant to answer the questions arising from his first affidavit. The trial court in reviewing and evaluating his affidavit along with the other affidavit did not consider the obvious contradictions between the depositions in the bailiff's affidavit of 17/4/2014 and the second bailiff's affidavit of 3/6/14 on how the bailiff met Mr. Shedrack Lawrence and served him the originating process on behalf of the 1st appellant. In his

I

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A affidavit of 17/4/2014, he stated thus “before the day I served the notice, I did not know Shedrack Lawrence personally, but after he was pointed out to me by Richard Akwah I asked him if he were Shedrack Lawrence and he said that he was. In his

B affidavit of 3/6/2014 the bailiff stated in paragraph 7 14 therein that on arrival at the gate of the residence of the 1st appellant, he and the pointer did not know any of the three security men they met at that gate and that it was the 1st appellant who on phone

C identified one of them to him as Shedrack Lawrence. The two versions of evidence contradict on how he met, identified and served Shedrack Lawrence the originating processes. While the earlier affidavit states that it was one Richard Akwah who

D accompanied the bailiff to effect the service of the process that identified the Shedrack Lawrence and that that the service was so identified, in his second affidavit, the bailiff now said that Richard Akwah did not know Shedrack Lawrence and that it

E was the 1st appellant who by telephone identified Shedrack Lawrence to the bailiff and directed the bailiff to deliver the processes to him.” See pages 753 - 754 of the record.

F The Court of Appeal further stated at pages 756 and 751 of the record thus:

“The trial court did not consider the depositions of the 1st appellant in paragraphs 3, 4, 5 and 16 of the counter affidavit...

G I have calmly and carefully read the said affidavits of the bailiff and the counter affidavit of the 1st appellant. It is glaring that the trial court did not evaluate the contents of the said affidavits properly and that its decision to believe the affidavits

H of the bailiff and disbelieve the counter affidavit of the 1st appellant runs contrary to the trend of evidence.”

Again to be said is that upon the evaluation of evidence, the court below found

I that the affidavit of proof of service deposed to by the bailiff on the 17/4/2014 did not prove that the originating processes had been served on the 1st respondent. That court held thus:

J

- A** “The contents of the bailiff’s affidavit sworn to and filed in the trial court on 17/4/2014 is reproduced at page 23(sic) of this judgment. The affidavit does not explain why processes ordered to be served on 1st appellant were served on one
- B** Shedrack Lawrence. It is glaring that the depositions in that affidavit did not prove that the originating processes in Suit No. E/202M/2014 were served on the 1st appellant”.
- C** The appellant did not appeal against that finding in such a situation this court had in **Ukpong vs. Commissioner for Finance & Economic Development (2006) 19 NWLR (Pt. 1013) 187 at 216 paras E-G**, per Onnoghen (JSC) held as follows:
- D**
- E** “It is clear from the record that after lodging the notice of appeal, appellants or their advocate must file a written statement of their grounds of appeal. On the other hand, the respondents filed a counter affidavit which is being contended is as good as the required written reply envisaged by the rules. The High Court found that it is not a written reply and there
- F** was no appeal against as also conceded by learned counsel for the respondents are deemed to have accepted that finding which is therefore binding on the parties irrespective of the allegation that the point was raised suo motu by the court in its judgment. If it was, it was the duty of the respondents against
- G** whom the finding was made to have appealed against same at the Court of Appeal which they failed to do. The law is that the finding stands unchallenged and therefore binding.” See **Usman vs. Garke (2003) FWLR (Pt. 177) 815**.
- H** Learned counsel for the appellant had made a fuss on the fact that inspite of the disputed mode of service that the respondents appearance in court had cured the irregularity. The court below did not buy that trend of thought 'and stated thus:
- I**
- J** “The presence and participation of a party and or his counsel in proceeding before the court without disputing service or proper service of the processes on him gives rise to a presumption of regularity of the proceedings before the court

A including service of the processes on the parties. Where he and
B his counsel appear and not only dispute the proper service of
the originating process on him but also by a motion on notice
C apply for an order to set aside the said service of the originating
processes on him, the issue of whether the service of the
originating service on him is proper arises. The appearance of
a party and his counsel in a proceeding does not preclude such
party from protesting the manner of service of the originating
processes on him.”

The court below then proceeded to find that the appearance of the respondents was made under protest. Here are the words of the court below:

D “It is clear from the record of this appeal that in the proceedings
in Suit No.E/202M/2014 that took place for the first time on 17 -
E 4-2014, after the service of the processes on the 1st appellant on
16/4/2014, learned SAN for the 1st appellant informed the trial
court that “there is no service as required by the rules of court
F arid that “the processes were dropped at Nbanano Street,
Independence Layout, two building away from the residence of
the 1st respondent on 25/4/2014, the 1st appellant filed an
application on notice praying for inter alia an order setting
aside the service on the 1st appellant of the originating process
and ex part order in the suit.”

G This court had in the case of **Adegoke vs. Motors Ltd vs. Adesanya & Anor.**
(1989) 3 NWLR (Pt. 109) 250, this court held as follows:

H “When a defendant desires to object to regularity of
proceedings by which the plaintiff seeks to compel his
appearance, he may, by leave of court, enter a conditional
appearance or an appearance under protest and then apply to
I the court to set aside the said plaintiffs proceedings or he may,
without entering an appearance, move to set aside the service of
the writ.” See **Nwabueze vs. Obi-Okoye (1998) 4 NWLR (Pt. 91)**
664.

J

- A** The bottom line as I see it is that on the one side if the service on the respondents in the regular form would suffice inspite of the court's order for substituted service, the appellants think it is in order while the respondents say no, that the court's order for substituted service cannot be averted and anything outside it was
- B** defective leading to a nullification of the service.

In **Odutola vs. Kayade (1994) 2 NWLP. (Pt. 324) 1 at 19 - 20 paras G - A**, this court had this to say:

- C** “Since the lower court ordered a personal service on the defendant, any other service not in accordance with the order of court was not a proper service. This case has brought out clearly the statutory and honest duties required of a bailiff: to
- D** serve in accordance with the order of court. Where a personal service is ordered, he must serve that person personally. Where a substituted service whether by pasting at the last known abode of the person required to be served, or by a publication
- E** in a newspaper is ordered, any other service which is not in accordance with the clear and unambiguous language of the court is ineffectual.

- F** Further at page 21 para F of **Odutola vs. Kayode (supra)**, this court continued:

- G** “To effect personal service of court process on a party, the bailiff or any officer of court entrusted with the task should satisfy himself that he has found the right man. It is not enough to leave a court process with a person who works in the same office with the defendant, as was done in this case, even if the latter undertakes to convey it to the appellants.”

- H** A similar presentation had erupted in the case of **Ihedioha vs. Okorocho (2016) 1 NWLR (Pt. 1492) 147 at 176 D – H**.

- I** “The order for substituted service which the trial court made is tied to the address for service which the appellant supplied and the specific person (i. e. the 1st respondent) named in that order. Neither the bailiff nor any person at all was competent to
- J** alter the text and subject of the order without a prior leave of

- A** the court. See **Odutola vs. Kayode (1994)2 NWLR (Pt. 334) 1 at 15** for persuasion to the effect that the court is bound by its own orders. In **Kida v Ogunmola (supra)** at 399 A H the Supreme Court relied on the decision of the Queen Bench Division of the Court of England **Fry vs. Moore (1889) 23 QBD, 395** and decided that there cannot be substituted service of a suit which could not at the time when it was issued be served personally. With all due respect the Supreme Court never decided in **Egolum vs. Obasanjo (1999) 7 NWLR (Pt. 511) 255 at 413** that defect in service of originating process is a mere matter of technicality. Instead the Supreme Court decided in **Kida vs. Ogunmola (supra)** that defect in service affects the jurisdiction of the court”.
- B**
- C**
- D**

- What I see as the long and short of the situation is that even if in the ordinary course of events, personal service would have been considered good service, the intervention of the court order for the service to be effected on the respondents through the 1st respondent by substituted service, that order took precedence over all else including the relevant Rules of court on how service in the quest for enforcement of fundamental rights is to be made. Therefore, it is by that substituted means along the provided routes in the order no more no less that is obedience to the order to the letter. Anything other than that would translate to no service of an originating process as in this case and that being so, the competence of the process is impaired and the result is that the jurisdiction of the court of trial cannot be activated.
- E**
- F**
- G**

- The position is not changed by the appearance in court of the respondents as once there is no jurisdiction of court, the appearance of the protesting party would not confer the jurisdiction as the long stated issue of putting something on nothing and expecting it to stand would apply. See **Macfoy vs. UAC Ltd (1961) 3 ALLER 1169**.
- H**

- Also to be said is that since there is no jurisdiction in the court, there is no vires on which the court can make a finding on whether by the improper service the respondents had suffered a miscarriage of justice. Indeed this is not one of those instances where technical justice is not applied and so the case of **Egolum vs. Obasanjo (1999) 7 NWLR (Pt. 511) 233 at 413** does not apply to aid the appellant. This is because what is at play here is fundamental, goes to the root of the jurisdiction of the court and the situation cannot be ignored.
- I**
- J**

A Clearly, the court below was on solid ground right in making the finding and conclusion it came to and I am in tune with it in answering the question against the appellant.

B ISSUE NO. 2

Whether the court below was right when it held that reliefs sought by the appellant cannot completely be applied for under Section 46 of the 1999 Constitution and the Fundamental Rights (Enforcement Procedure) Rules.

C Learned senior counsel for the appellant contended that the reliefs sought by the appellant at the trial court are within the ambit of the rights guaranteed under the Fundamental Rights guaranteed constitutionally under Chapter IV of the 1999 Constitution of the Federal Republic. He referred to **Fajemiroken vs.**

D Commercial Bank of Nigeria Ltd & Anor.(2009) 2 SCM 55 at 71, Anuka Commercial Bank vs. Olua (2000) 12 NWLR (Pt. 682) 64.

That a breach of those rights secured for the appellant the right to cry out for redress. He relied on **Agbai vs. Okagbue (1991) 7 NWLR (Pt. 391).**

E Reaction, learned counsel for the respondent submitted that the procedure of approaching the court for his perceived breach of his right to fair hearing was wrong and that the lower court found rightly so. He cited case of **Tukur vs. Government of Taraba State (1997) 6 NWLR (Pt. 510) Jack vs. University**

F Agriculture (2004) 1 SC (Pt. 11) 100 etc.

A background glimpse into the facts of the matter before this court shows that some concerned members of the church had brought an action in suit E.82/2014 to challenge the validity of the respondents meeting of 6/3/2014 and

G an order to maintain the status quo ante bellum had been made therein. Some of the events giving rise to the said suit are at the remote background of the facts of the present suit. In that said Suit E.82/2014 the matter of the infringement of the appellants fundamental rights precipitating the present application. The appellants

H justify their mode of approaching this court by way of fundamental rights enforcement procedure as guaranteed under Chapter IV of the 1999 Constitution of the Republic of Nigeria.

I The respondents dispute this manner of approach to the court in view of the facts at play. This trial court found thus:

J “I have gone through the processes filed. I feel this application equally relates to a previous suit which is also pending in this court over the crisis that has in recent past rocked the

A Assemblies of God Church Nigeria.”

B The respondents' contention is that the main or principal complaint in the instant case being the appellant's dismissal as minister and his suspension as member of the church and so the alleged breaches of his fundamental rights were merely accessory to his principal complaint and that the proceedings by way of the Fundamental Rights (Enforcement) Rules were inappropriate and the court below right to so hold.

C The court below had this to say at page 771 thus:

D “There is no doubt that a complaint that the proceedings and decisions of that meeting violate the rules of natural justice and the respondent's general legal right to fair hearing is a proper and recognizable complain in law. But the respondent can seek redress for such violation by the ordinary or general process for seeking remedy for infraction of legal rights and obligations. He cannot exercise the right of action given to him by Section 46(1) of the constitution to seek redress for violation of the general rules of natural justice, including his general legal right of fair hearing.... The appropriate method to challenge the decisions of such non judicial bodies acting judicially or quasi judicially is by an application for judicial review by the writ of certiorari or prohibition or declaration under the High Court Civil Procedure Rules or by any of the ordinary methods legal actions under the High Court Civil Procedure Rules like Writ of summon, originating motion.”

At page 778 of the record, the court below stated thus:

H “In all cases the courts have treated the central issue in controversy, the casus belli or the act or event that directly led to the suit as the main complaint. In *University of Ilorin & Anor. vs. Oluwadare* it was expulsion from school, in *Tukur vs. Government of Taraba State* it was deposition as the Emir of Muri, in *WAEC vs. Akinkumi* (supra) it was cancellation of result in Sea Truck (Nig.) Ltd vs. Anigboro it was dismissal from employment. In our present case it is the respondent's dismissal

A as minister and suspension as member of the church.

B In all these cases the complaints of violation of the applicant's right to fair hearing and other fundamental rights in the process of dismissal, termination, expulsion or deposition or cancellation of his result as the case may be, were held by the Supreme Court to be secondary or ancillary or accessory complaint.”

C The complaints are against decisions of a non-judicial body contrary to the provisions of Section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria as amended:

D The previous decisions of this court relating to fundamental rights actions are to the effect that breach of a fundamental rights under Section 36(1) of the Constitution arises only when it is charged against a court or tribunal established by law. In **Ekunola vs. CBN (2013) 15 NWLR (Pt. 1377) 224 at 262, paras G -**

E H, this court held as follows:

F “Besides, Section 36(1) (supra) arises where the denial of fair hearing has been charged against a court or tribunal established by law and not before domestic or standing ad hoc tribunals raised departmentally by parties as the 1st respondent here.”

G The implication of the above is that, there would be no case of infringement of the right to fair hearing under Section 36(1) of the 1999 Constitution when the decision alleged to have violated one's constitutional right to fair hearing is that of a non-judicial body. In **Bakare vs. L.S.C.C. (1992) 8 NWLR (Pt. 266) 641 at**

H 699 - 700. Paras H – B, this court had this to say of section 33(1) of the 1979 Constitution, a provision *impari material* with Section 36 (1) of the 1999 Constitution:

I “The courts in exercise of their power of judicial review are constantly called upon to scrutinize the validity of instruments, laws, acts, decisions and transactions. In the exercise of the jurisdiction, the courts can declare them invalid or *ultra vires*

J and void not because they are unconstitutional in terms of

- A** **Section 33 of the constitution but because they offend against the rules of natural justice of audi alterem pertem, or nemo judex in causa, or offend against the rules of fairness, or otherwise offend against the rules of natural justice. All these**
- B** **are in the realm of administrative and not constitutional law. The court can by its power of judicial review set them aside -**
- C** **The great divide is that section 33 deals with judicial bodies and does not naturally extend to bodies not judicial but all the same deciding on rights and obligations.”**

The court below stated further as follows:

- D** **“Some of the said reliefs such as reliefs Number 2, 3, 4, and 7 relate to the complaint that the decision of the General Committee dismissing the respondent as minister and suspending him as a member violates his right to fair hearing**
- E** **under Section 36(1) of the 1999 Constitution. .A decision of the meeting of the General Committee of the church, not being a court or tribunal established by law cannot be said to have violated the respondent's right to fair hearing under Section**
- F** **36(1) of the 1999 Constitution which provide that....”**

See page 678 of the record, the lower court held thus:

- G** **“Reliefs 2, 3, 4, 6 and 7 relate to the proceedings and decisions of the meeting of 6/3/2014 and the actions taken pursuant to those decisions in that meeting whose competence, constitution and legality is the subject of the primary or main complain and they seek to remedy violation of rights committed in the process of reaching the decision to dismiss the respondent and suspend him as member of the church. The reliefs seek declarations that the proceedings, decisions and actions of that body contravene**
- H** **rules of natural justice and the applicant's rights under S. 36, 38 (1) and 40 of the 1999 constitution. These are clearly secondary reliefs.”**
- I**
- J**

A On the other reliefs the court below had this to say at page 772 of the record thus:

Reliefs 9, 10, 11 and 12 are clearly secondary, ancillary and additional reliefs... -

B

Relief 15 is dependent on reliefs 1 to 9. Its success or failure depends on the success or failure of reliefs 1 to 10. It is a secondary relief.”

C

The appellant had sought to call in aid the case of **Anuka Community vs. Olua (2000) 12 NWLR (Pt. 682) 64**. I shall quote it for effect and thus:

D

“The institution or commencement of an action on fundamental rights arising from another action already in court cannot be based on the principles governing whether an order is final or interlocutory. In my opinion, a person is entitled to enforce his fundamental rights at any time and irrespective of whether it is, in the words of learned counsel, main or principal cause of action or fundamental issue before the court. The constitution of the Federal Republic of Nigeria, 1979, which was in operation at the material time, clearly provided for the right of action in respect of breach or threatened breach of fundamental rights. Section 42(1) of that constitution provided thus:

G

“Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that State for redress.”

H

Order 1 Rule 2(1) of Fundamental Rights (Enforcement Procedure) Rules 1979 Constitution contains similar provision in the following words:

I

Any person who alleges that any of the Fundamental Rights provided for in the constitution and to which he is entitled, has been, is being, or is likely to be infringed may, apply to the court in the state where the infringement occurs or is likely to occur, for redress.”

J

- A** The above are very clear provisions which a person can enforce where he feels that his fundamental right is contravened or being or likely to be contravened. See **General Archbishop Oligis and Ors. vs. The Attorney General of Lagos State (1981) 1 NWLR 218**; **Momoh vs. Senate of the National Assembly and Ors. (1981) 1 NCLR 21**; **Saude vs. Abdullahi (1989) 4 NWLR (Pt. 116) 387**; **Uzoukwu vs. Ezeonu II (1991) 6 NWLR (Pt. 200) 708**; **Lekwot vs. Judicial Tribunal (1993) 2 NWLR (Pt. 276) 410**; **Peterside vs. I.M.E. (Nig.). Ltd. (1993) 2 NWLR (Pt. 278) 712**, per Tobi JCA (pp. 23 - 24, Paras. C - E).

Briefly stated hereunder are the reliefs sought by the appellant as thus:

- D** “**Contravention of the rights of the applicant to peaceful exercise of the duties of his office as General Superintendent of the Assemblies of God, Nigeria enshrined in the 1999 Constitution of the Federal Republic of Nigeria (as amended).**”
- E****Contravention of the Rules of Natural Justice and the applicant's rights under Section 36 of the 1999 Constitution of the Federal Republic of Nigeria as amended).**
- F** **Contravention of the applicant's right to fair hearing as secured under section 3b of the 1999 constitution of the Federal Republic of Nigeria (as amended)**
- G****chairing the purported General Committee meeting of 6th March, 2014 by the 4th respondent and the participation of 11 members of - the Executive Committee of the Assemblies of God, Nigeria and 9th to 19th respondents. who are members of the Body of**
- H** **Ambassadors of the Kingdom, all of who had made the allegations against the applicant, amounts to being a judge in their own cause and was in contravention of the applicant's right to fair hearing secured under Section 36 of the 1999 Constitution of Federal**
- I** **Republic of Nigeria (as amended).**
**prohibiting the free association by the applicant with all unit', all ministers, all Presbyters, all General Council Directors/Coordinators and all members of General Assemblies of**
- J** **God, Nigeria is in breach of the applicant's fundamental rights**

- A** **enshrined and secured under Sections 40 and 42 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)**
- B** **.....the purported suspension of the applicant as a member of the Assemblies of God, Nigeria with the threatened implication of ex-communicating him from the church is a contravention of the applicant' right to freedom of religion and worship in community with others and right to freedom of association secured under sections 38(1) and 40 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)...**
- C** **.....decision to dismiss and suspend the applicant was ultra vires the body which met on 6th March, 2014 purportedly as the General Committee of the Assemblies of God, Nigeria, the same not being constituted of legitimate members of the General Committee and thus contravenes the applicant's rights under Section 6(6) of the 1999 constitution of the Federal Republic of Nigeria (as amended).**
- D** **.....the “Body of Ambassadors of the Kingdom” and the “Consultative Assembly” are not persons authorized or organs cognizable under the exant 2002 Constitution and Bye-laws of the Assemblies of God, Nigeria and have no functions thereunder, no powers to try, investigate or discipline the applicant for any alleged misconduct and especially for any alleged criminal offences and their conduct therefore contravenes the applicant's rights enshrined under section 36(4) and (5) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).....**
- E** **.....the “Body of Ambassadors of the Kingdom” and the “Consultative Assembly” are not persons authorized or organs cognizable under the exant 2002 Constitution and Bye-laws of the Assemblies of God, Nigeria and have no functions thereunder, no powers to try, investigate or discipline the applicant for any alleged misconduct and especially for any alleged criminal offences and their conduct therefore contravenes the applicant's rights enshrined under section 36(4) and (5) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).....**
- F** **.....the “Body of Ambassadors of the Kingdom” and the “Consultative Assembly” are not persons authorized or organs cognizable under the exant 2002 Constitution and Bye-laws of the Assemblies of God, Nigeria and have no functions thereunder, no powers to try, investigate or discipline the applicant for any alleged misconduct and especially for any alleged criminal offences and their conduct therefore contravenes the applicant's rights enshrined under section 36(4) and (5) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).....**
- G** **.....the “Body of Ambassadors of the Kingdom” and the “Consultative Assembly” are not persons authorized or organs cognizable under the exant 2002 Constitution and Bye-laws of the Assemblies of God, Nigeria and have no functions thereunder, no powers to try, investigate or discipline the applicant for any alleged misconduct and especially for any alleged criminal offences and their conduct therefore contravenes the applicant's rights enshrined under section 36(4) and (5) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).....**
- H** **From what is available before court and the reasoning in the court below, it is difficult to resist going along the path tred by that lower court. This is because as the respondents contended that the alleged breach of the appellant's right of fair hearing is found on the appellant's refusal to yield to the invitation to discuss and deal with the complaint of the members of the church and that breach being not on its own but related to the facts which brought about an earlier suit which was of well before the same court, then the method of crying out to the same court in this instance was better served by writ of summons or originating summons or any other appropriate originating process as stipulated in the High court (Civil**
- I** **From what is available before court and the reasoning in the court below, it is difficult to resist going along the path tred by that lower court. This is because as the respondents contended that the alleged breach of the appellant's right of fair hearing is found on the appellant's refusal to yield to the invitation to discuss and deal with the complaint of the members of the church and that breach being not on its own but related to the facts which brought about an earlier suit which was of well before the same court, then the method of crying out to the same court in this instance was better served by writ of summons or originating summons or any other appropriate originating process as stipulated in the High court (Civil**
- J** **From what is available before court and the reasoning in the court below, it is difficult to resist going along the path tred by that lower court. This is because as the respondents contended that the alleged breach of the appellant's right of fair hearing is found on the appellant's refusal to yield to the invitation to discuss and deal with the complaint of the members of the church and that breach being not on its own but related to the facts which brought about an earlier suit which was of well before the same court, then the method of crying out to the same court in this instance was better served by writ of summons or originating summons or any other appropriate originating process as stipulated in the High court (Civil**

A Procedure) Rules. I am emboldened by the cases of **Borno Radio Television Corporation vs. Basil Egbuonu (1991) 2 NWLR (Pt. 171) 90; FRN vs. Ifegwu (2013) 1 NWLR (Pt. 842) 113 at 180.**

B It is clear that from what is on ground, the court below was right that the reliefs sought by the appellant cannot be completely applied for under Section 46 of the 1999 Constitution and the Fundamental Rights (Enforcement Procedure) Rules and to this, issue 2 is answered against the appellant.

C In the light of the foregoing and the fuller and better reasoning of my learned brother, Kekere-Ekun (JSC), I see no light at the end of the tunnel for the appeal and so I hereby dismiss the appeal.

I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

D

E **AKAAHS, (JSC):** My learned brother, Kekere-Ekun (JSC) availed me before now, her comprehensive and lucid judgement just delivered. I am in total agreement with her reasoning and conclusion that the order of substituted service of the Writ was not effected as ordered by the court and consequently the Writ was not served on the respondents and that this is not a case that can be brought under the Fundamental Rights (Enforcement Procedure) Rules, 2009 to enforce the

F appellants fundamental rights.

The circumstances leading to the application by motion on notice before the Enugu State High Court for the enforcement of the appellant's fundamental rights using the Fundamental Rights (Enforcement Procedure) Rules 2009 and

G the reliefs sought have been well set out in the leading judgement and the resolution of the issues raised in the appeal. I wish to limit my comment to issue no. 2. The issue was distilled from ground 2 and it reads thus:

H **Whether the reliefs sought by the appellant at the High court was competent and rightly brought under Fundamental Right Enforcement Procedure”.**

I Learned counsel for the appellant posited that it is important to critically look at the reliefs sought in the resolution of this issue. He contended that the facts which gave rise to the application was the validity of the meeting of 6/4/2014 and even though suit No. E/82/2014 had already been filed and an order to revert to status

J quo had also been made in the said suit E/82/2014, which the respondents

- A** ignored, the application was purely aimed at protecting the rights of the appellant the infringement of which suit E/82/2014 did not address. She stated that some concerned members of the church instituted suit E/82/2014 to challenge the validity of the respondents' meeting of 6/3/2014 and some of the events giving
- B** rise to the said suit from the remote background facts of this action.

- Learned senior counsel argued that the procedure of filling different suits though emanating from the same set of facts is allowed especially where the cause of action gives rise to multiple causes of action including a breach or threatened
- C** contravention of a fundamental right under the constitution and relied on **Sokoto LG vs. Amale (2007) 8 NWLR (Pt. 714) 224 at 240-241**. She maintained that the appellant established various breaches of his fundamental rights in the affidavit in support of the application pointing out that one of such breaches is borne out in
- D** paragraphs 40, 46, 47, 48 and 49 of his affidavit where he deposed that the respondents prohibited all members in various units of the church from associating with him and this included denying him right to worship in communion with these other members of the church and where other members
- E** would want to worship and associate with him, they were prohibited from doing so by the respondents under pain of punishment. Learned counsel said the respondents did not file a counter-affidavit to deny the averments. Despite the uncontradicted proof of the breach, the lower court still set aside the trial courts
- F** decision which had upheld the appellant's claims. In spite of the lower court's finding that there had been an infringement of the appellant's rights, the panel still went on to hold that the appellant cannot seek reliefs for such infringement under S. 46(1) of the constitution.

- G** Learned senior counsel submitted that the lower court erred grievously when it discountenanced all the proximate facts leading to the filling of the fundamental rights application.

- Learned senior counsel for the respondents submitted that the appellant's
- H** main or principal complaint was his dismissal as minister and suspension as member of the church. He argued that it is only when the main or principal complaint in an application is the enforcement or the securing of the enforcement of a fundamental right that the court would exercise jurisdiction to entertain the
- I** application under the Fundamental Rights (Enforcement Procedure) Rules. Learned senior counsel also contended that the complaints are against decisions of a non-judicial body and a breach of a fundamental right under Section 36(1) of the constitution (as amended) arises only when it is charged against a Court or
- J** Tribunal established by law; consequently there would be no case of infringement

A of the right to fair hearing if the decision is that of a non-judicial body.

I agree with the submissions made by the learned counsel for the respondents that the fundamental rights procedure rules enshrined in Section 46(1) of the constitution can be invoked when the main or principal complaint in

B an application is the enforcement or securing of the enforcement of a fundamental right is in issue then the court could exercise jurisdiction to entertain the application under the Fundamental Rights (Enforcement Procedure) Rules.

C Where the denial of fair hearing is not charged against a court or tribunal established by law but is against a domestic or standing ad hoc committee of a non-judicial body, the infringement of Section 36(1) of the Constitution cannot lie. See: **Borno Radio Television Corporation vs. Egbuonu (1991) 2 NWLR (Pt. 171)81**. Learned senior counsel for the appellant stated correctly that it is the

D reliefs sought rather than the facts in support that determine the jurisdiction of the court.

My learned brother, Kekere-Ekun (JSC) set out the declaratory reliefs totalling 12 in number and two injunctive reliefs as well as the N500,000.00 being

E claimed by the appellant as general damages. The application is predicated on Suit E/82/2014 dealing with the crisis that has rocked the Assemblies of God Church, Nigeria which led to the removal of the appellant as a minister of the church and his suspension as a member of the church. His main complaint

F therefore is concerned with his dismissal as a minister and suspension as a member of the church. What the appellant wants to enforce through the Fundamental Rights (Enforcement Procedure) Rules are accessory or secondary complaints. The main cause of action would be entertained through Writ of

G Summons and not through enforcement of fundamental rights (enforcement procedure) rules. See: **Tukur vs. Government of Taraba State (1997) 6 NWLR (Pt. 510) 549; Jack vs. University of Agriculture Makurdi (2004) 5 NWLR (Pt. 865) 208; University of Ilorin vs. Oluwadare (2006) 14 NWLR (Pt. 1000)**

H **751**. The lower court found that the primary or main complaint of the appellant was his dismissal by the General Committee of the church as minister of the church and his suspension as a member of the church when it held at page 778 of the records:

I

“In all cases the courts have treated the central issue in controversy, the casus belli or the act or event that directly led to the suit as the main complaint. In University of Ilorin & Anor vs. Oluwadare it was expulsion from school; in Tukur vs.

J

- A Government of Taraba State it was deposition as Emir of Muri; in WAEC vs. Akinwunrni (supra) it was cancellation of result; in Sea Truck (Nig.) Ltd vs. Anighoro, it was dismissal from employment, in our present case it is the respondents dismissal as minister and suspension as member of the church. In all these cases the complaints of violation of the applicant's right to fair hearing and other fundamental rights in the process of dismissal, termination, expulsion or deposition or cancellation of his result as the case may be, were held by the Supreme Court to be secondary or ancillary or accessory complaints”.**

- D** There would be no case of infringement of the right to fair hearing under Section 36(1) of the 1999 Constitution when the decision alleged to have violated one's constitutional right to fair hearing is that of a non-judicial body. See **Bakare vs. L.S.C.S.C. (1992) 8 NWLR (Pt. 266) 641; Ekunola vs. CBN (2013) 15 NWLR (Pt. 1377) 224 at 262.** The complaint of lack of fair hearing by the appellant was made against the General Committee of the Assemblies of God Church which investigated the complaints against the appellant, deliberated over the same and terminated his appointment as Superintendent of the Church and also suspended him from the membership of the Church. The General Committee is not a Tribunal set up by any law but the Constitution of the Church. Reliefs 2, 3, 4, 5, 6 and 7 could not be entertained under the Fundamental Rights (Enforcement Procedure) Rules on the grounds that the alleged breach of appellants right to fair hearing is charged against a non-judicial body. The court below found them to be secondary reliefs when it stated at page 678 of the records:

- H Reliefs 2,3,4,5,6 and 7 relate to the proceedings and decisions of 6/3/2014 and the actions taken pursuant to those decisions in that meeting whose competence, constitution and legality is the subject of the primary or main complaint and they seek to remedy violation of rights committed in the process of reaching the decision to dismiss the respondent and suspend him as member of the church. The reliefs seek declarations that the proceedings, decisions and actions of that body contravene rules of natural justice and the applicant's right under S.35, 38(1) and 40 of the 1999 Constitution. These are secondary reliefs.”**

J

A The lower court also found that reliefs 9, 10, 11 and 12 are clearly secondary, ancillary and additional reliefs and relief 15 is dependent on reliefs I to 9. Reliefs 13 and 14 are dependent on the outcome of Suit E/82/2014.

B It is for this and the more comprehensive reasons given by my learned brother Kekere-Ekun (JSC), which I totally endorse and adopt as mine that I arrived at the inevitable conclusion that the appeal is devoid of merit and I accordingly dismissed it. The application in Suit E/202/2014 is struck out for being incompetent. I also make no order on costs.

C **K. B, Akaahs**
Justice, Supreme Court

D CHIMA CENTUS NWEZE, (JSC): My Lords, although scholars have subjected this court's distinction between principal and accessory claims in human rights litigation to scathing strictures, see, for example, E.S. Nwauche, "The Dubious Distinction between Principal and Accessory Claims in Nigerian Human Rights' Jurisprudence," (2008) *Journal of African Law*, Vol 52, Issue 1, 66
E -88, the courts have continually espoused this distinction.

The cases that exemplify this consistent trend are legion: they are too many, indeed, that only one or two of them would be cited here, *Tukur vs. Government of Taraba State and Ors* (1997) LPELR – 3273 (SC) 51; *Egbuonu vs. B.R. T.C.* (1997) LPELR – 1040 (SC) 22; *Gafar vs. The Govt of Kwara State and Ors* (2007) LPELR – 8073 (SC) 22; *Thomas and Ors vs. Olufosoye* (1986) LPELR – 3237 (SC) 26 *et seq*; *Sea Trucks (Nig) Ltd vs. Anigboro* (2001) LPELR – 3025 (SC) 22; *WAEC vs. Adeyanju* (2008) LPELR – 3467 (SC) 24 – 25;
G *WAEC vs. Akinkunmi* (2008) LPELR – 3468 (SC) 22.

Scholars, undoubtedly, relishing their liberty under the well-cherished canon of academic freedom, have the right to interrogate any judicial pronouncement Interestingly, this court has responded, constructively, to such
H criticisms of its judgment in laws journals. For example, in *Abioye vs. Yakubu* (1991) 5 NWLR (Pt.) 130 this court acknowledged that: academic writers in various Law Journals have criticised the approach of the courts in the interpretations of Statutes.”

I For now, since the appellant in this appeal did not invite this court to depart or overrule its previous decisions on this point under Order 6 Rule 5 (4) of the Rules of this court, **Opebiyi vs. Oshoboja [1976] 9 and 10 SC 195; Oyeniran and Ors vs. Egbetola and Anor [1997] 5 NWLR (pt 504) 122** etc., I shall say no

J

A more on this.

Suffice it, therefore, to endorse the reasoning of the lower court on this point as did the leading judgment. I abide by the consequential order in the leading judgement.

B

Chima Centus Nweze
Justice, Supreme Court

EJEMBI EKO, (JSC): I read in draft, the judgment just delivered by my learned brother, K.M.O, KEKERE-EKUN, (JSC). I hereby adopt the summary of facts therein.

The Court of Appeal (hereinafter referred to as the court below”) had set aside the service of the originating processes on the respondents on the grounds that the service was not in accordance with the order of the trial High Court. In this appeal it forms the first issue for determination of the appeal. That is, whether the court below was right when it set aside the said service of the originating processes on the respondents on the ground that the service was not in accordance with the order for substituted service of the processes on the respondents made by the trial High court on 16th April, 2014.

The order for substituted Service of the originating processes on the respondents was explicit and unambiguous. It directed that:

F

The substantive application for the enforcement of [the Applicant's] fundamental rights and all other processes relating to the said application, on all the Respondents (shall be) by substituted means, to wit: by delivering same to the 1st Respondent, whose address for service is: Evangel House, Plot No. 6 Ozobulu Street Independence Layout, Enugu. [Emphasis supplied]

H

—
It would seem that the respondents to be served by substituted means are only the 2nd – 19th respondents, since the order did not depart from the norm, as regards the 1st respondent who must be served personally, anyway. One Mr. Emmanuel L. Ugwu, the Chief Bailiff of the trial High Court, undertook the service of the processes. On 17th April, 2014, he filed his affidavit of service wherein he averred

J

A “I, Emmanuel L. Ugwu, chief bailiff of High Court Enugu make oath and say that on the 16th day of April, 2014 at 4.20pm. O-

B clock I served upon 1st respondents ex-parte order, motion on notice, statement and address upon the complaint of Prof. Paul

C Emeka by delivering same personally to 1st respondent through Shedrack Lawrence at 5 Mbanano street Independence Layout. Before the day I served the motion on notice I did not know Shedrack Lawrence personally, but after he was pointed out to me by Richard Akwoh I asked him if he were (sic) Shedrack Lawrence and he said that he was. Sworn at High Court Enugu this 17th day of April, 2014”.

D The purport of affidavit of service sworn on oath is that the bailiff, the deponent,, who effected the service of the process on the party or parties as directed by court order or in his normal course of duty, as the deponent, binds himself to the truth of the facts deposed to therein. Oaths have reverence. Subscribing to oath is one of

E the methods of establishing the truth of a fact. See **ONYENAE vs. EBERE (2004) 13 NWLR (pt.889) 20; (2004) 18 NSCQR 789**. A man who makes his statement or declaration on oath undertakes that his statement or declaration on oath is true and he is bound by his words of declaration. See S.C. **CHUKWUMA vs. ANTHONYEZECHINWOYE & ORS. (2009) LPELR 4997 (CA)**.

F Totally embarrassed and shocked that the chief bailiff, Emmanuel L. Ugwu, had sworn to and filed an affidavit that he handed the originating processes to him on 16th April, 2014; the 1st respondent took out an application to set aside

G the purported service at the trial High Court. The application was accompanied by an affidavit wherein the 1st Respondent averred, *inter alia*

H “3. That I was shocked to hear that an affidavit of service was sworn to and filed in the court to the effect that the bailiff of the court handed any court process to me on the said 16/4/2014. No bailiff of the court handed the court process to me.

I 4. The said affidavit of the bailiff is an intentional falsehood.

5.

J 6. The applicant Prof. Paul Emeka has never had any difficulty in accessing me or other respondents in this suit

A **and I verily believe that this option for substituted service of the court processes in this suit is a play to by him to take us unawares so that we will not be prepared to defend ourselves against him”.**

B The 1st respondent, on the same day, had filed counter- affidavit to debunk the chief bailiff's assertions in his affidavit of service; and therein averred, *inter alia*

C **“3 That up to 7.00 p.m. on the 16/4/2014 I was not anywhere within Mbanono Street instead, I was, at Evangel House at R8 Ozubulu Street, independence Layout Enugu 'until after 8.00pm when I left for my residence.**

D **“4. That in the night of the said 16/4/2014 a neighbor who occupies the next two buildings to my residence came to inform me that he found a bundle of documents dumped in front of his gate with a stone placed on top of it and that when he examined the documents he noticed that my name was among others on the documents, hence he brought them to me”.**

F Be it noted, my lords, that the order for substituted service directed the Bailiff to serve “1st respondent, whose address for service is: Evangel House, Plot. R18 Ozobulu Street, Independence Layout Enugu”. The 1st respondent has averred that on the said 16th April, 2014 beyond minutes past 4.00pm. and until after 6.00p.m. he was still at Evangel House” at Plot R8,.Ozobulu Street Independence Layout, Enugu; and that up to 7.00p.m. he was nowhere within, Mbanono Street, where the Chief Bailiff went to and effected service of the process.

G With the indictment of the chief bailiff for “intentional falsehood”, albeit perjury he came up with another affidavit filed on 3rd June, 2014. In this new affidavit the chief bailiff had shifted his position. He averred therein that on 16th April, 2014 at about 3.05p.m. he was given the processes for service on the respondents; that the address of the 1st respondent, Evangel House at Plot R8 Ozubulu Street, Independence Layout was close to the High Court, and that he and Richard Akwah, the pointer, quickly got to that address and were told that the 1st respondent had driven to his residence and would not come to the office that day. The affidavit continues:

J

- A** **“7. That we immediately turned and drove to the 1st respondent's house at No. 5 Mbanono Street, Independence Layout where we met 3 security men wearing uniform of ALFA Security Nigeria Limited at the gate. I came out from the car and told them that I am a bailiff of the High Court and I want to serve court processes on (the 1st respondent).**
- B**
- C** **8. That one of them told me that “Oga” has just come back from work and he gave me visitor's book to write and sign. I signed and he asked me to wait. He took the visitor's book to (the 1st respondent) inside the house. So I waited at the gate with the other 2 Security men and the pointer who was inside the car.**
- D**
- 9. After about 5 minutes, the Security man did not come out. I got [the 1st respondent's] phone number 08100273333 from Mr. Richard Akwah and call (sic) him with my cell phone No. 08052422559.**
- E**
- 10. That he picked the phone, I told him I am chief bailiff from High Court Enugu and I have order with motion on notice to serve him.**
- F**
- 11. That he said OK and instructed me to give the process to his security, Mr. Shedrack Lawrence who gave the visitor's book to sign.**
- G**
- 12. That immediately after this, the same security man came out of the house, and I asked him if his name is Shadrack Lawrence. He confirm (sic) that his name is Shedrick Lawrence and his “Oga” said I should give him the court orders and court processes to bring inside the house for him.**
- H**
- 13. That I gave all the 19 copies of the court order and 19 copies of the court processes to Shedrack Lawrence. I asked him to sign my dispatch book and he declined. He said that Oga told him only to receive the documents, not to sign any paper”.**
- I**

J In this further affidavit, it was not the pointer Richard Akwah (apparently the agent of the appellant) who identified Shedrack Lawrence to the bailiff; but the

- A** 1st respondent himself. The finding of the court below that the two affidavits deposed to by the chief bailiff are contradictory has not been challenged nor appealed. The rule is: facts not disputed or challenged are taken as admitted and therefore need no further proof. And the law is trite that specific findings of fact
- B** by a court that are neither challenged nor appealed are taken as acceptable to the parties and, therefore conclusive and forever binding between the parties.

The court below found that the affidavit evidence of the 1st respondent materially contradicted the mutually contradictory evidence of the chief bailiff.

- C** Ordinarily, and in the normal circumstance, the trial court ought to have called for oral evidence to resolve the conflicts. As submitted by Chief Kanu Agabi, SAN, for the respondents; and I agree, the appellant also conceded that the trial court was in error when it failed to resolve the conflict in the affidavits before it. The
- D** court below took it from there and held, correctly in my view, that the trial court was wrong to have believed and relied on the bailiff's mutually conflicting affidavits without calling for further evidence.

- The law is settled that a witness who has two materially inconsistent pieces
- E** of evidence on oath by him on the same issue or point of fact does not deserve to be believed or given the honour of credibility. He also does not deserve to be described as truthful. See **AYANWALE vs. ATANDA (1988) 1 NWLR (Pt.68) 22; MONOPRIX (Nig) LTD. vs. OKONWA (1995) 3 NWLR (Pt.383) 325;**
- F BAYO AREMU vs. DANIEL GEORE CHUKWU (2011) LPELR 3862 (CA).** A person who speaks differently from two corners of his mouth on oath and on the same matter is a perjurer who does not deserve to be credited with any honour.

- The bailiff had gone out to deliberately insubordinate the explicit court
- G** order and thereafter went out to desecrate his office by filing blatantly false affidavits of service. The court, in the circumstance, cannot pick and choose which of the two affidavits to believe or disbelieve. See **BOY MUKA vs. THE STATE (1976) 10 SC 305 ALFRED ONYEMENA vs. THE STATE (1974)**
- H ALL NLR 523.** It would be perverse for the court to hold that the materially conflicting affidavits of service of the bailiff had proved or established that the bailiff did the service of the originating processes as demanded of him by law or the court order. Orders of court are meant to be obeyed or carried out, anyway.

- I** In my view the bailiff's resort to deliberate falsehood in his affidavits of service leads to one conclusion. That is, that he lied to cover up not only his insubordination to the clear order of the trial court, but also his dereliction of duty. I say this on authority of the old English case of **CLARKE vs. MOLYNEUX**
- J (1897) 3 QB. 237 at 247** where it was stated:

**A “If a man is proved to have stated that which he knew was false
no one needs to enquire further; Every body assumes from
thenceforth that he was malicious, that he did a wrong thing for
some wrong motive.”**

B

The ulterior motive of the bailiff and whoever took him to the purported residence of the 1st respondent to serve originating processes at the time the 1st respondent was at the address the court order directed them to for the service is this obvious:

C to pervert the course of justice by the wrong service and the false affidavit of service.

This cannot be good service .by the bailiff on whom the foundation of the imperativeness of service of court process, being condition precedent for fair

D hearing, is laid. *Audi alteram partem* and service of originating process are imperatives of the justice ministry as directed by Section 36(1) of the Constitution, as amended. Without them justice is nothing but a hoax. The bailiff and/or the parties in litigation must never be allowed to do this in desecration of

E the hallowed temple of justice.

The purported service of the originating process in this suit on the 1st respondent, as ordered by the trial court on 16th April, 2014, either by their dumping at a nearby house or delivery to one Shedrack Lawrence, has been

F seriously discredited. Accordingly, it cannot be the basis for the plea of presumption of regularity under Section 168(1) of the Evidence Act, 2011; the act or conduct of the bailiff having been shown to have been done: in a manner substantially irregular.

G Chief (Mrs) A.J. Offiah, SAN had submitted, on authority of **JIKANTORO vs. DANTORO (2004) ALL FWLR (pt.216) 390 at 414**, that the respondents had waived their right to complain about the wrong service of the originating processes on them by the fact of their presence at the trial court in

H obedience to the processes. The respondents appeared in protest and had taken formal steps for the service of the processes on them to be set aside. That was not the situation in **JIKANTORO vs. DANTORO (supra)** where the rules of waiver and estoppel by conduct were held to be applicable against the defendant who, in

I the face of defective service of process, still submitted to the jurisdiction of the trial court. **JIKANTORO vs. DANTORO (supra)** followed the principle in **EZOMO vs. OYAKHIRE (1985) 1 NWLR (Pt.2) 195** where at page 203 Aniagolu, (JSC), who read the lead judgment of this court had stated:

J

- A “By contesting the case to the full on the merit, without earlier taking preliminary objection before trial, the appellant must be deemed to have waived whatever right he had under**
- B** Section 99 of the Sheriff's and Civil Process Act, against improper inter state service of an originating process.
- Service of originating process is not an issue of mere technicality. It goes to the roots of adjudication. This Court in **SKENCONSULT (NIG.) LTD vs. UKEY (1981) 1 SC (Reprint) 4 and UCHENDU vs. OGBONI (1995) 5 NWLR (Pt. 603) 337** has held that improper service of originating process on the defendant denies the court of its competence to adjudicate in the matter, since the suit would not have been initiated in accordance with the due process of law.
- C** The Court has been consistent in maintaining that service of processes, particularly the originating process, is a pre condition to the exercise of the court's jurisdiction. Where there is no service at all or there is some procedural fault in service, the subsequent proceedings are a nullity *ab initio*. This is based on the basic principle of law that a party should know or be aware that there is a suit against him so that he can prepare his defence thereto. If after service he choses not to put up any defence, the law assumes that he has no defence. However, where a defendant is not aware of a pending litigation because he was not served, the non service renders the proceedings null and void. See **EIMSKIP LTD. vs. EXQUISITE IND. (NIG) LTD. (2008) 4 NWLR (pt.809) 88** citing with approval, **SKEN CONSULT (NIG.) LTD. vs. UKEY(supra)**.
- D** The court below was, in my view, right when it set aside the service of the, originating processes an the respondent by the bailiff, accompanied Richard Akwah (who apparently on agent of the appellant acted. as the pointer). This issue is accordingly resolved in favour of the respondent.
- Issue 2 is: whether the main complaint of the appellant hinged on the suspension or dismissal of the appellant as a minister in the church can be enforced, as a fundamental right, under the Fundamental Rights (Enforcement Procedure) Rule [FREPR]. In the determination of this issue, we are left without binding precedents. When, the main or principal relief or redress cannot be raised or enforced under the **FREPR**; it is immaterial that in the course of committing the cause of action for the main complaint some ancillary breaches of fundamental rights were committed. See **TUKUR vs. GOVT. OF TARABA STATE (1997) 6 NWLR (Pt.510) 549; UNIVERSITY OF ILORIN & ANOR. vs. OLUWADARE (2006) 6 – 7 SC. 154; JACK vs. UNIVERSITY OF**

- A AGRICULTURE, MAKURDI (2004) 1 SC (Pt.2) 100** all binding decisions of this Court, applied by the court below particularly at page 778 of the Records. A cursory look at reliefs 2,3,4,5,6 & 7 claimed by the appellant at the trial reveals that he claims therein ancillary reliefs, i.e. violation of his right to fair hearing
- B** guaranteed by Section 36(1) of the Constitution (as amended), in relation to his right to employment or appointment in the Church, a private organisation. The charge is not against a court or tribunal established by law, but against a committee of a Church, a domestic tribunal. It is only when there has been an
- C** alleged violation of the right to fair hearing guaranteed by Section 36(1) of the Constitution by a court or tribunal established by law that such right to fair hearing can be enforced under the **FRFPR**, See **EKUNOLA vs. CBN (2013) 15 NWLR (pt.1377) 234 at 262**. The court below found, correctly in my view, at
- D** page 678 of the Records that reliefs 2,3,4,5,6,& 7, claimed by the appellant at the trial, are clearly secondary reliefs.

- Reliefs 1,8,13, & 14 claimed by the appellant are the main reliefs in the suit. They seek to protect his office as the General Superintendent of the
- E** Assemblies of God, Nigeria, a private religious organisation. The applicant, coming under **FREPR** to enforce his right to this office, must show, in the first place, that his right to hold the office of General Superintendent of the Assemblies of God, Nigeria is a fundamental right. The right to this office, like the office of
- F** the Emir of Muri (**TUKUR v. GOVT. OF TARABA STATE (supra)**), is not a fundamental right. Issue 2 deserves to be, and is hereby, resolved against the appellant.

- The appellant in the suit at the trial court claims that he has been ostracised
- G** and that other members of the church have been prevented from associating with him. He therefore claims, under Section 40 of the Constitution, a violation of his rights to religion (under Section 38(1) of the Constitution), freedom of association (under Section 40 of the Constitution) and the right not to be
- H** discriminated against (under Section 42 of the Constitution). These rights, from the processes the appellant had filed, are all ancillary to his right to hold the office of the General Superintendent of the Assemblies of God, Nigeria. The right of the appellant to hold this office is not co-terminus with his right to practise any
- I** religion of his choice.

- The right under Section 40 of the Constitution, the right to assemble and freely associate with others, works both ways. The others you want to associate with must be prepared to associate with you. None can be imposed, by order of
- J** court, on the other. The right to freedom of association also connotes the right of

A the others to freely associate with or dissociate from whosoever.

Issue I and 2, resolved against the appellant, are enough to end this appeal. The court below was, in my firm view right in holding that the originating process was not served on the respondents in accordance with the due process of law, and

B that the appellant's claims cannot be enforced under the Fundamental Rights (Enforcement Procedure) Rules.

I hereby adopt the judgment of my Learned brother, K.M.O. KEKERE-EKUN, (JSC), and the final order therein striking out the suit **No E/202M/2014**

C for being incompetent.

Ejembi Eko,
Justice, Supreme Court.

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**SOPAKIRIBA IGBIKIS
AND
THE STATE**

SC. 316/2014

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

FRIDAY, 17TH FEBRUARY, 2017

BEFORE THEIR LORDSHIPS

**OLABODE RHODES-VIVOUR
MUSADATTIJO MUHAMMAD
CLARA BATA OGUNBIYI
CHIMA CENTUS NWEZE
AMIRU SANUSI**

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

APPEAL: Concurrent findings – When Supreme Court will interfere – Guiding principles.

COURT: Conviction of accused – Circumstantial evidence – Need for court to properly scrutinize circumstantial evidence before conviction.

COURT: Where no prima facie case is made out against the accused – Court may suo moto discharge the accused – Failure to do this amounts to a breach of the accused right to fair hearing.

COURT: Where concurrent findings of two lower courts are perverse – The Supreme Court will interfere.

COURT: Where court makes findings of facts based on inadmissible evidence – Findings are regarded as perverse.

CRIMINAL LAW AND PROCEDURE Alibi – Where no prima facie case was made out against the accused – Whether the issue of Alibi still relevant.

CRIMINAL LAW AND PROCEDURE: Proof – Guilt of accused – Ways of proving.

CRIMINAL LAW AND PROCEDURE: Burden of proof – Burden of proof placed on prosecution – How discharged.

CRIMINAL LAW AND PROCEDURE: Evidence of the only eye witness unreliable – Implication.

CRIMINAL LAW AND PROCEDURE: Proof – Onus of proof – Whether onus is on accused to prove his innocence.

CRIMINAL LAW AND PROCEDURE: Proof – Suspicion – Suspicion no matter how strong, cannot amount to proof.

CRIMINAL LAW AND PROCEDURE: Where in proving guilt of accused there are circumstances of doubt – How resolved.

CRIMINAL LAW: Murder – Ingredients of murder – Considerations thereof.

EVIDENCE: Circumstantial evidence – Nature of circumstantial evidence required to prove a criminal charge.

EVIDENCE: Proof – Circumstantial evidence – When sufficient to sustain conviction.

EVIDENCE: Circumstantial evidence – Criteria for its cogency.

EVIDENCE: Perverse evidence – What constitutes.

PRACTICE AND PROCEDURE: Where conviction of accused is based on inadmissible and not credible evidence – Implication.

WORKS AND PHRASES “Circumstantial evidence” – Meaning.

Issue for Determination

- (i) Was there any admissible evidence on record from which the court below could have justifiably affirmed the trial court's inference of conspiracy to commit murder by the appellant (Ground 5).

Facts of the Matter

Respondent's case remains that following an agreement arrived at a meeting in a hotel at Agudama Street, "D" line, Port Harcourt, the appellant and two others with whom he was tried as well as others at large, on the 12th January 2007, murdered Chief Dan Opusingi, Chief Okpara Brown, Chief Obaye Ojuka, Chief Telema Eferebo, Chief Anthony Opuari, Gbang Gbang Pere, Ibiemi Bobmanuel, Bode Faabere and Ezekiel Kumi. The deceased were travelling on a speed boat from Abonnema to Kula both within Akuku Toru Local Government Area in Rivers State. The agreement among the conspirators was reached on the 5th January 2007.

To prove its case, the respondent called six witnesses and tendered Exhibits A, B, B1, C and CI C17. Exhibit B is appellant's extra judicial statement wherein he asserts being in Lagos at the time of the murder of the chiefs and totally denies being part of the agreement to the murder of the deceased. Of the witnesses the prosecution called, PW5 was the only eye witness to the murder in respect of which the appellant and two others were tried. Two of whom stand convicted which conviction, was affirmed by the Court of Appeal. PW5 made three extra judicial statements. Exhibits C6 on 13th January 2007, Exhibit C4 on 22nd January 2007 and Exhibit C5 on 28th January 2011. PW5 neither mentioned appellant's name in Exhibit C6 nor Exhibit C4. He did so only four years later in Exhibit C5.

In addition to appellant's testimony as DW4, three witnesses testified on his behalf. He tendered and relied on Exhibit D1-D16.

At the end of trial, including addresses of counsel, the trial court held that the respondent had proved its case, convicted and sentenced the appellant and his co-conspirators as charged. Aggrieved, the appellant appealed to the Court of Appeal on nine grounds. The court dismissed the appeal and affirmed the trial court's decision.

Dissatisfied, the appellant has further appealed to the Supreme Court seeking the determination of his appeal on the basis of the four issues he distilled one of which being the most apposite and on the basis of which the appeal will be determined.

Held: *(unanimously allowing the appeal)*

1. *Where conviction is not based on credible admissible evidence.*
Appellant's contention in this appeal is that the lower court's affirmation of the trial court's judgment which does not arise from credible admissible evidence is perverse. I agree with learned appellant's counsel that on the authorities a court's decision which does not arise from the evidence on record constitutes such miscarriage of justice that imposes on

the appellate court the duty to set same aside. If indeed the lower court has failed to set aside the trial court's conviction and sentence of the appellant which does not arise from any credible evidence, then this Court is entitled to step in and do the needful. [*Rabiu vs. The State* (1980) 8-11 SC 85; *Atolagbe vs. Shorun* (1985) 1 NWLR (Pt 2) 360; (1985) LPELR-592 (SC) and *Williams vs. The State* (1992) 10 SCNJ 74]. (P 423 paras C–E)

2. *The burden placed on the prosecution in a criminal trial never shifts.*
The conviction and sentence of the appellant arises from a criminal trial. The onus of establishing his guilt beyond reasonable doubt lies on the respondent. The onus does not shift. If at the end of trial and on the whole evidence, the trial court is left in a state of doubt, the respondent would have failed to discharge the burden the law puts on it thereby entitling the appellant to an acquittal. [*Okputuobiode & Ors vs. The State* (1970) LPLER-2524 (SC) and *Ogundiyan vs. The State* (1991) 3 NWLR (Pt. 181) 519]. (P 423 paras E–G)

3. *The nature of circumstantial evidence*
It is evident from the foregoing findings of both courts that appellant's conviction and sentence proceeded on the basis of circumstantial evidence. Circumstantial evidence is very often the best evidence. It is evidence of a combination of circumstances against an accused person, none of which, on its own, provides the court with cogent proof of guilt but when viewed together create strong conclusion of his guilt with the highest degree of exactitude. [*Isong Akpan Udoebre & Ors vs. The State* (2001) 8 SCM 127, *Joseph Ilori & Anor vs. The State* (1980) 8-11 SC 52 and *Moses Jua vs. The State* (2010) 1-2 SC 96].
In a number of its decisions, this court has insisted that only such circumstances that make a complete and unbroken chain constituting sufficient proof that the accused person did commit the offence for which he is charge will sustain a conviction. [*Ofe Adesina (A.K.A. Alhaji) & anor vs. The State* (2012) 6 SC (Pt. III) 114]. (P 427 paras C–F)

4. *When is it appropriate to consider the issue of alibi*
Appellant's alibi comes into issue only when a prima facie case is made out against him by the respondent in respect of the offences he is charged.

There is, as shown in the passages of the trial court's judgment earlier reproduced herein, no evidence whatsoever outside the evidence of PW5 linking the appellant either with the conspiracy or the murder both courts convicted him for. The finding of the trial court that PW5's evidence is unreliable renders same unavailing. That finding has not been appealed against. It still persists. (Pp 427–428 paras I–B).

5. *Suspicion no matter how strong does not constitute proof*
The circumstances the two courts found cogent and unequivocal enough to warrant the inference of appellant's guilt are very remote basis for suspicion. No matter how pointing the suspicion is, it does not constitute proof of the appellant's guilt. Thus in the absence of any evidence linking the appellant with the two offences, the lower court's affirmation of his conviction, learned appellant counsel is right, is perverse. Notwithstanding that the two courts are concurrent in their findings as to appellant's guilt, their findings which are not borne by the evidence on record cannot endure. (P 428 paras B–D)

6. *When Supreme Court may disturb concurrent findings*
It has been said in a plethora of cases that this court would rarely disturb or upset concurrent findings of the two courts below except there are exceptional circumstances such as the findings are perverse, there is miscarriage of justice or violation of some principle of law or procedure. [Daniel Holding Ltd vs. UBA PLC (2005) 13 NWLR (Pt. 943) P. 533; Solola vs. State (2005) 11 NWLR (Pt. 937) p. 460]. (P 428 paras G–H)

7. *Evidence of the only eye witness made after 4 years of the incident is unreliable*
There can be no doubt that the memory of healthy people fade with time. A witness who could not remember the appellant as one of those who, according to him was involved in the murders very soon after the murders but remembers that the appellant committed the murders four years after the murders is clearly unreliable. Indeed the learned trial Judge did find that PW5 evidence was unreliable. In view of the fact that PW5, the only eyewitness evidence is unreliable and there is no other evidence linking the appellant with the conspiracy and Murders, the appellant is entitled to an acquittal. (P 429 paras D–F)

8. *Prosecution must establish the ingredients of murder*
In a charge of murder for instance, the prosecution is saddled with the burden of establishing the following ingredients, which must co-exist:
- a) **that the deceased died**
 - b) **that the death of the deceased was caused by the accused**
 - c) **that the accused person intended to either kill the victim or cause him grievous bodily harm.**

Njokwu vs. The State (2013) 2 SCM page 177 at 180.

9. *Mode of proving guilt of the accused*
It is also a settled principle of law that the guilt of an accused person may be proved by any or all of the following ways:
- a. **confessional statement of the accused;**
 - b. **circumstantial evidence and**
 - c. **evidence of an eye witness.**

In the case at hand, the prosecution relied heavily on their witness PW5. For the witness's evidence to support and sustain the conviction of the appellant, it must be credible, reliable and points irresistibly to no one else but the accused/appellant. In the event of any doubt being entertained in the trial of an accused person, the doubt is resolved always in favour of the accused. This is obvious in view of our constitutional provision which cherishes and guarantees the presumption of innocence until proved guilty. (P 430 paras B–H).

10. *Where witness did not mention accused in his statement*
It is obvious from the record of appeal that PW5 was the only eye witness to the commission of the offences. The said witness's statement was admitted as Exhibit C4. Therein the statement, the names of accused persons in particular 2nd, 3rd and some others at large were mentioned among those who attacked their (PW5's) boat on the fateful day, there was no mention of the 1st accused/appellant in Exhibit 'C'4, except however in the PW5's evidence in court at the trial. The learned trial court in its wisdom did not waste time in refusing to rely on PW5's evidence which tended to implicate the 1st accused/appellant.

It is also imperative and revealing to state further that with the level of familiarity claimed by PW5 of the appellant, his name would not

**have been left out easily by PW5 if he was truly one of attackers.
(Pp 430–431 paras H—A).**

11. *Findings of trial court are perverse*

It is intriguing, that despite the findings and conclusions arrived at by the trial judge in exonerating the 1st accused/appellant from counts 2 -9 of the charge, His lordship however held a contrary view in respect of the 1st count, in other words, the trial court did hold that the appellant was privy to the plan and conspiracy to kill Chief Opusingi and was therefore adjudged culpable. (P 431 paras A–B).

12. *Conviction of appellant was based on suspicion*

For all intents and purposes, from the community reading of the evidence given by PW5 and relying also on his extra judicial statement to the police, admitted as Exhibit C4, the circumstantial evidence concept applied by the learned trial judge to convict the appellant and which was also endorsed by the justices of the lower court, was without any legal basis.

In my view, the conviction at best, was bordered on mere suspicion, which no matter how strong, cannot constitute a crime or ground a conviction. *See the case of Alake vs. State (1992) 9 NWLR (Pt. 265) 260 at 272. (P 431 paras G–I)*

13. *Where no prima facie case is made out against the accused*

As rightly submitted by the appellant's counsel, at the close of the prosecution's case on the totality of the witness PW5 and his statement Exhibit C4, a *prima facie* case was not made out against the appellant to warrant his being called upon to defend. At that point in time, it was incumbent on the court, *suo motu*, even without the appellant's application, to have invoked SS 286 and 287 (1) of the Criminal Procedure Law, Cap 38, Laws of Rivers State, 1999 to have discharged the appellant.

The failure of the trial court in taking that step in the instant case had occasioned a violation of the appellant's fundamental right as guaranteed him by Section 36(5) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). [*Okoro v. State (1988) 3 NSCC (Pt. II) Vol. P. 275 at 295 6*].

The general burden was on the prosecution to prove the accused's guilt. The onus never shifts. [Section 135 (1) and (2) of the Evidence Act, 2011].

The failure of the trial court to discharge the appellant was tantamount to placing upon him the onus of establishing his innocence. This the trial judge projected when at page 375 of the record he said:

..... the 1st accused failed to establish where he was at the material time of the commission of the offence”

This court has held times without number that a conviction must be founded on evidence establishing the guilt of the accused beyond reasonable doubt. I.T. Muhammed, JSC in the case of *The People of Lagos State vs. Umaru* (2014) 7 NWLR (Pt. 1407) 584 at 606. *Arabambi vs. Advance Beverages Ind. Ltd.* (2005) 19 NWLR (Pt. 959) 1 at 28. (Pp 432 – 433 paras H – F)

14. *Where findings are based on inadmissible evidence*

The law is again firmly established that findings of fact must be based on admissible evidence (oral or documentary). Where it is however otherwise and based on inadmissible evidence, the finding will be held as perverse and the law enjoins an appellate court to interfere and set it aside.

***Olayinka vs. State* (2007) 9 NWLR (Pt. 1040) 561 at 578, where it was held that a decision is perverse where:**

- i) **it is speculative and not based on any evidence; or**
- ii) **the court took into account matters which it ought not to have taken into account; or**
- iii) **the court has ignored the obvious.**

***Uwah vs. Akpabio* (2014) 7 NWLR (Pt. 1407) 472 at 488. (P 433 paras F – I)**

15. *Meaning of circumstantial evidence*

The category of evidence known as circumstantial evidence, which is, more often than not, the best evidence, *Obosi vs. State* (1965) NMLR 119; *Ukorah vs. State* (1977) 4 SC 167; *Lori vs. State* (1980) NSCC 269; *Onah vs.*

State (1985) 3 NWLR (pt 12) 236; *Ebenehi vs. State* (2009) All FWLR (Pt 486) 1825, 1832-1833; *Ijioffor vs. State* (2001) 9 NWLR (pt 718) 371, 385, is the evidence of surrounding circumstances which, by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics, *Ijioffor vs. State* (supra) 385.

In their aggregate content, such circumstances lead cogently, strongly and unequivocally to the conclusion that the act, conduct or omission of the accused person caused the death of the deceased person, *Idiok vs. State* [2008] All FWLR (pt 421) 797, 818.

Put, simply, it means that there are circumstances which are accepted so as to make a complete and unbroken chain of evidence, [*Omotola and Ors vs. State* [2009] 7 NWLR (pt 1139) 148, 178; (2009) LPELR – 2663 (SC) 42-43].

Where such circumstances are established to the satisfaction of the court, they may be properly acted upon, [*Wills on Circumstantial Evidence* [Seventh edition] 324; A. Okekeifere, *Circumstantial Evidence in Nigerian Law* (Port Harcourt: Law-house Books, 2000) 1; *Omotola vs. State* (supra) 178]. (*Pp* 434–435 *paras G–B*).

16. *Nature of circumstantial evidence required to sustain conviction*

Where there is no eye witness account or direct evidence of the commission of an offence, a conviction may be based on circumstantial evidence, [*Igbale vs. State* [2004] 15 NWLR (pt 896) 314].

However, such circumstantial evidence must point to only one conclusion, namely, that the offence had been committed and that it was the accused person who committed it, [*Dick vs. C.O.P.* [2009] 9 NWLR (pt 1147) 530, 551].

For the purpose of drawing an inference of an accused person's guilt from circumstantial evidence, there must not be other co-existing circumstances which would weaken or destroy that inference, [*Igho vs. State* [1978] 3 SC 87; *State vs. Edobor* [1975] 9-11 SC 69].

Thus, all other factors and surrounding circumstances must be, carefully, considered for they may be enough to adversely affect the inference of guilt, [*Lori vs. State* [1980] 8-11 SC. 81; *Udedibia vs. State* [1976] 11 SC 133; *Aigbadion vs. State* [2000] 7 NWLR (pt 666) 686].

The explanation for this need for circumspection is simple: evidence that falls within this category may be fabricated to cast aspersion on other people, per Lord Normand in *R vs. Tepper* (1952) 480,

489 approvingly adopted in *State vs. Edobor* [1975] 9-11 Sc 69, 77. That is why a court must, properly, appraise the circumstantial evidence adduced by the prosecution before convicting an accused person thereon, [*Adepelu vs. State* [1998] 9 NWLR (pt 565) 185; *Iko vs. State* [2001] FWLR (pt 68)) 1161; [2001] 14 NWLR (pt 732) 221; *Orji vs. State* [2008] All FWLR (pt 422) 1093, 1107].

It must be noted, however, that there is no yardstick by which any circumstantial evidence can be measured before a conviction can be entered against an accused person. Thus, each case depends on its own facts. However, one test which such evidence must satisfy is that it should lead to the guilt of the accused person and leave no degree to possibility or chance that other persons could have been responsible for the commission of the offence, [*Ijiofor vs. State* (supra) 385; *Ebenehi vs. State* (supra) 1832]. (*P 435 paras C–J*)

Nigerian cases cited in this judgment:

Adepelu vs. State [1998] 9 NWLR (pt 565) 185;
Aigbadion vs. State [2000] 7 NWLR (pt 666) 686.
Alake vs. State (1992) 9 NWLR (Pt. 265) 260.
Arabambi vs. Advance Beverages Ltd. (2005) 19 NWLR (Pt. 959) 1.
Atolagbe vs. Shorum (1985) 1 NWLR (Pt 2) 360; (1985) LPELR-592 (SC)
Daniel Holding Ltd vs. UBA PLC (2005) 13 NWLR (Pt. 943) P. 533
Dick vs. C.O.P. [2009] 9 NWLR (pt 1147) 530;.
Ebenehi vs. State (2009) All FWLR (Pt 486) 1825;
Idiok vs. State [2008] All FWLR (pt 421) 797;.
Igbale vs. State [2004] 15 NWLR (pt 896) 314
Igho vs. State [1978] 3 SC 87;
Ijiofor vs. State (2001) 9 NWLR (pt 718) 371;
Iko vs. State [2001] FWLR (pt 68)) 1161; [2001] 14 NWLR (pt 732) 221;
Isong Akpan Udoebre & Ors vs. The State (2001) 8 SCM 127,
Joseph Ilori & Anor vs. The State (1980) 8-11 SC 52
Lori vs. State (1980) NSCC 269;
Moses Jua vs. The State (2010) 1-2 SC 96.
Njokwu vs. The State (2013) 2 SCM page 177.
Obosi vs. State (1965) NMLR 119;
Ofe Adesina (A.K.A. Alhaji) & Anor vs. The State (2012) 6 SC (Pt. III) 114.
Ogundiyan vs. The State (1991) 3 NWLR (Pt. 181) 519.

- A** *Okoro vs. State* (1988) 3 NSCC (Pt. II) Vola P. 275.
Okputuobiode & Ors vs. The State (1970) LPLER-2524 (SC)
Olayinka vs. State (2007) 9 NWLR (Pt. 1040) 561.
Omotola and Ors vs. State [2009] 7 NWLR (pt 1139) 148; (2009) LPELR –
- B** 2663 (SC) 42-43.
Onah vs. State (1985) 3 NWLR (pt 12) 236;
Orji vs. State [2008] All FWLR (pt 422) 1093;.
Rabiu vs. The State (1980) 8-11 SC 85;
- C** *Solola vs. State* (2005) 11 NWLR (Pt. 937) p. 460.
State vs. Edobor [1975] 9-11 Sc 69, 77.
State vs. Edobor [1975] 9-11 Sc 69.
The People of Lagos State vs. Umaru (2014) 7 NWLR (Pt. 1407) 584.
- D** *Udedibia vs. State* [1976] 11 SC 133;
Ukorah vs. State (1977) 4 SC 167;
Umah vs. Akpabio (2014) 7 NWLR (Pt. 1407) 472 .
Williams vs. The State (1992) 10 SCNJ 74.

E

Foreign cases cited

R vs. Tepper (1952) 480, 489

F Nigerian statute cited:

Criminal Procedure Law, Laws of River State, 1999 – Ss 286 and 287

Constitution of Federal Republic of Nigeria 1999 (as amended) – S. 36(5)

G Representation

Wilcox Abereton with him, Emmanuel S. Njoka for the appellant.

O.T.K.D. Amachree for the respondent.

- H MUHAMMAD, (JSC) (Delivering the Lead Judgment):** This is an appeal against the judgment of the Court of Appeal sitting at Port Harcourt, hereinafter referred to as the lower court, delivered on 21st March 2014, affirming appellant's conviction and sentence for the offences of conspiracy and murder by the Rivers State High Court, the trial court, in the latter's judgment dated 6th June 2013. The brief and undisputed facts that brought about the appeal are hereinunder recounted.

- I** Respondent's case remains that following an agreement arrived at a meeting in a hotel at Agudama Street, “D” line, Port Harcourt, the appellant and
- J**

- A** two others with whom he was tried as well as others at large, on the 12th January 2007, murdered Chief Dan Opusingi, Chief Okpara Brown, Chief Obaye Ojuka, Chief Telema Eferebo, Chief Anthony Opuari, Gbang Gbang Pere, Ibiemi Bobmanuel, Bode Faabere and Ezekiel Kumi. The deceased were travelling on a
- B** speed boat from Abonnema to Kula both within Akuku Toru Local Government Area in Rivers State. The agreement among the conspirators was reached on the 5th January 2007.

- To prove its case, the respondent called six witnesses and tendered
- C** Exhibits A, B, B1, C and C17. Exhibit B is appellant's extra judicial statement wherein he asserts being in Lagos at the time of the murder of the chiefs and totally denies being part of the agreement to and the murder of the deceased. Of the witnesses the prosecution called, PW5 was the only eye witness to the murder
- D** in respect of which the appellant and two others were tried, two of whom stand convicted, which conviction is affirmed by the lower court. PW5 made three extra judicial statements. Exhibits C6 on 13th January 2007, Exhibit C4 on 22nd January 2007 and Exhibit C5 on 28th January 2011. PW5 neither mentioned
- E** appellant's name in Exhibit C6 nor Exhibit C4. He did so only four years later in Exhibit C5.

In addition to appellant's testimony as DW4, three witnesses testified on his behalf. He tendered and relied on Exhibit D1-D16.

- F** At the end of trial, including addresses of counsel, the court held that the respondent had proved its case, convicted and sentenced the appellant and his co-conspirators as charged. Aggrieved, the appellant appealed to the lower on nine grounds. The court dismissed the appeal and affirmed the trial court's decision.
- G** Dissatisfied, the appellant has further appealed to this court seeking the determination of his appeal on the basis of the four issues he distilled one of which being the most apposite and on the basis of which the appeal will be determined reads:
- H** (ii) Was there any admissible evidence on record from which the court below could have justifiably affirmed the trial court's inference of conspiracy to commit murder by the appellant (Ground 5).

- I** In arguing the appeal, Wilcox Abereton, learned counsel for the appellant, submits that the answer raised by the issue is in the negative. Of all the six witnesses the respondent called to prove its case against the appellant, it is contended, Ibitoroko Dan, PW5, is the only eye witness to the events which
- J** constitute counts 2 to 9 in the charge. The testimony of the four police officers,

A being hearsay, remains worthless. The findings of the trial court, which decision the lower court affirmed, at pages 181, 182, 202 and 261, learned counsel submits, bear out appellant's contention. At pages 366-367 and 370 in particular, learned counsel further submits, the trial court having found the entire evidence **B** of PW5 unreliable, rejected same.

Exhibit B, appellant's extra judicial statement, learned counsel further argues, is a total denial of appellant's participation either in the conspiracy that led to or the actual murder of the deceased by the appellant and his co-conspirators. **C** At page 376 of the record of appeal, learned counsel submits, is the trial court's finding that at the end of the prosecution's case no direct evidence avails to warrant appellant's conviction and sentence. The trial court, by the combined operation of **Section 286 and 287(1) of the Criminal Procedure Law, Cap 38, D Laws of Rivers State 1999** and Section 36(5) of the **1999 Constitution** as amended should have discharged and acquitted the appellant. Appellant's conviction in breach of these two provisions having occasioned miscarriage of justice, on the authorities, learned counsel concludes, warrants this court's **E** interference. It is urged that the appeal accordingly be allowed.

Responding, learned counsel contends that there is sufficient lawful evidence to sustain appellant's conviction by the two courts below. Appellant's opinion of the late Chief Dan Opusingi as contained in Exhibit B, appellant's extra **F** judicial statement, it is further submitted, clearly gives out the appellant. The appellant feared the late Chief and would be re-assured with nothing short of eliminating the chief. He did not take kindly to his being forced on exile by the late chief. Appellant re-emerged from exile, it is argued, only to exterminate the **G** person he so hated along with others he considered a threat. The lower court's affirmation of the trial court's inference of appellant's participation in the murder of the chiefs, learned counsel contends, is justified in law. The trial court's findings at pages 375 376 and the lower court's concurrent at pages 473-479, it is **H** argued, cannot be faulted.

Insistent, learned counsel submits that outside the evidence of PW5 the trial court rejected, the two courts relied not only on Exhibit B, appellant's extra judicial statement, but further on Exhibit B1, C and CI the confessional **I** statements of his co-accused, along with the evidence of PW1. These pieces of evidence, it is submitted, clearly show the appellant to be in concert with his co-accused persons in the murder of their victims on 12-1-2007. The law, it is submitted, places a burden on the appellant to rebut such evidence led which **J** conclusively points at him as being one of the perpetrators of the offences. None

- A** of the cases cited and relied upon by learned appellant counsel, it is further contended, absolves the appellant from that duty. His failure to provide the evidence in rebuttal justifies both court's reliance on the unchallenged evidence to convict him. The defence of alibi appellant sought to raise in Exhibit B was
- B** rightly rejected by the two courts below. Having failed to show that the concurrent decisions of the two courts are perverse, learned counsel concludes, the appeal must accordingly fail. He relies on *Ibodo vs Enarofia* (1980) 5-7 SC 42 and *Adeleke vs. The State* (2014) ALL FWLR (Pt. 722) 1652 at 1668. On
- C** the whole, learned counsel urges that the unmeritorious appeal be dismissed.

Appellant's contention in this appeal is that the lower court's affirmation of the trial court's judgment which does not arise from credible admissible evidence is perverse. I agree with learned appellant counsel that on the authorities a court's

- D** decision which does not arise from the evidence on record constitutes such miscarriage of justice that imposes on the appellant court the duty to set same aside. If indeed the lower court has failed to set aside the trial court's conviction and sentence of the appellant which does not arise from any credible evidence,
- E** then this Court is entitled to step in and do the needful. See *Rabiu vs. The State* (1980) 8-11 SC 85; *Atolagbe vs. Shorum* (1985) 1 NWLR (Pt 2) 360; (1985) LPELR-592 (SC) and *Williams vs. The State* (1992) 10 SCNJ 74.

The conviction and sentence of the appellant arises from a criminal trial.

- F** The onus of establishing his guilt beyond reasonable doubt lies on the respondent. The onus does not shift. If at the end of trial and on the whole evidence, the trial court is left in a state of doubt, the respondent would have failed to discharge the burden the law puts on it thereby entitling the appellant to an acquittal. See
- G** *Okputuobiode & Ors vs. The State* (1970) LPLER-2524 (SC) and *Ogundiyan vs. The State* (1991) 3 NWLR (Pt. 181) 519. What then are the crucial findings of the trial court in relation to the evidence led by the respondent that the lower court affirmed?

- H** In the determination of appellant's guilt under count one of the information, conspiracy, the trial judge at page 354 of the record commendably started by reasoning thus:

- I** “I find that by Exhibit BI the 2nd accused person have admitted the role he played in the commission of the offence i.e. count 1 of the information and also incriminated the 1st and 3rd accused persons but Exhibit BI cannot be used against the 1st and 3rd
- J** accused persons without more. This is because a voluntary

A confession is deemed admissible and relevant against the maker and not against another person” (Underlining supplied for emphasis).

B The court proceeded through page 355 of the record as follows:

C “Leaving the 2nd accused person aside, I go to the 1st and 3rd accused persons. From the evidence adduced in this case, I find that while the 3rd accused person was the chairman of Kula Youth Organization, the 1st accused was the organizing secretary. I also find as a fact that the 1st and 3rd accused persons were driven out of Kula Community and the 1st accused is one of those the 3rd accused referred to as his boys that were driven out of Kula Community as a result of the disagreement between the 3rd accused as the Chairman of Kula Youth Organization and the Kula Council of Chiefs headed by Chief Dan Opusingi. The 1st and 3rd accused persons, therefore had issues to settle with the Kula Council of Chiefs.

F Even though, the 2nd accused person in Exhibit 'B1' and his evidence in court denied that the 1st accused was present at the meeting of 5th January, 2007, the conduct of the 1st accused after 12th January, 2007 as revealed in his evidence in Exhibit 'B' and his evidence in court portray him as someone who was not only privy to the meeting but was aware of the plan to carry out the dastardly act of murder on 12th of January, 2007. The 3rd accused in Exhibit 'C' and 'C1' demonstrated being the Leader of the boys who carried out the dastardly act on 12th January, 2007. I do not believe the evidence of the 1st and 3rd accused persons denying count 1 of the information”. Underlining supplies for emphasis).

I And concluded at page 357 of the record thus:

J “I must say that although proof of the offence of conspiracy is generally a matter of inference to be deduced from the criminal

A acts and omissions of the conspirators, in the instant case, from
the totality of the evidence adduced, there exists not only
evidence from which this court can infer the offence of
conspiracy but also evidence in positive proof of same. For
B example, Exhibits 'B', 'C', 'C1' and 'C2' as well as the conduct
of the 1st accused in wanting to run to the 3rd accused camp near
Idama in Abonnema and also 3rd accused person avoiding police
arrest from January, 2007 until January, 2011.....

C Consequently, I hold that prosecution has proved count 1 of the
information against each of the accused persons.” (Underlining
supplied for emphasis).

D On counts 2- 9 of the information, the trial court at page 366 of the record found in
relation to the evidence of PW5, the only eye witness to the commission of the
offences, as follows:

E “In Exhibit 'C4', while PW5 mentioned the names of 2nd and 3rd
accused persons and some others at large, he did not mention
the name of the 1st accused person as one of those who attacked
F their boat on the 12th January 2007 but in his evidence in court
he mentioned his name..... the fact this is a criminal
trial where the prosecution is to prove the case against each of
the accused persons beyond reasonable doubt makes the
G submission of the learned counsel for the 1st accused person that
since PW5 did not mentioned the name of the 1st accused in
Exhibit 'C4' but mentioned it in his evidence in court, this court
cannot rely on PW5's evidence implicating the 1st accused
H person is potent (sic) and I agree with him. This is more so when
the said submission is view against the evidence of PW5 under
cross-examination that he knows the 1st accused person very
well and any where he sees him, he would know
I him.....By the authorities of Abudu vs. State (supra)
and Bassey & Ors. vs. The State (2003) FWLR (Pt 164) 292 at
310-311, the evidence of PW5 an eye witness, implicating the 1st
accused person is rendered unreliable and this Court cannot act

J

A on it against the 1st accused.” (Underlining supplied for emphasis).

Notwithstanding the foregoing, the trial court held in relation to the 2nd to 10th
B counts at pages 376 377 as follows:

C “Even if there is no positive evidence from any of the prosecution witnesses since PW5 evidence implicating the 1st accused was rejected establishing that the 1st accused was seen on the 12th day of January, 2007 committing the crime for which he was charged to court, but from my findings while considering count 1 of the information on the alibi pleaded by
D the 1st accused, I cannot but hold that the 1st accused was privy to the plan to kill Chief Opusingi and therefore by the provision of Section 8 of the Criminal Code Law (supra) he cannot escape the consequences of what happened on 12th January, 2007,
E I, hold that the prosecution has proved that the accused persons committed this heinous crime of murder beyond reasonable doubt.

F In the final analysis, I find each of the accused persons guilty in count 1 and in counts 2 to 9 of the information.” (Underlining supplied for emphasis).

G In affirming the trial court's foregoing findings the lower court at page 478 – 479 of the record concluded as follows:

H “The trial court by circumstantial evidence found that the appellant was among those who caused the death of the deceased They i.e. the Appellant and the two other convicts all nursed a common purpose i.e. to eliminate Chief Dan Opusingi their common foe tormentor and oppressor
I according to them. The learned trial court found that the weapon of choice i.e. firing guns at the deceased human beings was an act the probable consequence of which is death. This is in cognizance with the decision in Akpan V. State (1994) 9

J

A N.W.L.R. Part 368 pages 347 at 362 paragraph D.

B The findings of the learned trial judge on the circumstantial evidence are cogent and point irresistibly to the fact that the appellant was privy to the plan to kill Chief Dan Opusingi. The findings are not perverse and this court has no cause to reverse it.” (Underlining supplied for emphasis).

C It is evident from the foregoing findings of both courts that appellant's conviction and sentence proceeded on the basis of circumstantial evidence. Circumstantial evidence is very often the best evidence. It is evidence of a combination of circumstances against an accused person, none of which, on its own, provides the court with cogent proof of guilt but when viewed together create strong conclusion of his guilt with the highest degree of exactitude. See *Isong Akpan Udoebre & Ors vs. The State (2001) 8 SCM 127*, *Joseph Ilori & Anor vs. The State (1980) 8-11 SC 52* and *Moses Jua vs. The State (2010) 1-2 SC 96*. In a number of its decisions, this court has insisted that only such circumstances that make a complete and unbroken chain constituting sufficient proof that the accused person did commit the offence for which he is charge will sustain a conviction. See *Ofe Adesina (A.K.A. Alhaji) & Anor vs. The State (2012) 6 SC (Pt. III) 114*.

F In the case at hand, the two courts relied on appellant's animosity with, nay hatred for, the late chief Opusingi whom, from Exhibit B1, C1 and C2, the extra judicial statement of the 2nd and 3rd accused persons respectively, is shown to be the leader of the rival union that sent the appellant on exile. On return from exile and given this circumstance, the trial court held, the appellant would settle for nothing short of the murder of the deceased chief and his associates. This conclusion is arrived at inspite of the aspect of Exhibit B1 which absolves the appellant from being privy to the agreement arrived at on 5th December 2007 in a hotel at Aguduna Street 'D' line Port Harcourt by the conspirators which agreement led to the murder of the chiefs. Appellants alibi in Exhibit B the trial court adjudged untenable and his demeanor in the course of testifying provide the court the further irresistible circumstance of inferring that the appellant was a party to the conspiracy and eventual murder of the deceased.

I These circumstances cannot form the basis of the inference the trial court made as to appellant's guilt. Appellant's alibi comes into issue only when a prima facie case is made out against him by the respondent in respect of the offences he

A is charged. There is, as shown in the passages of the trial court's judgment earlier reproduced herein, no evidence whatsoever outside the evidence of PW5 linking the appellant either with the conspiracy or the murder both courts convicted him for. The finding of the trial court that PW5's evidence is unreliable renders same **B** unavailing. That finding has not been appealed against. It still persists.

At best, therefore, the circumstances the two courts found cogent and unequivocal enough to warrant the inference of appellant's guilt are very remote basis for suspicion. No matter how pointing the suspicion is, it does not **C** constitute proof of the appellant's guilt. Thus in the absence of any evidence linking the appellant with the two offences, the lower court's affirmation of his conviction, learned appellant counsel is right, is perverse. Notwithstanding that the two courts are concurrent in their findings as to appellant's guilt, their **D** findings which are not borne by the evidence on record cannot endure. Not being maintainable, the findings are hereby set aside. The appeal succeeds. The appellant is discharged and acquitted.

Musa Dattijo Muhammad,
Justice, Supreme Court

E

Representations

Wilcox Abereton with him, Emmanuel S. Njoku for the appellant

F O.T.K.A. Amachree for the respondent

RHODES-VIVOUR, (JSC): I read in draft a copy of the leading judgment prepared by my learned brother, M.D. Muhammad, (JSC), and I agree with his **G** lordship that the appellant should be acquitted on the counts and discharged from court.

It has been said in a plethora of cases that this court would rarely disturb or upset concurrent findings of the two courts below except there are exceptional **H** circumstances such as the findings are perverse, there is miscarriage of justice or violation of some principle of law or procedure. See *Daniel Holding Ltd vs. UBA PLC (2005) 13 NWLR (Pt. 943) P. 533; Solola vs. State (2005) 11 NWLR (Pt. 937) p. 460.*

I This, without doubt is one of the rare cases in which this court would quickly set aside concurrent findings of fact which have been found to be perverse.

The evidence against the appellant is circumstantial. PW5 is the only **J** eyewitness. He made three extra judicial statements to the Police investigating

A these multiple murders. His statements were made on 13/1/2007. Exhibit C6.

On 22/1/2007 – Exhibit C4.

On 28/1/2011 – Exhibit C5.

B

On page 222 of the record of appeal PW5 said:

C **“I know the 1st accused person very well. Anywhere I see the 1st accused I will know him.....”**

The 1st accused person is the appellant. PW5 made exhibit C4 on 22/1/2007, that is within two weeks after the murders were committed when the events should be
D fresh in his memory, yet he claimed to know the appellant very well but failed to say in his statement that the appellant was one of the murderers, but four years later when he wrote his third statement on 28/1/2011, exhibit C5, he mentioned the name of the appellant as one of those who murdered the chiefs'. There can be
E no doubt that the memory of healthy people fade with time. A witness who could not remember the appellant as one of those who, according to him was involved in the murders very soon after the murders but remembers that the appellant committed the murders four years after the murder is clearly unreliable. Indeed
F the learned trial judge did find that PW5 evidence was unreliable. In view of the fact that PW5, the only eyewitness evidence is unreliable and there is no other evidence linking the appellant with the conspiracy and murders, the appellant is entitled to an acquittal.

G It is for these reasons and those given in the leading judgment that I too, allow this appeal. The appellant is acquitted and discharged.

Olabode Rhodes-vivour
Justice Supreme Court

H

OGUNBIYI, (JSC): I have had the privilege of reading in draft the lead judgment of my learned brother Hon. Justice Dattijo Muhammad, JSC. I agree that the appeal has merit and should be allowed.

I For purpose of making my brief contribution to the judgment, which is very well written, I would seek to reproduce the issue which is at the centre of this appeal as follows:

J

- A** “Was there any admissible evidence on record from which the court below could have justifiably affirmed the trial court's inference of conspiracy to commit murder by the appellant.”
- B** The law is trite and well settled that in a criminal trial, the prosecution has a duty to prove its case against an accused person beyond reasonable doubt. **See the case of Abirifon v. State (2013) 9 SCM page 1 at 5.**
- Specifically and in a charge of murder for instance, the prosecution is
- C** saddled with the burden of establishing the following ingredients, which must co-exist:
- a) that the deceased died
 - b) that the death of the deceased was caused by the accused
- D** c) that the accused person intended to either kill the victim or cause him grievous bodily harm.
- See case of Njoku v. The State (2013) 2 SCM page 177 at 180.**
- E** It is also a settled principle of law that the guilt of an accused person may be proved by any or all of the following ways:
- a) confessional statement of the accused;
 - b) circumstantial evidence and
- F** C) evidence of an eye witness.
- In the case at hand, the prosecution relied heavily on their witness PW5. For the witness's evidence to support and sustain the conviction of the appellant, it must
- G** be credible, reliable and points irresistibly to no one else but the accused/appellant. In the event of any doubt being entertained in the trial of an accused person, the doubt is resolved always in favour of the accused. This is obvious in view of our constitutional provision which cherishes and guarantees
- H** the presumption of innocence until proved guilty.
- It is obvious from the record of appeal that PW5 was the only eye witness to the commission of the offences. The said witness's statement was admitted as exhibit C4. Therein the statement, while the names of accused persons in
- I** particular 2nd, 3rd and some others at large were mentioned among those who attacked their (PW5's) boat on the fateful day, there was no mention of the 1st accused/appellant in Exhibit 'C'4, except however in the PW5's evidence in court at the trial. The learned trial court in its wisdom did not waste time in refusing to
- J** rely on PW5's evidence which tended to implicate the 1st accused/appellant.

A It is also imperative and revealing to state further that with the level of familiarity claimed by PW5 of the appellant, his name would not have been left out easily by PW5 if he was truly one of their attackers.

B It is intriguing, that despite the findings and conclusions arrived at by the trial judge in exonerating the 1st accused/appellant from counts 2 -9 of the charge, His lordship however held a contrary view in respect of the 1st count, in other words, the trial court did hold that the appellant was privy to the plan and conspiracy to kill Chief Opusingi and was therefore adjudged culpable.

C The lower court endorsed the judgment of the trial court which it held was decided based on circumstantial evidence.

This is what the lower court had to say for instance at **pages 478 – 479.**

D **“The trial court by circumstantial evidence found that the appellant was among those who caused the death of the deceased...**

E **They i.e. the appellant and the two other convicts all nursed a common purpose i.e. to eliminate Chief Dan Opusingi their common foe tormentor and oppressor according to them.....**

F **The findings of the learned trial judge on the circumstantial evidence are cogent and point irresistibly to the fact that the appellant was privy to the plan to kill Chief Dan Opusingi.**

G **The findings are not perverse and this court has no cause to reverse it.”**

H For all intents and purposes, from the community reading of the evidence given by PW5 and relying also on his extra judicial statement to the police, admitted as Exhibit C4, the circumstantial evidence concept applied by the learned trial judge to convict the appellant and which was also endorsed by the justices of the lower court, was without any legal basis.

I In my view, the conviction at best, was bordered on mere suspicion, which no matter how strong, cannot constitute a crime or ground a conviction. ***See the case of Alake vs. State (1992) 9 NWLR (Pt. 265) 260 at 272.***

J As rightly submitted by the learned counsel for the appellant, the court below was in grievous error when it affirmed the trial court's conviction of the

- A appellant for murder, when there was no evidence on record linking him (appellant) with the alleged killing. The appellant did not in his statement to the police (Exhibit B) confess to the crimes alleged. The witness PW5 was from the same Kula community but he did not name the appellant in his statement, exhibit
- B C4.

The evidence of PW5, an eye witness, implicating the 1st accused/appellant was rendered unreliable. Therefore, the trial court should not have acted on same against the 1st accused person.

- C At page 366 367 of the record of appeal for instance, this was what the trial court said:

- D **“PW5 did not in his evidence offer any explanation as to why he could not mention the name of the 1st accused person in Exhibit 'C4'” which he made almost nine days after the alleged commission of the offence.....**

- E **The evidence of PW5, an eye witness, implicating the 1st accused person is rendered unreliable and this court cannot act on it against the 1st accused person.”**

- F It is relevant to say that there was no appeal against the said findings (supra). Also at page 376 the trial court further said:

- G **“..... There is no positive evidence from any of the prosecution witnesses establishing that the 1st accused was seen on the day of committing the crime.....”**

- H It is intriguing that despite the findings by the trial court **supra**, it nevertheless proceeded to convict the appellant of murder. The conviction was affirmed by the lower court. This is regardless of the constitutional provision, that an accused person is presumed innocent until he is proven guilty.

- I As rightly submitted by the appellant's counsel, at the close of the prosecution's case on the totality of the witness PW5 and his statement exhibit C4, a **prima facie** case was not made out against the appellant to warrant his being called upon to defend. At that point in time, it was incumbent on the court, **suo motu**, even without the appellant's application, to have invoked **SS 286 and 287**
- J **(1) of the Criminal Procedure Law, Cap 38, Laws of River State, 1999** to have

A discharged the appellant.

The failure of the trial court in taking that step in the instant case had occasioned a violation of the appellant's fundamental right as guaranteed him by section 36(5) of the **Constitution of the Federal Republic of Nigeria 1999** (as

B amended).

See the case of Okoro vs. State (1988) 3 NSCC (Pt. II) Vol. P. 275 at 295 6.

With the seeming oversight by the trial court, the duty was on the lower court to have corrected the mistake. The general burden was on the prosecution to prove the accused's guilt. The onus never shifts. *See section 135 (1) and (2) of the Evidence Act, 2011.* The failure of the trial court to discharge the appellant was tantamount to placing upon him the onus of establishing his innocence. This the trial judge projected when at page 375 of the record he said:

D

..... the 1st accused failed to establish where he was at the material time of the commission of the offence

E The findings by the trial court was upheld by lower court erroneously.

This court has held times without number that a conviction must be founded on evidence establishing the guilt of the accused beyond reasonable doubt. See **I.T. Muhammed, JSC** in the case of *The People of Lagos State vs.*

F *Umaru* (2014) 7 NWLR (Pt. 1407) 584 at 606. *See also Arabambi vs. Advance Beverages Ltd.* (2005) 19 NWLR (Pt. 959) 1 at 28.

The law is again firmly established that findings of fact must be based on admissible evidence (oral or documentary). Where it is however otherwise and based on inadmissible evidence, the finding will be held as perverse and the law enjoins an appellate court to interfere there with and set it aside. *See Olayinka vs. State* (2007) 9 NWLR (Pt. 1040) 561 at 578, where it was held that a decision is perverse where:

- G
- H iv) it is speculative and not based on any evidence; or
 - v) the court took into account matters which it ought not to have taken into account; or
 - vi) the court has ignored the obvious.

I *See again Umah vs. Akpabio* (2014) 7 NWLR (Pt. 1407) 472 at 488.

In the case at hand, as rightly submitted by the appellant's counsel, the prosecution was unable to produce any evidence that linked the appellant with the

J death of the deceased chiefs.

A Neither PW5 nor any other witness singled out the appellant by name or description as having participated in the murder of the chiefs.

In the circumstance, I hold the firm view that the court below was wrong to have affirmed the conviction and sentence of death on the appellant. There was

B no basis for that conclusion whatsoever. This is unfortunate indeed. The issue is hereby resolved in favour of the appellant.

With the few words of mine and taking into consideration the totality of all the issues and conclusion arrived at by my learned brother, Dattijo Muhammad,

C JSC, I adopt the totality of his judgment which is well considered, as mine.

In the same vein therefore, I also set aside the concurrent findings by the two lower courts as perverse. The appeal has merit and I allow same in terms of the leading judgment. The findings of the two lower courts are hereby set aside,

D the appeal succeeds and the appellant is acquitted and discharged forthwith.

Clara Bata Ogunbiyi
Justice, Supreme Court

E NWEZE, (JSC): I had the advantage of reading the draft of the leading judgment which my Lord, M.D. Muhammad, (JSC), just delivered now. I endorse the conclusion that, being meritorious, this appeal ought to be allowed.

This short contribution is limited only to an elaboration of the point made

F in the said leading judgment that only such circumstances that make a complete and unbroken chain, constituting sufficient proof that an accused person committed the offence for which he is charged, that would sustain a conviction.

From an intimate reading of the findings of the courts below, I am left in no

G doubt that the appellant's conviction and sentence eventuated from the said courts' sustenance of what was, actually, a remote evidence of circumstances only.

My lords, it is true, indeed, that the category of evidence known as circumstantial evidence, which is, more often than not, the best evidence, *Obosi*

H *vs. State* (1965) NM LR 119; *Ukorah vs. State* (1977) 4 SC 167; *Lori vs. State* (1980) NSCC 269; *Onah vs. State* (1985) 3 NWLR (pt 12) 236; *Ebenehi vs. State* (2009) All FWLR (Pt 486) 1825, 1832-1833; *Ijiofor vs. State* (2001) 9 NWLR (pt 718) 371, 385, is the evidence of surrounding circumstances which,

I by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics, *Ijiofor v State* (supra) 385.

The reason is not far-fetched. In their aggregate content, such circumstances lead cogently, strongly and unequivocally to the conclusion that

J the act, conduct or omission of the accused person caused the death of the

A deceased person, *Idiok vs. State* [2008] All FWLR (pt 421) 797, 818.

Put, simply, it means that there are circumstances which are accepted so as to make a complete and unbroken chain of evidence, *Omotola and Ors vs. State* [2009] 7 NWLR (pt 1139) 148, 178; (2009) LPELR 2663 (SC) 42-43. Where

B such circumstances are established to the satisfaction of the court, they may be properly acted upon, *Wills on Circumstantial Evidence* [Seventh edition] 324; A. Okekeifere, *Circumstantial Evidence in Nigerian Law* (Port Harcourt: Law-house Books, 2000) 1; *Omotola v State* (supra) 178.

C Thus, where there is no eye witness account or direct evidence of the commission of an offence, a conviction may be based on circumstantial evidence, *Igbale vs. State* [2004] 15 NWLR (pt 896) 314. However, such circumstantial evidence must point to only one conclusion, namely, that the offence had been

D committed and that it was the accused person who committed it, *Dick vs. C.O.P.* [2009] 9 NWLR (pt 1147) 530, 551.

However, there is a snag here. For the purpose of drawing an inference of an accused person's guilt from circumstantial evidence, there must not be other

E co-existing circumstances which would weaken or destroy that inference, *Igho vs. State* [1978] 3 SC 87; *State vs. Edobor* [1975] 9-11 Sc 69. Thus, all other factors and surrounding circumstances must be, carefully, considered for they may be enough to adversely affect the inference of guilt, *Lori vs. State* [1980] 8-11 SC. 81; *Udedibia vs. State* [1976] 11 SC 133; *Aigbadion vs. State* [2000] 7 NWLR (pt 666) 686.

The explanation for this need for circumspection is simple: evidence that falls within this category may be fabricated to cast aspersion on other people, per

G Lord Normand in *R vs. Tepper* (1952) 480, 489 approvingly adopted in *State vs. Edobor* [1975] 9-11 Sc 69, 77. That is why a court must, properly, appraise the circumstantial evidence adduced by the Prosecution before convicting an accused person thereon, *Adepelu vs. State* [1998] 9 NWLR (pt 565) 185; *Iko vs State* [2001] FWLR (pt 68) 1161; [2001] 14 NWLR (pt 732) 221; *Orji vs. State* [2008] All FWLR (pt 422) 1093, 1107.

It must be noted, however, that there is no yardstick by which any circumstantial evidence can be measured before a conviction can be entered

I against an accused person. Thus, each case depends on its own facts. However, one test which such evidence must satisfy is that it should lead to the guilt of the accused person and leave no degree to possibility or chance that other persons could have been responsible for the commission of the offence, *Ijiofor vs. State*

J (supra) 385; *Ebenehi vs. State* (supra) 1832.

A This is where the courts below erred. As pointed out in the leading judgment, the circumstances which the lower courts adjudged to be cogent and un-equivocal were, actually, remote.

B It is for these, and the more detailed, reasons in the said leading judgment that I, too, shall set aside the concurrent findings of the lower courts. I, therefore, enter an order allowing this appeal. The appellant is, accordingly, acquitted and discharged.

Chima Centus Nweze
Justice, Supreme Court

C

AMIRU SANUSI, JSC: I had the advantage of reading before now, the Judgment just delivered by my learned brother M.D. Muhammad JSC. I am at one with the reasoning and conclusion arrived at that this appeal is meritorious and ought to be allowed. It is also accordingly allowed by me. I have nothing useful to add except to abide by the consequential orders made in the lead Judgment. Appeal allowed.

E **Amiru Sanusi**
Justice, Supreme Court

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J

**TOTAL ENGINEERING SERVICES TEAM INC
AND
CHEVRON NIGERIA LIMITED**

SC. 185/2010

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

FRIDAY, 24TH FEBRUARY, 2017

BEFORE THEIR LORDSHIPS

**MARY UKAEGO PETER-ODILI
KUMAI BAYANG AKA' AHS
KUDIRAT M. O. KEKERE-EKUN
CHIMACENTUS NWEZE
EJEMBI EKO**

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

APPEAL: Raising new issues on appeal – Need to seek and obtain leave – Where the new issue involves substantial questions of substantive and procedural law – Effect.

ARBITRATION ARBITRAL AWARD: When liable to be set aside.

ARBITRATION: Misconduct – Arbitrator raises and decided an issue outside his mandate – Whether decision liable to be set aside – Sections 20 and 30 of the Arbitration Act – Extent and purport.

ARBITRATION: Misconduct of Arbitrator – Circumstances which amount to such misconduct.

ARBITRATION: Need for Arbitrator to act within the agreement of parties – Failure to observe this principle – Effect.

ARBITRATION: Where arbitrator raises a point suo motu – What he should do – Considerations thereof

ARBITRATION: Where arbitrator went outside his mandate and raised an issue suomotu – No opportunity to parties to canvass such issue – Propriety.

COURT Raising of issues suomotu – When amounts to a breach of fair hearing.

COURT: Raising issues suomotu – When permissible – Procedure thereof.

COURT: Principles of proper adjudication – Consideration thereof.

Issue for Determination

Was the Court of Appeal right to affirm the decision of the trial court to the effect that it was misconduct on the part of the arbitrator to have raised and determined suomotu the question of who paid attorney's fees in defence of Mr. Bufkin's claims in the United States of America, and if not, were the learned justices of the Court of Appeal not in error to have remitted part of the award to the arbitrator for reconsideration.

Facts of the Matter

The respondent herein was the claimant in the arbitration proceedings and the appellant was the respondent.

On or about the 14th day of April 1999, Mr. Danny Bufkin, a citizen of the United States of America who was seconded to the respondent by the appellant under a service contract No. OPR-95-1214 dated the 1st day of November 1995 was abducted by unknown armed men in the course of his duties at the Robert Kiri Terminal Flow Station in Kula Area of River State.

Mr. Bufkin remained in the custody of his abductors for several days and was only released upon the payment of a ransom by the respondent. Upon being released, Mr. Bufkin instituted legal proceedings against the respondents before a United States District Court.

Clause 10 of the contract contained provisions in respect of liability. The clause provided that the appellant was to indemnify the respondent against all liabilities, claims, demands, losses, costs and expenses including attorney's fees arising out of injury to any person including employees of the appellant (Mr. Bufkin) subject to stated exceptions.

Consequently, the respondent and its designated affiliated companies and the appellant negotiated a settlement agreement with Mr. Danny Bufkin in the sum of \$325,000 (Three Hundred and Twenty Five Thousand United States Dollar). The

appellant paid the sum of \$150,000 (One Hundred and Fifty Thousand United States Dollar) while the respondent paid the balance sum of \$175,000 (One Hundred and Seventy-five Thousand United States Dollar) to Mr. Bufkin. This agreement was without prejudice to the rights and obligations of the parties under the contract.

The respondent relying on the provisions of the contract demanded from the appellant a refund of the sums of \$175,000 (One Hundred and Seventy-five Thousand USD) incurred in settling Mr. Bufkin's claim as well as the sum of \$232,249.66 (Two Hundred and Thirty-two Thousand, Two Hundred and Forty-nine USD and Sixty-six Cents) incurred on Attorney's fees in respect of the case. The appellant failed to settle the amounts on the basis that the exception stated in the contract in respect of such claims applied.

Subsequently a dispute arose following which the respondent filed a notice of arbitration dated the 4th day of September 2002 referring the dispute that had arisen between the parties in respect of the provisions of the contract to a sole arbitrator for resolution.

The arbitrator awarded to the respondent the sum of \$175,000 (One Hundred and Seventy-five Thousand USD) paid to settle Mr. Bufkin's suit, interest thereon and the costs of the arbitration. He refused the award of N232,249.66 (Two Hundred and Thirty-two Thousand, Two Hundred and Forty-nine USD and Sixty-six Cents) for the Attorney's fees incurred in defending Mr. Bufkin's suit.

The award of the sole arbitrator was delivered on the 23rd day of April, 2004, a portion of which award was in favour of the respondent but the arbitrator dismissed a significant part of the respondent's claim.

On the 21st July 2004, the respondent filed originating summons with supporting affidavit at the High Court of Lagos State seeking an order setting aside part of the arbitral award or an order remitting that part of the award to the arbitrator for reconsideration. The High Court set aside the award on the ground that the arbitrator mis-conducted himself in the proceedings. That decision was affirmed by the Court of Appeal and it is in dissatisfaction that the appellant has come before the Supreme Court on a notice of appeal of 12th April, 2010 on two grounds.

Held: *(Unanimous dismissing the appeal)*

1. *The parties never canvassed the issue of who paid the attorney's fees*
It seems to me from the background facts showcased earlier that what is before this court is within very narrow confines which is the issue of whether the arbitrator went outside his mandate in raising the issue of who paid the

attorney's fees. The two courts below were satisfied that the issue was raised suomotu by the arbitrator and the parties were not called upon to address on it since it was neither raised in the pleadings, in the briefs of argument and did not arise in the issues for determination as formulated by the parties or the arbitrator himself. It clearly came as a shot in the dark since no questions were raised between the parties as to who made the payment. (*P 455 paras H–J*).

2. *Decision of a Court must be based on submissions of parties.*

The guide on what a court or tribunal or as in this instance the arbitrator should do when he seeks to raise a point or issue of his own motion is well settled but a reference to the case of **Kraus Thompson Organisation Ltd vs. University of Calabar (2004) 9 NWLR (Pt. 879) 631** would be of assistance at least to clarify any doubt in a foggy mind. It is thus:

“Now it is settled law that when an issue is not placed before a court, such court has no business whatsoever to deal with it as decisions of a court of law must not be founded on any ground in respect of which it has neither received argument from or on behalf of the parties before it nor even raised by or for the parties or either of them. See Shitta-Bay vs. FPSC (1981) 1 NCLR 372; Saude vs. Abdullahi (1989) 4 NWLR (Pt. 116) 378. (*P 456 paras A–D*).

3. *Court cannot suomotu make a case for the parties and give judgment on such a case.*

The law is also well established that it is not competent for any court suomotu to make a case for either or both parties and then proceed to give judgment on the case so formulated contrary to the case of the parties before it. See **Commissioner for Works, Benue State and Anor vs. Devcon Development Consultants Ltd (1988) 3 NWLR (Pt. 83) 407; Nigerian Housing Development Society Ltd and Anor vs. Mumuni (1977) 2 SC 57; Adeniji vs. Adeniji (1972) 1 All NLR (Pt. 1) 298; A.C..B. Ltd vs. Northern Nigeria (1967) NMLR 231. (*P 456 paras D–G*).**

4. *Courts can raise issues suomotu on certain conditions*

There can be no doubt that courts of law have the power to raise suomotu relevant issue or issues which are not before the court for the determination of the case. In exercising this power, however, the court must adhere strictly to

the principle of natural justice and in particular, to the *audialterampartem* rule. Accordingly the law is also well settled that on no account should a court raise a point or issue *suomotu* no matter how clear it may appear to be and then proceed to resolve it one way or the other without inviting the parties to address it on the point. If it does so, it will be in flagrant abuse and breach of the aggrieved party's right to fair hearing as entrenched in the constitution. See **Ugo vs. Obiekwe (1989) 1 NWLR (Pt. 99) 566; Oje vs. Babalola (1991) 4 NWLR (Pt. 185) 267.** (Pp 456–457 paras G–A).

5. *When necessary to invite parties to address court.*
When a court for any compelling reason finds it necessary and particularly in the interest of justice, to raise a point *suomotu*, the parties must be given an opportunity to be heard on such point or issue, particularly the party that may be prejudiced as the result of the point raised *suomotu*. See **Adegoke vs. Adibi (1992) 5 NWLR (Pt. 242) 410; Atanda vs. Lakanmi (1974) 3 SC; Odiase vs. Agho (1972) 1 All NLR (Pt. 1) 170.** (P 457 paras A–C).
6. *Misconduct by the arbitrator under the Arbitration Act*
A consideration of the materials before the trial court which are the pleadings, evidence or even in the arguments taken up by the counsel on either side and also as seen from the affidavits and counter affidavits filed by the appellant show quite clearly that the matter raised by the arbitrator on who paid the attorney's fees was well outside the range of the dispute between the parties and in the mandate of his authority. Thus the trial court found what the arbitrator did a misconduct in granting the award and in line with Sections 20 and 30 of the Arbitration Act set aside the award in part. This was affirmed by the Court of Appeal.
I agree with learned counsel for the respondent referring to this court's in **Baker Marine Ltd vs Chevron Nigeria Ltd (2000) 12 NWLR (Pt. 681) 393 at 406** that there is a need for arbitrators to act within the agreement of the parties and when an arbitrator veers off the track, the necessity of the court as was done in the case in hand to right the wrong. (P 457 paras D–G).
7. *Raising new issues without leave*
A follow up to the foregoing is that the line of arguments of the appellant on the award of attorney's fees is a new issue and that he cannot get away since there is a requirement for leave of this court to so do, failure of which as has happened translate to a still born argument. In this, I place reliance on the case

of: **Owners, M/V Gongola Hope & Anor. vs Smurfit Cases Nig. Ltd. & Anor (2007) 15 NWLR (Pt. 1056) 189 at P. 206** wherein the court per Musdapher JSC (as he then was) stated thus:

“In any event, this court will not generally allow a party on appeal to raise a question or an issue not raised in the Court of Appeal or to grant leave to argue fresh grounds not canvassed in the Court of Appeal except where the new ground involves substantial points of law substantive or procedural which need to be allowed in order to prevent an obvious miscarriage of justice. Even in such a case, there must be the evidence adduced by the party relying on the new issue”. (Pp 457–458 paras G–B).

8. *The findings and conclusions of the two lower courts were right*
Indeed what has emerged is the clarity of the findings and conclusions by the trial court as affirmed by the Court of Appeal and that is that bearing in mind the immutable principle of fair hearing and the need to uphold the principle that a judicial body ought at all times to decide upon points only canvassed before it and if it has to raise any point *suomotu*, there is a mandatory injunction which impels that judicial body to give a hearing to the parties especially in this instance, the respondent who would be adversely affected. Failure to go along that pathway renders the act of the arbitrator a misconduct which justifies the court setting aside that part of the award tainted with the vice. (P 458 paras B–D).
9. *Situations when an arbitral award may be set aside*
The sole issue for determination in this appeal is whether the court below was right in dismissing the appeal and affirming the decision of the trial court.
By virtue of Sections 29(2) and 30 of the Arbitrator and Conciliation Act, Cap A18 Laws of the Federation of Nigeria 2004, an arbitral award may be set aside in the following circumstances:
 - (i) Where it is shown that the award contains decisions on matters which are beyond the scope of the submission to arbitration;
 - (ii) Where the arbitrator misconducted himself;
 - (iii) Where the arbitral proceedings or award has been improperly procured; or

- (iv) Where there has been an error of law in the face of the record.
(P 460 paras A–C).

10. *Some of the conducts which constitute misconduct*

Some of the conducts which constitutes misconduct as a ground for setting aside an arbitral award are:

- (a) Where the arbitrator fails to comply with the terms, express or implied, of the arbitration agreement;
- (b) Where even if the arbitrator complies with the terms of the arbitration agreement, the arbitrator makes an award, which on grounds of public policy ought not to be enforced;
- (c) Where the arbitrator has been bribed or corrupted;
- (d) Technical misconduct, such as where the arbitrator makes a mistake as to the scope of the authority conferred by the agreement of reference. This does not mean that every irregularity of procedure amounts to misconduct;
- (e) Where the arbitrator or umpire fails to decide all the matters, which were referred to him;
- (f) *Where the arbitrator or umpire has breached the rules of natural justice;*
- (g) If the umpire has failed to act fairly towards both parties, as for example:
 - (i) by hearing one party but refusing to hear the other; or
 - (ii) *by deciding the case on a point not put by the parties*
 (underlining mine for emphasis)

See: **A. Savoia Ltd. vs Sonubi (2000) 12 NWLR (Pt. 682) 539 @ 547 C-G; Taylor Woodrow (Nig.) Ltd. vs. Suddeutsche Etna-Werk GMBH (1993) 4 NWLR (Ptr. 286) 127.** (P 460 paras D–I).

11. *Raising issue suo motu and the imperatives of fair hearing*

The complaint in his appeal hinges on the right to fair hearing, where it is alleged that the arbitrator raised and determined an issue *suo motu* without first hearing the parties and thereby misconducted himself.

The imperatives of fair hearing, which have been incorporated into Section 36(1) of the 1999 Constitution, are that a body discharging a judicial or quasi-judicial function, as the arbitrator, shall give each party before it an

opportunity to be heard on any issue so calling for a decision or determination, and that the body shall, throughout the proceedings before it remain neutral or impartial. For these imperatives of fair hearing, whenever a judicial body, arbitrator or umpire raises an issue, *suo motu*, the parties must be given an opportunity to be heard on such issue. (Pp 460; 467 paras I–J; A–C).

12. *Consequence of misconduct of arbitrator*

In consequence of misconduct by the arbitrator the court has powers to set aside his award, and remit or return the award published to the arbitrator for the error to be corrected either on the existing facts or further facts. See **HALSBURY'S LAWS OF ENGLAND (supra); BAKER MARINE (NIG.) LTD. vs. CHEVRON (NIG.) LTD. (supra) at P. 412** per Aderemi, JCA (as he then was). (P 467 paras C–D).

Nigerian Cases Cited

A. Savoia Ltd. vs. Sonubi (2000) 12 NWLR (Pt. 682) 539;
A.C..B. Ltd vs. Northern Nigeria (1967) NMLR 231.
Adegoke vs. Adibi (1992) 5 NWLR (Pt. 242) 410;
Adeniji vs. Adeniji (1972) 1 All NLR (Pt. 1) 298;
Atanda vs. Lakanmi (1974) 3 SC;
Baker Marine Ltd vs. Chevron Nigeria Ltd (2000) 12 NWLR (Pt. 681) 393
Commissioner for Works, Benue State and Anor vs. Devcon Development Consultants Ltd (1988) 3 NWLR (Pt. 83) 407;
Kraus Thompson Organisation Ltd vs. University of Calabar (2004) 9 NWLR (Pt. 879) 631
Nigerian Housing Development Society Ltd and Anor vs. Mumuni (1977) 2 SC 57;
Odiase vs. Agho (1972) 1 All NLR (Pt. 1) 170".
Oje vs. Babalola (1991) 4 NWLR (Pt. 185) 267.
Owners, M/V Gongola Hope & Anor vs. Smurfit Cases Nig. Ltd & Anor (2007) 15 NWLR (Pt. 1056) at P. 206
Saude vs. Abdullahi (1989) 4 NWLR (Pt. 116) 378.
Shitta-Bay vs. FPSC (1981) 1 NCLR 372;
Taylor Woodrow (Nig.) Ltd. vs. Suddentsche Etna-Werk GMBH (1993) 4 NWLR (Ptr. 286) 127.
Ugo vs. Obiekwe (1989) 1 NWLR (Pt. 99) 566;

A Foreign Cases Cited

Champsey Bhara and Co. vs. Jivrajs Balloo Spinning and Weaving Co. (1923) A.C. 480; (1923) All E.R. Rep. 235,

Animistic vs. Foreign Compensation Commission (1969) 1 All E.R. 208 at 213
B etc.,

Nigerian Statutes cited

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

C The Arbitrator and Conciliation Act, – SS 29(2), 20 and 30

Representations

ADEWALE ATAKE for appellant and with him are:

D Chidiebere Ejiofor; Solomon Babajide

ADEDOYIN RHODES-VIVOUR for the Respondent and with her is Anthony Onwaeze.

E

PETER-ODILI, (JSC) (Delivering the Lead Judgment): This is an appeal against the judgment of the Court of Appeal, Lagos Division, Coram: C.B. Ogunbiyi, R.C Agbo and A. Jauro JCA. In the judgment, the Court of appeal or
F court below or lower court affirmed the decision of Adefope-Okojie J. (as she then was) of the Lagos State High Court remitting a part of the arbitral award to the sole arbitrator, H. Odein Ajumogobia (SAN) for reconsideration and decision.

The respondent herein was the claimant in the arbitration proceedings and
G the appellant was the respondent in the arbitration proceedings.

The award of the sole arbitrator was delivered on the 23rd day of April, 2004, a portion of which award was in favour of the respondent but the arbitrator dismissed a significant part of the respondent's claim.

H On the 21st July 2004, the respondent filed originating summons with supporting affidavit at the High Court of Lagos State seeking an order setting aside part of the arbitral award or an order remitting that part of the award to the arbitrator for reconsideration. The High Court set aside the award on the ground
I that the arbitrator mis-conducted himself in the proceedings. That decision was affirmed by the court below and it is in dissatisfaction that the appellant has come before the Supreme Court on a notice of appeal of 12th April, 2010 on two grounds.

J

A BACKGROUND FACTS

The facts leading to this appeal are stated hereunder, viz:

- B** On or about the 14th day of April 1999, Mr. Danny Bufkin, a citizen of the United State of America who was seconded to the respondent by the appellant under a service contract No. OPR-95-1214 dated the 1st day of November 1995 (hereinafter referred to as “the contract” and which is at pages 9-35 of the record of appeal) was abducted by unknown armed men in the course of his duties at the Robert Kiri Terminal Flow Station in Kula Area of River State.
- C** Mr. Bufkin remained in the custody of his abductors for several days and was only released upon the payment of a ransom by the respondent. Upon being released, Mr. Bufkin instituted legal proceedings against the respondents before a United States District Court.
- D** Clause 10 of the contract (at page 14 of the record of appeal) contained provisions in respect of liability. The clause provided that the appellant was to indemnify the respondent against all liabilities, claims, demands, losses, costs and expenses including attorney's fees arising out of injury to any person
- E** including employees of the Appellant (Mr. Bufkin) subject to stated exceptions. Clause 10.1 of the liability clause provides as follows:

- F** **10.1 contractor shall indemnify indemnitees against all claims, demands, losses, costs, liabilities and expenses, including attorney's fees, arising out of injury to or death of any person (including employee of CONTRACTOR and indemnitee) and damage to or destruction of any property (including property**
- G** **of the indemnitees and CONTRACTOR) however caused regardless of the negligence of COMPANY or others and regardless of whether liability without fault is imposed or sought to be imposed on one or more of the indemnitee arising**
- H** **out of or in connection with the agreement.**

The relevant cause on exclusion of liability provided thus:

- I** **10.2 The indemnity of Article 10.1 shall not apply to the extent that such indemnity:**
- J** **10.2 is void or otherwise unenforceable under applicable law in effect on or validly retroactive to the date of this agreement, or**

- A 10.22 Where such loss, damage, injury, liability, cost or claim referred to in Article 10.1 is the result of active negligence or willful misconduct of an indemnitee and it not contributed to by any act of or by any omission to perform some duty imposed by the law or contract on CONTRACTOR its subcontractor or ether' agent or employee.**
- B**

Pursuant to the contractual indemnity provisions, the respondent requested that the appellant and its underwriters (Zurich American Insurance Group) defend the suit and provide indemnification and insurance coverage on the basis of clauses 10 and 11 of the contract. The underwriters however refused to provide defence, indemnification and insurance coverage.

- D Consequently, the respondent and its designated affiliated companies and the appellant negotiated a settlement agreement with Mr. Danny Bufkin in the sum of \$325,000 (Three Hundred and Twenty Five Thousand United States Dollar). The appellant paid the sum of \$150,000 (One Hundred and Fifty Thousand United States Dollar) while the respondent paid the balance sum of \$175,000 (One Hundred and Seventy-five Thousand United States Dollar) to Mr. Bufkin. This agreement was without prejudice to the rights and obligations of the parties under the contract. See clause XIII of the Settlement Agreement (at page 49-55 of the record of appeal).**
- E**
- F**

The respondent relying on the provisions of the contract demanded from the appellant a refund of the sums of \$175,000 (One Hundred and Seventy-five Thousand USD) incurred in settling Mr. Bufkin's claim as well as the sum of \$232,249.66 (Two Hundred and Thirty-two Thousand, Two Hundred and Forty-nine USD and Sixty-six Cents) incurred on Attorney's fees in respect of the case. The appellant failed to settle the amounts on the basis that the exception stated in the contract in respect of such claims applied.

- G**
- H Subsequently a dispute arose following which the respondent filed a Notice of Arbitration dated the 4th day of September 2002 referring the dispute that had arisen between the parties in respect of the provisions of the contract to a sole arbitrator for resolution.**

- I The arbitrator awarded to the respondent the sum of \$175,000 (One Hundred and Seventy-five Thousand USD) paid to settle Mr. Bufkin's suit, interest thereon and the costs of the arbitration. He refused the award of N232,249.66 (Two Hundred and Thirty-two Thousand, Two Hundred and Forty-nine USD and Sixty-six Cents) for the Attorney's fees incurred in defending Mr.**
- J**

A Bufkin's suit. The reason adduced for his refusal is set out in pages 16-18 of his award (at pages 155-157 of the record of appeal). He had previously held at paragraph 15.08 which is at page 17 of his award (at page 156 of the record at appeal) as follows:

B

“In the light of the arbitrator's finding that the (respondent/appellant) in this appeal failed to prove “active negligence” on the part of the claimant (respondent in this appeal) it cannot be contested that respondent would be liable for the reimbursement of all attorney's fees paid by the claimant (respondent in this appeal) where such payment is proved”.

C

D Thus the arbitrator found in his award that the respondent was entitled to payment of attorney's fees.

At paragraph 3.01 at page 3 of his award which is at page 142 of the record of appeal, the arbitrator had stated thus:

E

“Essentially the dispute between the parties was the interpretation and legal effect or consequences of the provisions of the contract with regard to the indemnity/insurance clauses viz clauses 10.01, 10.02 and 11 of the contract”.

F

However the arbitrator went outside the agreed issues for determination, raised the question pertaining to who paid the attorney's fee *suomotu* and refused to grant the respondent the attorney's fees it had found it was entitled to.

G

The parties had hitherto at a preliminary meeting held with the arbitrator formulated the agreed issue for determination. At paragraphs 1.07 to 1.08 of the award which is at page 1142 of the record of appeal, the arbitrator stated the issue for determination as formulated by the parties' counsel at the preliminary meeting held on the 13th day of February, 2003 as follows:

H

“Whether the respondent is liable under the indemnity/insurance provision of Contract No. OPR-95-1214 to indemnity and/or hold the claimant harmless against costs and expenses arising from Mr. Bufkin's claim and/or law suit”.

I

J

A The arbitrator had formulated two issues as arising for the determination in the dispute namely:

- B**
- 1. Firstly, the meaning in Nigerian Law of the phrase “active negligence” and whether as a matter of fact “active negligence” occurred.**
 - 2. Whether the injury suffered by Mr. Bufkin consequent upon his abduction was an insurable risk under clause 11 of the contract.**
- C**

In his award, the arbitrator determined the agreed issue as well as the first issue for determination as formulated by him in favour of the respondent herein. The second issue as formulated by the arbitrator is not relevant to these proceedings. The arbitrator thus held that the appellant herein had failed to prove the fact of the exclusion it relied upon and accordingly it was liable to indemnify the respondent herein for the expenses and losses arising from the abduction of Mr. Bufkin.

E However, though the arbitrator held that under the contract the respondent is entitled to reimbursement of attorney's fees from the appellant he refused to grant the respondent the said fees on the basis of lack of proof of payment.

F Dissatisfied with that part of the award refusing the respondent's claim for reimbursement of attorney's fees in the sum of \$232,249.66 (Two Hundred and Thirty-two Thousand, Two Hundred and Forty-nine USD and Sixty-six Cents) the respondent filed an originating summons dated 21st day of July 2004 at the Lagos High Court seeking to set aside that part of the award or in the alternative **G** remit same to the arbitrator for reconsideration and decision on that head of claim.

The complaint of the respondent before the honourable justice Adefope-Okojie was that the arbitrator went outside the agreed issues before him, raised the matter pertaining to the proof of payment of attorney's fees *suomotu* and relied upon grounds not canvassed by any of the parties in coming to a decision about proof of such payment by the respondent, thus leading to the refusal of this head of claim. The lower court agreed with the respondent and remitted the part of the award on payment of attorney's fees to the arbitrator for reconsideration and **I** decision.

On the 29th day of November, 2016 date of hearing, learned counsel for the appellant, Adewale Atake Esq. adopted its brief of argument filed on 14/9/2010 and a reply brief of 23/11/16. The appellant framed a sole issue for determination **J** in its brief of argument which is thus:

A Was the Court of Appeal right to affirm the decision of the trial court to the effect that it was misconduct on the part of the arbitrator to have raised and determined suomotu the question of who paid attorney's fees in defence of Mr. Bufkin's claims in the United State of America, and if not, were the learned justices of the Court of Appeal not in error to have remitted part of the award to the arbitrator for reconsideration?

C Mrs. Adedoyin Rhodes-Vivour of counsel for the respondent adopted its brief filed on 12/1/2011 and deemed filed on 15/6/2011 distilled two issues for determination as follows:

- D (i) Whether the issue of who paid attorney's fees was an issue before the arbitrator and if not whether the Court of Appeal was correct in holding that it was misconduct for the arbitrator to have raised and decided the issue suomotu without hearing the parties.**
- E (ii) Whether the argument before the lower court related to the arbitrator making a pronouncement on who paid the fees and if not whether the appellant can introduce new lines of argument (not raised at the trial court or the lower court) at this stage without the leave of court.**
- F**

The single issue of the appellant being easy for use, I shall utilize it in the determination of this appeal.

SOLE ISSUE

H Was the Court of Appeal right to affirm the decision of the trail court to the effect that it was misconduct on the part of the arbitrator to have raised and determined suomotu the question of who paid attorney's fees in defence of Mr. Bufkin's claims in the United States of America, and if not, were the learned justices of the Court of Appeal not in error to have remitted part of the award to the arbitrator for reconsideration.

I For the appellant, AdewaleAtake Esq. of counsel contended that the arbitrator did not raise any issue suomotu without reference to the parties as to justify the decision of the lower court to remit the award to the arbitrator. That the fact that the arbitrator held the respondent's claim for reimbursement of attorney's

J

A fees in the sum of \$232,249.66 not proved, does not amount to raising an issue suomotu. He cited **Kraus Thompson Org. Ltd vs. Unical (2004) 9 NWLR (Pt. 879) 631 at 652.**

B That by Section 29 (2) of the Arbitration Act, in order for an award to be set aside or remitted to the arbitrator for reconsideration, it must contain “matters which are beyond the scope of the submission to arbitration”. That in the circumstance, the court below was wrong to hold that the arbitrator went outside the issues before him.

C Mr. Atake of counsel contended that the parties had joined issues on the respondent's assertion that it incurred reasonable attorney's fees in defence of Mr. Bufkin's claim and so the appropriate question would be if the claimant or defendant substantially proved his assertion. He cited **Tewogbade vs. Akande (1968) NMLR 404.**

D He stated that the evidence put forward by the respondent was at variance with the pleadings in regard to the attorney's fee and so the evidence must be disregarded. He referred to **Dabo vs. Abdullahi (2005) 7 NWLR (Pt. 923) 181 at 207; Fashanu vs. Adekoya (1974) All NLR 32 at 43.**

E Appellant's counsel concluded by urging the court to allow the appeal.

Canvassing the stance of the respondent, Mrs. Rhodes-Vivour of counsel submitted that the lower court was right to affirm the decision of the trial court.

F That the respondent was able to satisfy the lower court that the issue of proof of payment was outside the scope of issues placed before the arbitrator as the issue neither arose from the pleadings nor affidavit evidence nor even in the written address of the appellant. That the arbitrator raised the issue by himself suomotu

G without the parties being put on notice and in the award the arbitrator denied the respondent its attorney's fees which he had held it was entitled to. That the appellant in bringing up the issue is springing a surprise on its opponent which it cannot do. He cited **Eneli vs. Oraekwe (2005) 1 NWLR (Pt. 961) 342 at 353.**

H Learned counsel for the respondent contended that the appellant has veered into a new area outside what was before court from the beginning and that without leave of court which rendered the fresh issue non presentable as there is nothing canvassed in the lower court to support it. He cited **Owners, M/V Gongola Hope & Anor vs. Smurfit Cases Nig. Ltd & Anor (2007) 15 NWLR (Pt. 1056) 206; Ogunbadejo vs. Otunba A.L.A. Owoyemi (1993) 1 NWLR (Pt. 271) 534.**

I In reply on points of law along the lines of the reply brief, learned counsel

J for the appellant referred the court to the relief sought by the respondent which is

A for the appellant to pay to the respondent the amount it claimed to have incurred as legal fees in the suit of Mr. Bufkin which ought to be granted as a matter of course and needs no proof by respondent that the said legal fees should be paid. He relied on **UNIJOS vs. Ikegwuoha (2013) 9 NWLR (Pt. 1360) 478 at 497.**

B That the implication is that the arbitrator did not go outside the case before him in making the finding on the “reimbursement of attorney's fees. That the appellant was not introducing new issues for which leave of court should firstly be sought and obtained and this court should give effect to those findings of fact of the arbitrator. He referred to **Aye-FenusEnt.Ltd vs. Saipem (Nig.) Ltd (2009) NWLR (Pt. 1126) 583 at 518; Baker Marina (Nig.) Ltd vs. Danos& Carole Cont. Inc. (2000) 12 NWLR (Pt. 681) 393 at 410.**

D The long and short of this appeal is as stated by the appellant that the appeal should be allowed because among other things, the arbitrator did not make any pronouncement on who paid the attorney's fees as erroneously canvassed by respondent's counsel and affirmed by the lower court. That what the arbitrator decided is that the respondent had not proved its claim to be entitled to a reimbursement of attorney's fees.

E The respondent's counter argument is for the court to dismiss the appeal and uphold the judgment of the lower court remitting the part of the award dealing with the issue of who paid attorney's fees to the arbitrator for reconsideration and decision.

F The decision of the arbitrator central to this appeal is captured at pages 155-157 of the record and quoted thus:

G “15.01: Contrary to the assertion in the claimant written submission to the effect that the respondent “did not deny the payment” by claimant of the sum of \$232,249.66 as legal fees and therefore impliedly admitted same, the respondents did not admit same and “put claimant to the strictest proof thereof (see paragraph 10 of the Points of Defence).

H 15.02: The claimant may have been influenced in its conclusion by the principle applicable in most of our high courts by virtue of the specific rules of court which stipulate that a general denial or traverse of a claim for a liquidated sum of money is inadmissible and amounts to an admission of the sum.

I

J

- A 15.03: The arbitrator is also familiar with the general legal principle restated by the Supreme Court in Meridan Trade Corp Ltd vs. Metal Construction (W.A.) Ltd (1998) 4 NWLR (Pt. 544) 1 that “where a plaintiff alleges**
- B that a certain sum is owing to him, it is not enough of the defendant to deny that he owes that sum but must go on to deny that he owes any part thereof or else set out how much he owes. Thus, where the alleged debt is not denied**
- C expressly or by implication by the defendant, the allegation must be deemed indirectly admitted and the plaintiff is not obliged to establish it by evidence**
- D 15.04: The arbitrator holds however that these general principles embodied in cases and in specific rules of court are inapplicable to these proceedings. Claimant was therefore required to first prove payment of the claimed sum of \$232,249.66 in order to be entitled to reimbursement of Attorney's fees in the sum of USD 232,249.66 paid to the firm of Adams and Reese LLP in defence of the claimant.....**
- E 15.05: The claimant witness Mr. Boyo “CW1” did give evidence (by affidavit).... that the sum of \$232,249.66 was expended by the claimant as attorney's fees in the defence of Mr. Bufkin's claim as per Exhibit CNL5 to the points of claim.**
- F 15.09: The evidence before the arbitrator contained in Exhibit CNL5, however contradicts the sworn testimony of Mr. Boyo, on this point.**
- G 15.10: EXHIBIT CNL5 on which Mr. Boyo evidently relied and which was evidently tendered to corroborate his testimony on this point shows the client name as Chevron Texaco Overseas Petroleum Inc. and not the claimant/indemnatee.**
- H 15.15: It is therefore apparent that the claimant failed to prove that it paid the attorney's fees of \$232,249.66 in respect of the defence and eventual settlement of Danny Bufkin's claim. There is no evidence either of any demand for payment or reimbursement by Chevron Texaco**
- I**
- J**

- A Overseas Petroleum Inc. or of payment by claimant to either the firm of Adams \$ Reed LLP or Chevron Texaco Overseas Petroleum Inc.**
- B** The learned trial judge in her ruling on the propriety of what the arbitrator did pointed at some facts from the claim/defence, the deposition of the witnesses and documents tendered at the arbitral proceedings as follows:
- C 1. That the defendants in the suit instituted in the United States by Danny Bufkin include the claimant in this case (i.e the respondent before the Court of Appeal) as well as Chevron Corporation, Chevron USA Inc and Chevron Overseas Petroleum.**
- D 2. That Adams & Reese represented the defendants in that case.**
- E 3. That the companies in paragraph 2 as stated in the letter of Adams & Reese to the defendant, are affiliates of the claimant.**
- F 4. The deposition of the claimant's witness Ezekiel Oritsemeyiwa Boyo, was not contradicted and the witness was held by the arbitrator to be truthful.**
- G 5. That the issue of who paid the fees for which reimbursement was sought was not an issue before the arbitrator not having being raised by either party but was raised suomotu by the arbitrator.**

The learned trial judge stated at page 267 of the record thus:

- H “The law is that where a judge decides to raise a point suomotu, it must, in the interest of justice, invite the parties, particularly the party that may be adversely affected as a result of the point raised suomotu, to address it on such a point, before basing his decision thereon”.**

- I** On appeal, the court below per Ogbunbiyi JCA (as she then was) dismissed the appeal and stated as follows:

J

- A** “That in the interest of justice where a Judge raises a matter suomotu such Judge is enjoined to invite parties, particularly the party that may be adversely affected as a result of the point raised suomotu, to address it on such a point, before basing its decision thereon”. (See page 16 of the judgment of the lower court which is at page 353 of the record of appeal).
- B**

The Court of Appeal went on to hold thus:

- C** “The fact that Messrs Adams and Reese had represented the respondent and other parties as counsel in relation to the defence of Mr. Bufkin's claim was not contested by the appellant in the arbitral proceedings and that there was nowhere where the question of who paid attorney's fees was taken up as an issue between the parties thus that the appellant in its pleadings, evidence or address did not contest the issue whether the sums claimed as attorney's fees was paid for by the respondent. That the arbitral tribunal as rightly found by the lower court flouted the provisions of Sections 14 and 15 of the Arbitration Act which obliged the tribunal to give the parties full opportunity of presenting their case and ensure fair hearing.
- D**
- E**
- F**
- G** That the arbitral tribunal made a finding on an issue raised suomotu without giving the opportunity to the parties to address it on the issue”. See pages 356, 360 and 362 of the record.

- H** It seems to me from the background facts showcased earlier that what is before this court is within very narrow confines which is the issue of whether the arbitrator went outside his mandate in a manner of speaking in raising the issue of who paid the attorney's fees. The two courts below were satisfied that the issue was raised suomotu by the arbitrator and the parties were not called upon to address on it since it was neither raised in the pleadings, in the briefs of argument and did not arise in the issues for determination as formulated by the parties or the arbitrator himself. It clearly came as a shot in the dark since no questions were raised between the parties as to who made the payment.
- I**
- J**

- A** The guide on what a court or tribunal or as in this instance the arbitrator should do when he seeks to raise a point or issue of his own motion is well settled but a reference to the case of **Kraus Thompson Organisation Ltd vs. University of Calabar (2004) 9 NWLR (Pt. 879) 631** would be of assistance at
- B** least to clarify any doubt in a foggy mind. It is thus:

Kraus Thompson Ord, Ltd vs. UniCal (supra) thus:

- C** “Now it is settled law that when an issue is not placed before a court, such court has no business whatsoever to deal with it as decisions of a court of law must not be founded on any ground in respect of which it has neither received argument from or on behalf of the parties before it nor even raised by or for the parties or either of them. See *Shitta-Bay vs. FPSC* (1981) 1 NCLR 372; *Saude vs. Abdullahi* (1989) 4 NWLR (Pt. 116) 378. The law is also well established that it is not competent for any court *suomotu* to make a case for either or both parties and then proceed to give judgment on the case so formulated contrary to the case of the parties before it.
- D**
- E**
- F** See *Commissioner for Works, Benue State and Anor vs. Devcon Development Consultants Ltd* (1988) 3 NWLR (Pt. 83) 407; *Nigerian Housing Development Society Ltd and Anor vs. Mumuni* (1977) 2 SC 57; *Adeniji vs. Adeniji* (1972) 1 All NLR (Pt. 1) 298; *A.C..B. Ltd vs. Northern Nigeria* (1967) NMLR 231. There can be no doubt that courts of law have the power to raise *suomotu* relevant issue or issues which are not before the court for the determination of the case. In exercising this power, however, the court must adhere strictly to the principle of natural justice and in particular, to the *audialterampartem* rule. Accordingly the law is also well settled that on no account should a court raise a point or issue *suomotu* no matter how clear it may appear to be and then proceed to resolve it one way or the other without inviting the parties to address it on the point. If it does so, it will be in flagrant abuse and breach
- G**
- H**
- I**
- J**

A of the aggrieved party's right to fair hearing as entrenched in the Constitution. See Ugo vs. Obiekwe (1989) 1 NWLR (Pt. 99) 566; Oje vs. Babalola (1991) 4 NWLR (Pt. 185) 267. In other words, when a court for

B any compelling reason finds it necessary and particularly in the interests of justice, to raise a point suomotu, the parties must be given an opportunity to be heard on such point or issue, particularly the party that

C may be prejudiced as the result of the point raised suomotu. See Adegoke vs. Adibi (1992) 5 NWLR (Pt. 242) 410; Atanda vs. Lakanmi (1974) 3 SC; Odiase vs. Agho (1972) 1 All NLR (Pt. 1) 170”.

D

A consideration of the materials before the trial court which are the pleadings, evidence or even in the arguments taken up by the counsel on either side and also as seen from the affidavits and counter-affidavits filed by the appellant show quite

E clearly that the matter raised by the arbitrator on who paid the attorney's fees was well outside the range of the dispute between the parties and in the mandate of his authority. Thus the trial court found what the arbitrator did a misconduct in granting the award and in line with Sections 20 and 30 of the Arbitration Act set

F aside the award in part. This was affirmed by the Court of Appeal.

I agree with learned counsel for the respondent referring to this court's in **Baker Marine Ltd vs. Chevron Nigeria Ltd (2000) 12 NWLR (Pt. 681) 393 at 406** that there is a need for arbitrators to act within the agreement of the parties

G and when an arbitrator veers off the track, the necessity of the court as was done in the case in hand to right the wrong.

A follow up to the foregoing is that the line of arguments of the appellant on the award of attorney's fees is a new issue and that he cannot get away since

H there is a requirement for leave of this court to so do, failure of which as has happened translate to a still born argument. In this, I place reliance on the case of: **Owners, M/V Gongola Hope & Anor vs. Smurfit Cases Nig. Ltd & Anor (2007) 15 NWLR (Pt. 1056) at P. 206** wherein the court per Musdapher JSC (as

I he then was) stated thus:

J “in any event, this court will not generally allow a party on appeal to raise a question or an issue not raised in the Court of Appeal or to grant leave to argue fresh grounds not canvassed

- A in the Court of Appeal except where the new ground involves substantial points of law substantive or procedural which need to be allowed in order to prevent an obvious miscarriage of justice. Even in such a case, there must be the evidence**
- B adduced by the party relying on the new issue”.**

- Indeed what has emerged is the clarity of the findings and conclusions by the trial court as affirmed by the Court of Appeal and that is that bearing in mind the
- C** immutable principle of fair hearing and the need to uphold the principle that a judicial body ought at all times to decide upon points only canvassed before it and if it has to raise any point *suomotu*, there is a mandatory injunction which impels that judicial body to give a hearing to the parties especially in this instance, the
- D** respondent who would be adversely affected. Failure to go along that pathway renders the act of the arbitrator a misconduct which justifies the court setting aside that part of the award tainted with the vice.

- My train of thoughts are glaring and that is that I see no basis for interfering
- E** with what the court below did in its concurrent findings with those of the trial High Court and so I find this appeal lacking in merit and have no hesitation in dismissing it.

- Appeal is hereby dismissed as I affirm what the Court of Appeal decided in
- F** its own affirmation of the findings and conclusion of the trial court remitting the part of the award dealing with the issue of who paid the attorney's fees, back to the arbitrator for reconsideration and decision.

- I order the sum of N250,000.00 costs to be paid by the appellant to the
- G** respondent.

Mary Ukaego Peter-odili
Justice, Supreme Court

- H**
- KEKERE-EKUN, (JSC):** My learned brother, MARY PETER-ODILI, (JSC) obliged me with an advance copy of the judgment just delivered. I agree entirely with the reasoning and conclusion that the appeal lacks merit and should be
- I** dismissed.

- In the proceedings before the High Court of Lagos State, which gave rise to the instant appeal, the respondent, as claimant, filed an originating summons seeking to set aside part of an arbitral award or for an order remitting the part of
- J** the award complained of to the sole arbitrator arose out of a contract Service

- A** Agreement between the respondent, Chevron Nigeria Ltd, and Total Engineering Services Team Inc. (TEST) (the appellant herein) under which it (TEST) undertook to provide labour services to Chevron Nig. Ltd and other Chevron entities. One Mr. Danny Bufkin, an American citizen and employee of the
- B** appellant was abducted and kept in captivity for a period of 8 days while on official assignment. The respondent eventually secured his release upon the payment of a ransom.

- Mr. Bufkin instituted an action in the United States of America against the
- C** respondents on grounds of negligence. Both the respondent and the appellant eventually settled the matter out of court. Pursuant to the indemnity provisions in the Contract Service Agreement, the respondent sought reimbursement from the appellant in the sum of US\$232,249.66 being the amount expended by it in
- D** defence and settlement of the suit.

- An issue arose as to whether the appellant was liable to indemnify the respondent under certain clauses of the contract. The dispute was referred to the Sole Arbitrator for resolution wherein the said arbitrator published an award in
- E** favour of the respondent in the sum of US\$175,000.00 being the amount paid by the respondent to Mr. Bufkin in settlement of his claim against it. The arbitrator however refused the respondent's claim for reimbursement of attorney's fees of US\$232,249.66 for want of evidence in proof of that head of claim.

- F** It was the respondent's dissatisfaction with the award that led to the institution of the suit before the trial court by originating summons for an order setting aside that part of the award refusing the claim for reimbursement. The main ground for seeking the relief was that the arbitrator misconducted himself
- G** by taking a decision outside the scope of the issue for determination as formulated and agreed by the arbitrator and counsel to the parties.

- The circumstance in which the arbitrator was alleged to have misconducted himself was as regards his findings that the claimant (respondent
- H** herein) failed to prove that it actually paid the attorney's fees. It was contended before the High Court that the arbitrator raised the issue of proof of payment of attorney's fees *suomotu* without inviting the parties to address him on the issue and relied on grounds not canvassed by the parties.

- I** The High Court found and the lower court affirmed the finding, that the arbitrator indeed misconducted himself in the proceedings. The High Court ordered the matter remitted to the arbitrator to reconsider the part of the award complained of. The lower court affirmed the decision. The appellant is still
- J** dissatisfied with the concurrent findings of the two courts and has further

A appealed to this court.

The sole issue for determination in this appeal is whether the court below was right in dismissing the appeal and affirming the decision of the trial court.

B By virtue of Sections 29(2) and 30 of the Arbitrator and Conciliation Act, Cap A18 Laws of the Federation of Nigeria 2004, an arbitral award may be set aside in the following circumstances:

- (i) Where it is shown that the award contains decisions on matters which are beyond the scope of the submission to arbitration;
- C** (ii) Where the arbitrator misconducted himself;
- (iii) Where the arbitral proceedings or award has been improperly procured; or
- (iv) Where there has been an error of law in the face of the record.

D Some of the conduct which constitutes misconduct as a ground for setting aside an arbitral award are:

- (a) Where the arbitrator fails to comply with the terms, express or implied, of the arbitration agreement;
- E** (b) Where even if the arbitrator complies with the terms of the arbitration agreement, the arbitrator makes an award, which on grounds of public policy ought not to be enforced;
- (c) Where the arbitrator has been bribed or corrupted;
- F** (d) Technical misconduct, such as where the arbitrator makes a mistake as to the scope of the authority conferred by the agreement of reference. This does not mean that every irregularity of procedure amounts to misconduct;
- (e) Where the arbitrator or umpire fails to decide all the matters, which were referred to him;
- G** (f) Where the arbitrator or umpire has breached the rules of natural justice;
- (g) If the umpire has failed to act fairly towards both parties, as for example:-
 - (i) by hearing one party but refusing to hear the other; or
 - H** (ii) by deciding the case on a point not put by the parties (underlining mine for emphasis)

See: **A. Savoia Ltd. vs Sonubi (2000) 12 NWLR (Pt. 682) 539 @ 547 C-G;**

I Taylor Woodrow (Nig.) Ltd. vs Suddentsche Etna-Werk GMBH (1993) 4 NWLR (Ptr. 286) 127.

The complaint in his appeal hinges on the right to fair hearing, where it is alleged that the arbitrator raised and determined an issue *suomotu* without first

J hearing the parties and thereby misconducted himself.

- A** My lords, it was acknowledged by the arbitrator at page 155 of the record that the respondent (now appellant) did not deny payment by the claimant (now respondent) of the sum of US\$232,249.66 as legal fees but merely made a general denial in paragraph 10 of its points of defence. It was not in dispute that the
- B** appellant herein did not file a counter-affidavit to challenge the affidavit evidence of CW1, with exhibits attached, to the effect that the sum claimed was expended as attorney's fees. Though at page 155 of the record, he referred to the general principle of law as enunciated in **Meridien Trade Corporation Ltd. vs Metal**
- C** **Construction (W.A) Ltd. (1998) 4 NWLR (Pt.544) 1** to the effect that in a claim for an ascertained sum of money, a defendant must go beyond a bare denial and must be specific in his denial. That he must deny that he owes any part thereof or he must state what part if any that he owes, otherwise he would be deemed to have
- D** admitted the claim and the claimant would not be required to establish it by evidence.

- Curiously, in spite of the authority referred to, he proceeded to dissect the uncontroverted Exhibit CNLL5 relied upon by the respondent herein to contend
- E** that the client name on the invoice was Chevron Texaco Overseas Petroleum Inc. and not that of the respondent and therefore there was no proof that the respondent was the one who paid the attorney's fees and on that basis refused that head of claim. He did not proffer any reason for not following the authority he cited.

- F** The High Court per Adefope-Okojie, J. (as she then was) at pages 267-268 and at 269 of the record held:

- G** **“From the foregoing observations, it is my opinion that since the evidence of Mr. Boyo with regard to the claimant's payment of legal fees had not been contradicted and the witness found to be truthful, and since it was not an issue for resolution before the arbitrator as to whether it was the claimant or it's affiliates that**
- H** **paid the fees for which reimbursement was sought, the issue raised by the arbitrator of the fess not having been paid by the claimant, but by Chevron Texaco Overseas Petroleum Inc. and which issued led to the denial of a leg of the claim by the**
- I** **arbitrator, the same not having been raised by either party.**

- J** **The law is that where a judge decides to raise a point *suo motu*, it must, in the interest of justice, invite the parties, particularly the party that may be adversely affected as a result of the point**

A raised *suomotu*, to address it on such a point, before basing it's decision thereon.

B This was the decision of the Supreme Court, per Iguh JSC in the case of *Provisional Liquidator, Tapp Industries vs Tapp Industries (1995) 5 NWLR part 393 page 9 at page 41*.

His lordship continued:

C 'In the present case, the issue of the worthlessness of the said affidavit of inventory was raised for the first time by the court of appeal *suomotu*. It was neither canvassed by the parties in the trial court nor before the court below. With profound respect, the court below was in gross error by failing to give the parties an opportunity to address it on the status of the document before arriving at its decision on the worthlessness or otherwise of the said affidavit of inventory.

D

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F I hold likewise. The interest of justice dictates that since neither of the parties raised the issue as to which party paid the professional fees and since this was not canvassed by either party as an issue, the arbiter should have given the parties an opportunity to address him on the invoice of *Adams and Reese* before arriving at his decision.

G In the present case, the question of who paid the fees was never disputed either by the witnesses at the proceedings, or in the defendant's point of defence. The arbitrator, before he made a decision based thereon, should, I hold, have put the issue to the parties, the same not having emerged as a dispute between the parties.

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I Indeed in paragraph 622 of Halsbury's Laws of England supra "misconduct" was said to occur, as stated in clause (5) supra, where the arbitrator decides a case on a point not put to the parties.

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A I accordingly hold that the arbitrator misconducted himself by raising and determining *suomotu* the issue of who paid the fees in the suit instituted by Daniel Bufkins, without putting the same to the parties.”

B

The court below at page 326 of the record affirmed the above finding *intoto*. The appellant has failed to satisfy this court that the concurrent findings of fact by the two lower courts are perverse. I therefore decline to interfere with the decision of the court below.

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For these and the more elaborate reasons advanced in the lead judgment, I also find this appeal to be devoid of merit. It is accordingly dismissed. I abide by the consequential orders made in the lead judgment, including the order for costs.

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

E CENTUS NWEZE, (JSC): My lords, as shown in the leading judgement, what prompted the decision of the lower court, now on appeal before this court, was its judgment affirming an order of a Lagos State High Court which set aside the award of the sole arbitrator on the ground that the said arbitrator misconducted himself in the proceedings.

F

Although the Nigerian Arbitration and Conciliation Act consecrates the arbitrator's misconduct as a second ground for setting aside an arbitral award, the draftsman of the Act did not make any attempt to define this term of wide import, **Araka vs.Ejeagwu(2000) LPELR-533 (SC) 58; D-E, citing**

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Halsbury's Laws of England, paragraph 694.

What is more, the act exhibits a glaring lacuna as to the acts or omissions of an arbitrator which could be constitutive of misconduct on his part so as to necessitate the setting aside of his award, **Taylor Woodrow (Nig.) Ltd. vs. S-W.**

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GMBH Ltd (1993) LPELR – 3139 (SC) 14. In consequence, our courts have had to fall back on the common law to determine what constitutes misconduct, **Taylor Woodrow Nig Ltd vs. S. – W GMBH (supra); A. Savoia Ltd vs. Sonubi [2000] 7 SC (pt 1) 36; Kano State Urban Development Board vs. Fanz**

I

Construction Company Ltd (1990) 4 NWLR (Pt 142) 1; (1990) LPELR-1559 (SC) 63 64; G-C.

There is a snag, however, on this reliance on the common law. As acknowledge by the illustrious authors of the *Halsbury's Law of England*, under that system, quite apart from the difficulty in giving an exhaustive definition of

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A what may amount to misconduct on the part of an arbitrator, *Halsbury's Laws of England* (4th Edn.) Vol. 2, paragraph 622, pages 330 – 331; **Taylor Woodrow Nig Ltd v S.-W GMBH (supra) 15-16; paragraph A.**; there is:

B Much confusion [caused] by the fact that the expression 'misconduct' is used to describe both these quite separate grounds for setting aside an award, and it is not wholly clear in some of the decided cases on which of these two grounds the award has been set aside. However, on one or other of these grounds the expression includes on the one hand that which is misconduct by any standard, **C** such as being bribed or corrupted, and on the other hand mere 'technical' misconduct, such as making a mere mistake as to the scope of the authority conferred by the agreement of reference.

Halsbury's Laws of England (supra), cited in **Taylor Woodrow (Nig) Ltd vs. S.-W GMBH (supra) 15 – 16; paragraph A.**

Although, pursuant to section 68 of the English Arbitration Act, 1996, the ground of “misconduct of the arbitrator” has fallen into desuetude, see, D. S. Sutton *et al*, *Russel on Arbitration* (Twenty Third edition) (London. Sweet and **E** Maxwell, 2007) 332, Nigerian courts, still relying on such English cases like **Champsey Bhara and Co. vs. JivrajsBalloo Spinning and Weaving Co. (1923) A.C. 480; (1923) All E.R. Rep. 235, [per Lord Dunedin]; Animistic vs. Foreign Compensation Commission (1969) 1 All E.R. 208 at 213 etc., still** **F** **espouse the ten examples of misconduct highlighted in Halsbury's Laws of England (supra); see, for example, Nigeria Ports Authority. Panalpina World Transport [1973] 5 SC 77; Taylor Woodrow Nig Ltd vs. S.-W GMBH (supra); Kano State Urban Development Board vs. Fanz Construction** **G** **Company Ltd (supra); A. Savoia Ltd vs. Sonubi(supra) etc.**

In *Taylor Woodrow Nig Ltd vs. S.-W GMBH* (supra) 16-18; A-B, Ogundare, (JSC), quoted the ten examples where misconduct may occur, [as advanced by the illustrious authors of *Halsbury's Laws of England*] **H** **thus:**

(1) If the arbitrator or umpire fails to decide all the matters which were referred to him; (2) if by his award the arbitrator or umpire purports to decide matters which have not in fact been included in the agreement of reference; for example, where the arbitrator construed the lease (wrongly) **I** instead of determining the rental and the value of buildings to be maintained on the land; or where the award contains unauthorized directions to the parties; or where the arbitrator has power to direct what **J** shall be done but his directions affect the interests of third persons; or

- A** where he decided as to the parties' rights, not under the contract upon which the arbitration had proceeded, but under another contract; (3) if the award is inconsistent, or is ambiguous; or even if there is some mistake of fact, although in that case the mistake must be either admitted or at least be clear beyond any reasonable doubt; (4) if there has been irregularity in the proceedings, as, for example, where the arbitrator failed to give the parties notice of the time and place of meeting, or where the agreement required the evidence to be taken orally and the arbitrator received affidavits, or where the arbitrator refused to hear the evidence of a material witness, or where the examination of witnesses was taken out of the parties' hands, or where the arbitrator failed to have foreign documents translated or where, the reference being to two or more arbitrators, they did not act together, or where the umpire, after hearing evidence from both arbitrators received further evidence from one without informing or hearing the other or where the umpire attended the deliberations of the appeal board reviewing his award: (5) if the *arbitrator or umpire has failed to act fairly towards both parties*, as, for example, by hearing one party but refusing to hear the other, or by deciding in default of defence without clear warning, or by taking instructions from or taking with one party in the; absence of the other or by taking evidence in the absence of one party or both parties, or by failing to give a party the opportunity of considering the other party's evidence, or by using knowledge he has acquired in a different capacity in such a way as to influence his decision or the course of the proceedings, or by making his award without hearing witnesses whom he has promised to hear, or by deciding the case on point not put to the parties: (6) if the arbitrator or umpire refuses to state a special case himself or allow an opportunity of applying to the court for an order directing the statement of a special case; (7) if the arbitrator or umpire delegates any part of his authority, whether to a stranger or to one of the parties, or even to a co-arbitrator: (8) if the arbitrator or umpire accepts the hospitality of one of the parties, being hospitality offered with the intention of influencing his decision: (9) if the arbitrator or umpire acquires an interest in the subject matter of the reference, or is otherwise an interested party; (10) if the arbitrator or umpire takes a bribe from either party.

J In this appeal, the learned counsel for the respondent, in support of the position of the lower court, contended that the arbitrator was wrong when, *suomotu*, he raised

- A** and determined a question on which issues were neither joined in the pleadings nor affidavits, on the one hand; and on which neither evidence was taken nor were arguments canvassed in the written addresses, on the other hand. That question was: who paid the attorney's fees in defence of Bufkin's claims in the United States of America?

- B** There is considerable merit in this submission for it is now settled that, where a court [and here, I must add an arbitrator] raises an issue *suomotu*, the parties must be afforded the opportunity of offering arguments on it, **Odiase vs. Agho [1972] 3 SC 71; Adegoke vs. Adibi [1992] 5 NWLR (pt 242) 410; Atanda vs. Lakanmi [1974] 3 SC 109; Kraus T. Org. Ltd vs. UNICAL [2004] 25 WRN 1, 17. Indeed, a violation of this canon is an invasion of the right to fair hearing, Oje vs. Babalola [1991] 4 NWLR (pt. 185) 267; Ugo vs. Obiekwe (1989) 1 NWLR (Pt. 99) 566. It has, actually, been elevated to a miscarriage of justice, Owoso vs. Sunmonu [2004] 30 WRN 93, 106-107, Ojo vs. Anibire [2004] 5 KLR (pt 177) 1205, 1207, Wilson vs. Wilson (1969) ALR 191.**

- D** Against this background, therefore, I endorse the decision of the lower court. I find no merit in the appellant's complaint in this appeal. Appeal dismissed. I abide by the consequential orders in the leading judgment.

ChimaCentusNweze
Justice, Supreme Court

- F** **EJEMBI EKO, (JSC):** I read in draft the judgment just delivered in this appeal by my learned brother, MARY UKAEGO PETER-OILI, JSC. The judgment represents my views in the appeal, and I hereby adopt it, including all the consequential orders made herein.

- G** The issue before the Court of Appeal (the court below) was whether the arbitrator misconducted himself by his failure to comply with the express or implied terms of the arbitration. In the case of **BAKER MARINE (NIG.) LTD vs. CHEVRON (NIG.) LTD. (2000) 12 NWLR (pt. 681) 393** the Court of Appeal, citing with approval the English case **LONDON EXPERT CORPORATION LTD. vs. JUBILEE COFFEE ROASTING CO. LTD. (1958) 1 ALL E.R. 494**, held that the failure of an arbitrator to comply with the terms of an arbitration agreement amounts to misconduct on his part. See also **HALSBURY'S LAWS OF ENGLAND, para. 622 at page 330.**

- I** The concurrent findings of the trial court and the court below, on whether the arbitrator went outside his mandate by raising *suomotu* the issue of who paid the attorney's fees without giving the parties an opportunity to comment on it, are

- A** that the arbitrator had gone outside his mandate and thereby misconducted himself. I agree with them. The imperatives of fair hearing, which have been incorporated into Section 36(1) of the 1999 Constitution, are that a body discharging a judicial or quasi-judicial function, as the arbitrator, shall give each
- B** party before it an opportunity to be heard on any issue so calling for a decision or determination, and that the body shall, throughout the proceedings before it remain neutral or impartial. For these imperatives of fair hearing, whenever a judicial body, arbitrator or umpire raises an issue, *suo motu*, the parties must be
- C** given an opportunity to be heard on such issue.

In consequence of misconduct by the arbitrator the court has powers to set aside his award, and remit or return the award published to the arbitrator for the error to be corrected either on the existing facts or further facts. See

- D** **HALSBURY'S LAWS OF ENGLAND (supra); BAKER MARINE (NIG.) LTD. vs. CHEVRON (NIG.) LTD. (supra) at P. 412** per Aderemi, JCA(as he then was).

- Appeal dismissed. The order made by the trial court and the Court of
- E** Appeal remitting the part of the award published for reconsideration and possible correction are hereby affirmed.

**Ejembi Eko,
Justice, Supreme Court**

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RAYMOND EZE

(For himself and on behalf of UmuonugboEze family of Idedu Amokwe in Udi Local Government Area)

AND

1. BETRAMENE

2. SIMONENE

*(For themselves and on behalf
Of the members of Umuonugbo
Family of Idedu Amokwe in Udi
Local Government Area)*

RESPONDENTS

SC.295/2006

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

FRIDAY 10TH MARCH, 2017

BEFORE THEIR LORDSHIPS

**OLABODE RHODES-VIVOUR
MUSADATTIJO MUHAMMAD
CLARA BATA OGUNBIYI
CHIMACENTUS NWEZE
AMIRUSANUSI**

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

COURT: Amendment – Duty of court thereto

COURT: Concurrent findings of facts by two lower courts – Attitude of Supreme Court thereto.

COURT: Power of court in respect of admissibility of the testimony of a witness in a former proceedings – Power under S. 46(1) of the Evidence Act – How exercised.

EVIDENCE: Admissibility of testimonies of witnesses in previous proceedings – Necessity for proper foundation.

EVIDENCE: Conditions for the admissibility of the testimony of a witness in a previous proceedings – Section 46(1) of Evidence Act – Imperatives of.

PRACTICE AND PROCEDURE: Rationale for amendment – Order 8 Rule 1 High Court (Civil Procedure) Rules of Anambra State 1988 – Considerations thereof.

PRACTICE AND PROCEDURE: Where court allowed amendment of statement of defence at the close of evidence – Options available to plaintiff

PRACTICE AND PROCEDURE: Stages in proceedings when applications for amendment can be granted – Relevant principles.

PRACTICE AND PROCEDURE: When amendment will be refused – Guiding principles.

STATUTE: Section 46(1) of Evidence Act 2011 – Considerations thereof.

Issues for Determination

- 1. Whether the learned justices of the court of appeal were right in law in upholding the decision of the High court granting a fundamental amendment to the statement of defence after the close of the cases for the parties; and whether same resulted in a denial of fair hearing to the appellant.**
- 2. Whether the learned justices' of the court of appeal were right in law in affirming the trial judge's rejection of exhibit 1.**

Facts of the Matter

The appellant as plaintiff sued the respondents' as defendants' on a writ of summons accompanied by statement of claim. The writ of summons states the plaintiff's claims as follows:

- “13. WHEREOF the plaintiff claims against the defendants jointly and severally as follows:**
 - (a) Declaration that the plaintiff is entitled to the Customary Rights of Occupancy to the land indispute.**
 - (b) N1,000.00 (One thousand naira) damages for trespass.**

(C) Perpetual injunction restraining the defendants', their servants agents and privies from further entering the land without the consent of the plaintiff.

At the trial the issue of the admissibility of previous testimonies of witness was contested. The trial court granted an amendment to the statement of defence at the close of evidence. At the end of trial the 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. *The rationale for amendment.*

Order 8 Rule 1 of the High court (Civil procedure Rules) of Anambra State provides for amendment of pleadings for the purpose of determining the real question/s in controversy between the parties. A party's case is in his pleadings and his case is proved by evidence. A party is thus bound by his pleadings, and so evidence which is contrary to his pleadings go to no issue. [*Emegokwe vs. Okadigbo 1973 4 SC p.113*].

The statement of claim and statement of defence are thus, are very important processes in all proceedings. (P 478 paras D–E)

2. *Stages in proceedings when amendment can properly be granted*

Usually there are two stages in proceedings when a party can apply to amend his pleadings, and in each of the stages different considerations apply.

Before trial an application to amend or add to particulars would be granted if made at a reasonable time before trial but would not be allowed if the amendment would introduce a new cause of action. Before the close of evidence and after the close of evidence amendments would be allowed if evidence on it, is already on record. An amendment would be allowed to make pleadings fall in line with evidence already on record. The reasoning being that the amendment should be allowed so that the court would be at liberty to use evidence already on record to resolve the real issues in dispute.

(P 478 paras E–H)

3. *When an amendment can be made*

The general principle of law is well settled that an amendment of pleadings can be made at any time, before judgment. However, and notwithstanding the

wide latitude, the intention is not to leave the consideration open-ended and without proper control so as to create a flood gate of an abuse of discretion.

The case of **Imonikhe vs. A.G. Bendel State (1992) 7 SCNJ 197 at 207 – 208 per Nnaemeka – Agu, JSC** is relevant wherein this court said:

“Although, by the rules, an amendment to the pleadings can be made at any stage of the proceedings, different considerations apply depending on whether the amendment is being sought before or after the close of the evidence by the parties. Before the close of evidence, such amendments are allowed to make such evidence as may be called admissible, as any evidence on an issue which was not pleaded or a claim not on the record is strictly inadmissible. But once the calling of evidence has been concluded, any amendment of the pleadings or claim can be justified or allowed only on the premise that evidence in support of it is already on record, so it is necessary and in the interest of justice to allow the amendment in order to make the pleadings or the claim accord with the evidence already on record. The rationale of it is that such amendment should be allowed to enable the court to use the evidence already on record to settle the real issue in controversy between the parties.”

(Pp 482 – 483; 484 paras I–E)

4. *When amendment of pleadings will not be allowed*

Application for amendments of pleadings would not be allowed where if granted it would entail injustice to the other party, where the applicant is acting in bad faith or where the applicant has done some injury by his blunder which cannot be compensated by costs. [**Ojah & ors vs. Ogboni & ors (1976) 10 NSCC p.244**]. *(P 478 paras H–I)*

5. *Duty of court on amendment*

In view of all that I have been saying the courts would readily allow an applicant to amend a defect in his pleading rather than give judgment in ignorance of facts which ought to be known before rights are finally decided.

The amendments to the defendants' pleadings in paragraphs 4, 5 and 7 became necessary after the defendants witnesses particularly DW3 (the surveyor) by their testimony gave a clearer picture of the land in dispute. The defendants plan exhibit 4, shows that the land in dispute is called **“ISHIOWELLEUMUENOV OALI”** by the defendant and **OKOTO** land is

also separately owned. The amendment was to bring the pleadings in line with the evidence already given and so would be of tremendous assistance for the purpose of resolving the real dispute between the parties. Furthermore, the appellants' cannot complain of being denied fair hearing since their learned counsel was never denied the right to cross-examine the defendants' witnesses, and he did cross-examine them. He cross-examined DW3 on these amendments (see page 46 of the Record of Appeal).

Per Ogunbiyi (JSC)

“Relevant to this appeal is to determine the nature of the amendment sought for. This I say, because the duty of a court as an arbiter is to act for the benefit of all parties. It follows therefore that an amendment which will serve the interest of the justice of the case is beneficial to all parties and should be allowed and granted.

The caveat however is also true that if an amendment is sought either in bad faith, for purpose of undermining the case of the opponent or is simply done with the intention of giving the party seeking same to have a second bite at the cherry, then such should not be allowed.

Finally the learned CJ after hearing arguments for and against the application to amend the defendants' pleadings said:

“Objection Overruled.”

That means that the application to amend the defendants' pleadings is granted. If learned counsel for the plaintiff felt that by the amendment he was denied fair hearing he ought to have made an application to effect consequential amendments to his pleadings and ask for a date to recall witness/s for cross-examination on the amendment granted.

“On the said date *20th February, 1991* when the trial court granted the amendment sought by the respondents, the appellants' counsel was in court. The counsel, did not deem it necessary to seek for consequential amendments to his pleadings if any, following the order of the court. He did not also seek for an adjournment to enable him recall any of the witnesses for purpose of being cross-examined, based on the amendment granted.

The presumption I hold, was because the appellant knew that the amendment granted was solely to bring the evidence before the court in line

with the pleadings. It is also for this court to effectually and effectively determine the real issues in dispute between the parties. There was no further adduce of additional evidence by the respondent after the amendment was granted. The appellant, as rightly submitted by the respondent, did not produce any evidence considered as either injurious or a denial of fair hearing to the appellant, who had also closed his case.

(Pp 478–479; 481; 485; 481; 487 paras I–A; B–E; G–I; E–G; A–D).

6. *The implication of the amendment granted by the learned chief judge*
The amendments granted by the learned chief judge of Anambra State did not require further evidence or recall of witnesses. Once again the amendments were granted to bring evidence already given in line with pleadings. The Court of Appeal was correct. (P 481 paras G–H).
7. *The principles laid down in S.46(1) of Evidence Act 2011*
Section 34 (1) of the Evidence Act Cap E14 Laws of Federation of Nigeria, 2004, (now repealed) is now section 46(1) of the Evidence Act 2011. The section lays down the conditions under which secondary evidence of the testimony of a witness given in a former proceeding, be it civil or criminal is admissible in a subsequent proceedings, or in a later stage of the same proceedings. This is premised on the position of the law that the best evidence available must always be produced and used by the courts so that the rights of litigants are correctly decided.
The power under section 46(1) must at all times be exercised with great caution. For instance death or incapability to give evidence must be proved strictly and the onus of proving that a witness is dead or cannot be found is on the party who wishes to rely on the evidence. (P 482 Paras G–I).
8. *Conditions for the admissibility of a witness's testimony in a previous proceedings*
The following conditions must be fulfilled before a previous testimony can be admitted in evidence. Once any of them is absent the evidence to be relied on would be inadmissible.
 1. **The evidence must have been given in a judicial proceeding.**
 2. **The first proceeding must be between the same parties as the second proceeding and the identity of the parties in the two proceedings must be substantial and not nominal.**
 3. **The party against whom the testimony is tendered must have had**

- the opportunity of cross-examining the witness when his testimony was taken;**
- 4. The issue in both proceedings must be the same or substantially the same.**
 - 5. The witness must be incapable of coming to court in the subsequent proceeding on account of death, or incapability of giving evidence, or prevented from coming to court by the adverse party, or bringing him to court would entail huge expense or unreasonable amount of delay. [*Ikenye & Anor v Ofune & ors (1985) 16 NSCC (Pt.1) p.379*].**

I am satisfied that the first to third witnesses are able to come to court and so do not come under section 46(1) of the Evidence Act, neither was sufficient evidence laid for the admissibility of their evidence. Despite the fact that the judge rejected Exhibit 1, His lordship still relied on it and found it worthless. Once again both courts were correct in rejecting Exhibit 1.
(Pp 482 – 483; 484 paras I – D; G – H).

9. *The Supreme Court is slow to upset the concurrent findings of two lower courts*

This court is slow to upset concurrent findings of facts of the trial court and the Court of Appeal but would be quick to upset 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. *Ilodigwe vs. State (2012) 5-7 SC (Pt.II) p.143*.

The finding of fact by the trial court is that the defendant is entitled to the customary right of occupancy of the land in dispute. A fact affirmed by the Court of Appeal. By no stretch of imagination has learned counsel for the appellant been able to show that the finding is perverse, or cannot be supported from the evidence led or that there was miscarriage of justice or violation of some principle or law or procedure. Concurrent findings of facts are in the circumstances correct. (Pp 484 – 485 paras I – B).

Nigerian Cases Cited

Emegokwe vs. Okadigbo (1973) 4 SC p.113].

Ikenye & Anor vs. Ofune & ors (1985) 16 NSCC (Pt.1) p.379.

Ilodigwe vs. State (2012) 5-7 SC (Pt.II) p.143.

Imonikhe vs. A.G. Bendel State (1992) 7 SCNJ 197

A *Ojah & ors vs. Ogboni&ors (1976)10 NSCC p.244*].

Statutes Cited

The Evidence Act 2011.

B The Evidence Act Cap E14 Laws of Federation of Nigeria, 2004, (now repealed)

The High Court (Civil procedure Rules) of Anambra State

C Representations

T. MADUKA for the Appellant with him, E. Ehiane

ALEX EJESIEME for the Respondent.

D **RHODES-VIVOUR, (JSC) (Delivering the Lead Judgment):** The appellant as plaintiff sued the respondents' as defendants' on a writ of summons accompanied by statement of claim.

Paragraph 13 of the Statement of claim states the plaintiff's claim. It reads:

E

13. **WHEREOF the plaintiff claims against the defendants jointly and severally as follows:**

F

(a) **Declaration that the plaintiff is entitled to the Customary Rights of Occupancy to the land in dispute.**

G

(b) **N1,000.00 (One thousand naira) damages for trespass.**

(C) **Perpetual injunction restraining the defendants', their servants agents and privies from further entering the land without the consent of the plaintiff.**

H

The plaintiff relied on their statement of claim filed on 30th May 1983.

I Trial commenced at, one time or the other before the judges who were unable to hear the case to the end. Finally trial commenced on 4th February, 1991 before the Hon. Justice P.K. Nwokedi (CJ Anambra State as he then was). Three witnesses were called by the plaintiff in proof of his case.

On 15th February, 1991 the defendants opened their defence, relying on their statement of defense, filed on 9th September 1983.

J

The defendants called four witnesses and on 18th February, 1991 after DW

A 4 concluded his evidence, filed an application to amend their statement of defence. This application was opposed by the plaintiff. The learned chief judge heard arguments and ruled as follows:

B **Court “Objection is overruled. I shall give reasons in my judgments. Amendments are here by granted as prayed.”**

C Four documents were admitted in evidence as exhibits. They are:

1. **Exhibit 1 - Certified copy of records of proceedings is suit No. E/113/77**
- D 2. **Exhibit 2 - plan No MEC/12/18/78**
3. **Exhibit 3 - Judgement is criminal case.**
4. **Exhibit 4 Plan No. MLS/2311/83.**

E The learned chief judge delivered judgement on 21st march 1991 dismissing the plaintiff's claims. The plaintiff filed an appeal. It was heard by the Enugu division of the Court of Appeal. That court dismissed the appeal. On a further and final appeal to this court and in accordance with Rules of court both sides filed briefs of arguments. The appellant's brief was filed on 17th may, 2012, but was deemed duly filed and served on 1st November, 2016. The respondents' brief was filed on 3rd November, 2016. Learned counsel for the appellant's Mr. T. Maduka formulated two issues from his amended notice of appeal. They are:

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ISSUE1

Whether the learned justices of the Court of Appeal were right in law in upholding the decision of the High court granting a fundamental amendment to the statement of defence after the close of the cases for the parties; and whether same resulted in a denial of fair hearing to the appellant.

I **ISSUE 2**

Whether the learned justices' of the court of Appeal were right in law in affirming the trial judge's rejection of exhibit 1.

Learned counsel for the respondents' Mr. A. Ejiesime also formulated two issues

J for determination of this appeal. They read:

A

ISSUE 1

Whether the court below was right in affirming the decision of the trial court which allowed the amendment sought by the respondents'.

B

ISSUE 2

Whether the court below was right in affirming the decision of the trial court in the rejection of Exhibits 1.

C

Both sets of issues ask the same question, so the issues formulated by the appellant would be considered in resolving this appeal.

D At the hearing of the appeal on 13th December, both sides adopted their briefs. Learned counsel for the appellant urged us to allow the appeal, while learned counsel for the respondents' urged the opposite.

ISSUE 1

E **Whether the learned justices' of the Court of Appeal were right in law in upholding the decision of the high court granting a fundamental amendment to the statement of defence after the close of the cases for the parties; and whether same resulted in a denial of fair hearing to the appellant?**

Learned counsel for the appellant observed that the respondents' case had always been that their land "Ishi Owelle Umunevoali" is situate within a larger piece of land called "Okoto" but by the amendment their case changed in that "Ishi Owelle Unmunevoali" now borders the Idedu Amokwe section of "Okoto" land. He further observed that by the said amendment the respondents substituted their original survey plan No. NLS/AN/234/83 with a new survey plan No. NLS/AN/2311/83, thereby denying the appellant the right to cross-examine the respondents since they had closed their case. Reliance was placed on *Imonikhe vs. Ag Bendel Stat (1992) 7SCNJp.197*.

I He submitted that granting the amendment at such a belated stage of the proceeding amounted to a denial of fair hearing. Reference was made to *C.IAdetutu vs. W.O. Aderohunmu & ors (1984) 6SCp.92*.

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

J Learned counsel for the respondents' observed that the amendment was granted solely to bring the evidence before the court in line with the pleadings. He

- A further observed that he closed the respondents' case with the grant of the amendment as no further evidence was called. He argued that if the appellant felt that he was denied a fair hearing he could have made application to effect consequential amendments to his pleadings and ask for an adjournment to recall the witness for further cross examination. Reliance was placed on *Emegokwue vs. Okadigbo (1973) 1 ALL NLR (Pt.1)p. 379; Obijuanu vs. Ozims (1985)2 NWLR (Pt.6)p.167.*

- He submitted that the appellant was not denied fair hearing. He urged this court to resolve the issue against the appellant and in favour of the respondents'

- Order 8 Rule 1 of the High court (Civil procedure Rules) of Anambra State provides for amendment of pleadings for the purpose of determining the real question/s in controversy between the parties. A party's case is in his pleadings and his case is proved by evidence. A party is thus bound by his pleadings, and so evidence which is contrary to his pleadings goes to no issue. See *Emegokwe vs. Okadigbo 1973 4 SC p.113*

- The statement of claim and statement of defence are thus, are very important processes in all proceedings. Usually there are two stages in proceedings when a party can apply to amend his pleadings, and in each of the stages different considerations apply.

- Before trial an application to amend or add to particulars would be granted if made a reasonable time before trial but would not be allowed if the amendment would introduce a new cause of action. Before the close of evidence and after the close of evidence amendments would be allowed if evidence on it, is already on record. An amendment would be allowed to make pleadings fall in line with evidence already on record. The reasoning being that the amendment should be allowed so that the court would be at liberty to use evidence already on record to resolve the real issue in dispute.

- Application for amendments of pleadings would not be allowed where if granted it would entail injustice to the other party, where the applicant is acting in bad faith or where the applicant has done some injury by his blunder which cannot be compensated by costs. See *Ojah & ors vs. Ogboni & ors (1976)10 NSCC p.244*

- In view of all that I have been saying the courts would readily allow an applicant to amend a defect in the pleading rather than give judgment in ignorance of facts which ought to be known before rights are finally decided.

- At the close of re-examination of the defendants final witness, DW4 on 18th February, 1991 learned counsel for the defendants' informed the court that he has

A a motion to amend the statement of defence. Hearing of the application was fixed for 20th February, 1991. The learned CJ heard arguments, overruled the objection and said that reasons would be given in the judgment.

Now, what were the amendments?

B Amendments were made to paragraphs 4, 5 and 7 of the statement of defence.

In the original statement of defence paragraphs 4, 5 and 7 run as follows:

- C** 4. The defendants' deny paragraph 6 of the statement of claim. The land in dispute is situate within a larger piece of land called "OKOTO" which has boundary with Udi Obinagu and Umuabi. This Okoto land is "Agu" land (that is farm land in the out-skirt of the town) and each of the three towns referred to in this paragraph has its own Okoto. The land in dispute is situate in Idedu Amokwe section of Okoto land.
- D**
- E** 5. The defendants' deny paragraph 7 of the statement of claim. The land in dispute with its boundaries and features are as shown in plan No. NLS/AN/234/83 filed with this defence.
- F** 7. Standing on the Enugu/Onitsha road and facing the wall, all the land on the right including the land in dispute belong to the defendants while the land on the left hand side belong to the plaintiff. The defendants' call their land at "OKOTO ISHIOWELEUMUNEUO ALI" of which the land in dispute is a part. Paragraph 8 of the statement of claim is denied."

G With the amendments to the statement of defence granted, paragraphs 4, 5 and 7 of the statement of defence now reads:

- H** 4. "The defendants' deny paragraph 6 of the statement of claim. The land in dispute borders a larger piece of land called "OKOTO" which has boundary with Udi Obinagu and Umuabi. This Okoto land is "Agu" land (that is farm land in the outskirts of the town) and each of the three towns referred to in this paragraph has its own OKOTO. The land in dispute is borders Idedu Amokwe section of Okoto land.
- I**
- J** 5. The defendants deny paragraph 7 of the statement of claim. The land in dispute with its boundaries and features are as

- A** **shown in plan No. NLS/AN2311/83 filed with this defence.**
- 7** **Standing on the Enugu/Onitsha road and facing the wall, all the land on the right including the land in dispute belong to the defendants while the land on the left hand side belong to the plaintiff. The defendant call their land “ISHIOWELEUMUNEVO ALI” of which the land in dispute is a part. Paragraph 8 of the statement of claim is denied.”**
- B**
- C** What did the Court of Appeal have to say on these amendments? The court said:
- “...The amendment granted by the trial court did not require further evidence or recall of witnesses. It was merely to bring the evidence already given in line with the pleadings.”**
- D**

Was The Court of Appeal Correct?

- After the defendants' witnesses led evidence on the correct identity of the land, their counsel applied to amend paragraph 4 of the statement of defence so that Plan NLS/AN2311/83 is admitted in evidence as an exhibit. It was admitted as exhibit 4. Thereafter learned counsel for the plaintiffs/appellants. Mr. Kalu cross-examined the defence witness. (See page 46 of the Record of Appeal),
- E**

- F**
- Question: Was there a boundary wall between Umuanagu and The defendants?**

Answer: No.

- G** **Question: What was the land called?**

Answer: Ishi Owelle Umuenovo Ali-part of which is in dispute.

Question: Were there houses in the area in dispute at the time of survey?

Answer: No.

- H** **Question: Were you shown the land of Eze Nwachiwe?**

Answer: No.

Question: And Ene Nwene?

Answer: No

- I** **Question: Did you see the plaintiffs' plan before you made your own?**

Answer: No.

Re-examination: Nil.

- J** **Court to Witness: The area in dispute in exhibit 1 is not the same as the area**

A in Exhibit 4 would that be correct

Answer: It is so my lord.

- B** The amendments to the defendants' pleadings in paragraphs 4, 5 and 7 became necessary after the defendants witnesses particularly DW3 (the surveyor) by their testimony gave a clearer picture of the land in dispute. The defendants plan exhibit 4, shows that the land in dispute is called “**ISHIOWELLEUMUENOVO**
- C** **ALI**” by the defendant and **OKOTO** land is also separately owned. The amendment was to bring the pleadings in line with the evidence already given and so would be of tremendous assistance for the purpose of resolving the real dispute between the parties. Furthermore, the appellant's cannot complain of being
- D** denied fair hearing since their learned counsel was never denied the right to cross-examine the defendants' witnesses, and he did cross-examine them. He cross-examined DW3 on these amendments (see page 46 of the record of appeal).

Finally the learned CJ after hearing arguments for and against the

E application to amend the defendants' pleadings said:

“Objection Overruled.”

- F** That means that the application to amend the defendants' pleadings is granted. If learned counsel for the plaintiff felt that by the amendment he was denied fair hearing he ought to have made an application to effect consequential amendments to his pleadings and ask for a date to recall witness/s for cross-examination on the
- G** amendment granted. The amendments granted by the learned chief judge of Anambra State did not require further evidence or recall of witnesses. Once again the amendments were granted to bring evidence already given in line with pleadings. The Court of Appeal was correct.

H

ISSUE 2

Whether the learned justices of the Court of Appeal were right in law in affirming the trial judge's rejection of exhibit 1.

I

Exhibit 1 is a certified true copy of records of proceedings in suit No. E/113/77. On 5th February, 1991 learned counsel for the plaintiff relying on section 34(1) of the Evidence Act, now section 46(1) of the Evidence Act 2011, applied to tender a

J certified copy of records of proceedings in suit No. E/113/77. Suit No. E/113/77

- A** and this suit are the same. Suit No. E/113/77 was never concluded. It was learned counsel for the plaintiffs' desire to rely on the witness testimony in suit No. E/113/77 in this suit since according to him he no longer could trace the witnesses. The learned Chief Judge (trial Judge) admitted certified true copy of proceedings
- B** in suit No. E/113/77 as exhibit 1. However in his lordships judgment he rejected exhibit 1. The Court of Appeal agreed with the trial high court.

- Learned counsel for the appellant observed that witnesses to wit. Mrs. Nwadiuko Aneke, Mr. John Onyia, Mr. Okoli Ezeonyia who gave evidence in suit
- C** No. E/113/77 were either dead or could not be traced, contending that their testimony in suit No. E/113/77 ought to have been admitted in this suit.

Reliance was placed on *C. Akunne vs. M. Ekwuno & ors (1952) 14 WACA p.59; A. Alade vs. S. Olukade (1976) 6 SC p.183.*

- D** Concluding he submitted that the Court of Appeal was in error affirming the rejection of exhibit 1 by the trial court.

- Opposing, learned counsel for the respondents' observed that after PW1 gave evidence it was clear that **Emmanuel Eze, Okoli Ezeonyia, and John**
- E Onyia** were available to give evidence as where they reside was known. He further observed that PW1 who tendered exhibit 1 is a total stranger and had no nexus with exhibit 1.

- Concluding he submitted that the learned chief judge was right not to
- F** ascribe any probative value to exhibit 1 and the Court of Appeal was right to affirm the trial court's decision. Section 34 (1) of the Evidence Act Cap E14 Laws of Federation of Nigeria, 2004, (now repealed) is now section 46(1) of the Evidence Act 2011. The section lays down the condition under which secondary
- G** evidence of the testimony of a witness given in a former proceeding, be it civil or criminal is admissible in a subsequent proceedings, or in later stage of the same proceedings. This is premised on the position of the law that the best evidence available must always be produced and used by the courts so that the rights of
- H** litigants are correctly decided. The power under section 46(1) must at all times be exercised with great caution. For instance death or incapability to give evidence must be proved strictly and the onus of proving that a witness is dead or cannot be found is on the party who wishes to rely on the evidence.

- I** The following conditions must be fulfilled before a previous testimony can be admitted in evidence. Once any of them is absent the evidence to be relied on would be inadmissible.

- J** **1. The evidence must have been given in a judicial proceeding.**

- A** 2. The first proceeding must be between the same parties as the second proceeding and the identity of the parties in the two proceedings must be substantial and not nominal.
- B** 3. The party against whom the testimony is tendered must have had the opportunity of cross-examining the witness when his testimony was taken;
4. The issue in both proceeding must be the same or substantially the same.
- C** 5. The witness must be incapable of coming to court in the subsequent proceeding on account of death, or incapability of giving evidence, or prevented from coming to court by the adverse party, or bringing him to court would entail huge expense or unreasonable amount of delay. See *Ikenye & Anor vs. Ofune & ors (1985) 16 NSCC (Pt.1) p.379*.
- D**

Agreeing with the trial court, that the Court of Appeal was right in affirming the decision rejecting exhibit 1 the Court of Appeal said:

- E**
- F** “When exhibit 1 was tendered by the appellant with the consent of the respondent no attempt whatsoever was made to fulfill the conditions prescribed by this section of the Evidence Act as a foundation for the admissibility.

- G** The trial chief judge was right in holding that the document was inadmissible. To do that he did not require to recall the parties to address him as this was purely a matter of law which he was competent to pronounce on. The learned chief judge out of abundant caution took a look at exhibit 1, evaluated it and came to the conclusion that it did not assist the appellant prove his claim....”
- H**

In a bid to find out if the witnesses that gave evidence in suit No. E/113/77 – Exhibit 1 were available and able to attend court to give evidence, PW1 was recalled. His cross-examination is on page 38 of the record of appeal. It runs as follows:

- I**
- Question:** Do you know where Emmanuel Eze Lives?
- Answer:** Yes.
- J**

- A Question:** Okoli Ezeonyia is a wine tapper?
Answer: He is an Artist. He does tap palm wine. He is wood carver and makes hoes.
- Question:** He is still carrying on with the above activities?
B Answer: Yes as much as he can
- Question:** If you get him a vehicle he can travel to Enugu?
Answer: Yes.
- Question:** Did you know John Onyia left for the North?
C Answer: No.
- Question:** He came home last Christmas
Answer: Yes I saw him.
- Question:** His relations know where he is in the North.
D Answer: Yes.

PW1 gave evidence to justify admitting the evidence of witnesses in exhibit 1 in this proceeding. He made a poor attempt.

- E** John Onyia according to him, travelled to the North of the country and came home for Christmas. His relations and friends know where he is. Under cross-examination it is clear that no attempt was made to get him to come to court. Emmanuel Eze was absent from court. The witness said he knows where he lives.
- F** The third witness is Okoli Ezeonyia who is alleged to be advanced in age and so could not attend court but is still able to carry on his trade as a palm wine tapper and wood carver. He admitted that if a car is provided he would be brought to court.

- G** The death of Nwachuke Aneke was not strictly proved.

I am satisfied that the first to third witnesses are able to come to court and so do not come under section 46(1) of the Evidence Act, neither was sufficient evidence laid for the admissibility of their evidence. Despite the fact that the trial judge rejected exhibit 1, his lordship still relied on it and found it worthless. Once again both courts were correct rejecting exhibit 1.

- H** Finally, I must observe that this court is slow to upset concurrent findings of fact of the trial court and the Court of Appeal but would be quick to upset 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 *Ilodigwe s.v State (2012) 5-7 SC (Pt.II) p.143*.

- I** The finding of fact by the trial court is that the defendant is entitled to the customary right of occupancy of the land in dispute. A fact affirmed by the Court
- J**

A of Appeal. By no stretch of imagination has learned counsel for the appellant been able to show that the finding is perverse, or cannot be supported from the evidence led or that there was miscarriage of justice or violation of some principle or law or procedure. Concurrent findings of facts are in the circumstances correct.

B In the end, there is no merit in this appeal.
Appeal dismissed.

Olabode Rhodes-vivour
Justice Supreme Court

C **DATTIJO MUHAMMAD, (JSC):** Having read in draft the lead judgment of my learned brother Rhodes-Vivour (JSC), I entirely agree with his lordship's reasoning and conclusion, which I hereby adopt as mine, that the appeal lacks
D merit.

I dismiss the appeal and abide by the consequential orders made in the lead judgement.

Musa Dattijo Muhammad
Justice, Supreme Court

E **BATAOGUNBIYI, (JSC):** My learned brother Hon. Justice Rhodes-Vivour, (JSC) has done adequate justice to the two issues raised in his appeal. I
F have had the privilege of reading his draft judgment, I agree with him that the appeal is devoid of any merit and should be dismissed. I therefore adopt his judgment as mine.

However, for purpose of emphasis, I will deem it pertinent to put in my few
G words.

Relevant to this appeal is to determine the nature of the amendment sought for. This I say, because the duty of a court as an arbiter is to act for the benefit of all parties. It follows therefore that an amendment which will serve the interest of the
H justice of the case is beneficial to all parties and should be allowed and granted.

The caveat however is also true that if an amendment is sought either in bad faith, for purpose of undermining the case of the opponent or is simply done with the intention of giving the party seeking same to have a second bite at the
I cherry, then such should not be allowed.

The general principle of law is well settled that an amendment of pleadings can be made at any time, before judgement. However, and notwithstanding the wide latitude, the intention is not to leave the consideration open-ended and
J without proper control so as to create a flood gate of an abuse of discretion. The

A case of **Imonikhe vs. A.G. Bendel State (1992) 7 SCNJ 197 at 207 – 208 per Nnaemeka Agu, JSC** is relevant wherein this court said:

B “Although, by the rules, an amendment to the pleadings can be made at any stage of the proceedings, different considerations apply depending on whether the amendment is being sought before or after the close of the evidence by the parties. Before the close of evidence, such amendments are allowed to make such evidence as may be called admissible, as evidence on an issue which was not pleaded or a claim not on the record is strictly inadmissible. But once the calling of evidence has been concluded, any amendment of the pleading or claim can be justified or allowed only on the premise that evidence in support of it is already on record, so that it is necessary and in the interest of justice to allow the amendment in order to make the pleadings or the claim accord with evidence already on record. The rationale of it is that such amendment should be allowed to enable the court to settle the real issue in controversy between the parties.”

Parties are enjoined and must be aware that instituting an action must first require great consideration and caution. This should give a cause for careful and proper planning.

It is pertinent to say that by the very nature of the amendment sought for, same did not require calling for further evidence. It was merely to bring the evidence already given before the court and on record, to proper perspective. The intention is to lay before the court the entire facts for purpose of doing justice to the cases in question and eventually to all the parties involved.

It is the submission of the appellant's counsel that the situation created by the order of court allowing the amendment at such a belated stage of the proceedings amended to a denial of a fair hearing to the appellant in the conduct of the proceeding. This, learned counsel submits have unfairly prejudiced his case. Counsel sites in support the case of ***George & Ors vs. Dominion Flour Mills Ltd.***

The issue at hand is whether, the court below was right in affirming the decision of the trial court which allowed the amendments sought by the respondents.

Learned trial judge on the **20th of February, 1991**, granted the amendment sought by the respondents and reserved his reasons until the judgment which was

A eventually given on the **21st of March, 1991**.

On the said date **20th February, 1991** when the trial court granted the amendment sought by the respondents, the appellant's counsel was in court. The counsel, did not deem it necessary to seek for consequential amendments to his

B pleadings if any, following the order of the court. He did not also seek for an adjournment to enable him recall any of the witnesses for purpose of being cross-examined, based on the amendment granted.

The presumption I hold, was because the appellant knew that the
C amendment granted was solely to bring the evidence before the court in line with the pleadings. It is also for this court to effectually and effectively determine the real issues in dispute between the parties. There was no further adduce of witness by the respondent after the amendment was granted. The appellant, as rightly
D submitted by the respondent, did not produce any evidence considered as either injurious or a denial of fair hearing to the appellant, who had also closed his case.

In the case of ***Ojah vs. Ogboni (1976) 1 NWLR 95 at 99*** it was held that an amendment of pleadings should be allowed unless:

E

- a. It will entail injustice to the respondent**
 - b. The applicant is acting malafide and**
 - c. By his blunder, the applicant has done some injury to the**
- F** **respondent which cannot be compensated by cost or otherwise.**

The respondent herein was not shown to have come within the **three criteria a c**
G **above**. The appellant's complaint is not shown as firmly established. This is especially where the respondent did not adduce any additional evidence to the detriment of the appellant's case.

There was also no request made by the appellant which was refused.

H The decision at hand is concurrent by the two lower courts. The appellant has the duty to show that the concurrent findings of the two lower courts are perverse in the sense that they either did not draw from the evidence on record or that they are consequent upon wrong application of some principles of law or that
I the findings have occasioned a miscarriage of justice. ***See M. D. Muhammad, JSC in Ude vs. State (2016) 14 NWLR, (Pt.1531) at page 134.***

See also Mohammed v. Hussein (1998) 14 NWLR(Pt. 584) 108.

In the absence of the appellant showing such evidence of perversity
J therefore, I see no reason why the judgment of the lower court should be

A disturbed.

My learned brother has dealt adequately with the justice of this case and I hereby endorse his judgment as mine. In the same tone therefore, I also find the appeal devoid of any merit and dismiss same and abide by all orders made in the

B lead judgment.

Clara Bata Ogunbiyi
Justice, Supreme Court

C **CENTUS NWEZE, (JSC):** My lord, Rhodes-Vivour, (JSC), obliged me with the draft of the leading judgement just delivered now. I agree that, being unmeritorious, this appeal ought to be dismissed. My contribution shall, therefore, be circumscribed to a few comments on the submissions relating to the

D admissibility of the proceedings in Suit No. E/113/77 in the instant proceedings.

The second issue was woven around the question “**whether the learned Justices of the Court of Appeal were right in law in affirming the trial judge's rejection of exhibit 1?**”

E As shown in the leading judgement, exhibit 1 is a certified true copy of the record of proceedings in Suit No. E/113/77. At the trial court, learned counsel for the plaintiff, anchoring his submissions on Section 34(1) of the Evidence Act (then applicable), applied to tender a certified true copy of the record of

F proceedings in the said suit, that is E/113/77, which was inconclusive, in the proceedings of the present case. He sought to rely on the testimony of a witness in the said previous proceedings, namely, E/113/77 in the proceedings in the instant case at the trial court.

G Although, the trial court admitted the said proceedings, as urged, it, nonetheless, rejected it in the actual judgement. The lower court endorsed the rejection of the said exhibit. Expectedly, counsel for the appellant impugned the lower court's approach.

H Contrariwise, it was contended on behalf of the respondents herein that Emmanuel Eze, Okoli Ezeonyia and John Onyia, whose residences were well-known, were available and so should have been summoned to testify. In his submission, therefore, the lower court, rightly affirmed the trial court's non-

I ascription of any probative value to the said exhibit 1.

Like the leading judgement, I entirely, endorse the approach of the lower court. It cannot be otherwise. The general law is that evidence of a witness taken in earlier proceedings is not relevant in a later trial except for the purpose of

J discrediting such witness on cross examination, and for that purpose only, in

- A effect, it is wrong to treat evidence in previous proceedings of an absent witness in later proceedings as one of truth, ***Alade vs. Aborishade* [1960] SCNLR 398; (1960) 5 FSC 167, 171; *Asuquo Udo Enang and Anor vs. Edem Udo Ekanem and Ors* (1962) 1 All NLR 530; *Ariku vs. Ajiwogbo* [1962] 2 SCNLR 369; (1992) 1 All NLR 629, 631-632.** Let me elaborate.

The Evidence Act, only permits the admissibility of testimonies in previous suits or proceedings in subsequent judicial proceedings under three circumstances. Under the said Act [relevant to the proceedings at the trial court], they were categorized under Section 34(1); admissions in a previous judicial proceedings under Sections 19 to 26 inclusive of the Evidence Act, ***Iga and Ors vs. Amakrir* [1976] 11 SC 1, 12; *Ojiegbe and Ors vs. Okwaranyia and Ors* (1961) 1 All NLR (Pt.4) 605, 610.**

D In passing, it must be noted that if an admission is relied on as an estoppel, then it must be pleaded, ***K. Chellaram and Sons vs. G. B. Olivant Ltd* (1994) 10 WACA 77; *Ajayi vs. Briscoe (Nig.) Ltd.* (1964) 3 All ER 556, 559-560; *Chukwura vs. Ofochebe* (1972) 1 All NLR (Pt 2) 514.**

E The last category was under Sections 199, 208 and 299 of the Evidence Act. Under these sections, cross examination as to previous statements in writing was permissible in a subsequent judicial proceeding to discredit the witness provided the conditions prescribed by the section were satisfied, ***Madumere and Ors vs. Okafor and Ors* (1996) LPELR -1810 (SC) 18; *Nahman vs. Odutola* (1953) 14 WACA 381, 384; *Alade vs. Aborishade* (supra); *Ajadi vs. Kelani* (1985) LPELR -302 (SC) 16-17, para. B-C**

As shown above, under this last category, such evidence is only relevant for the purpose of discrediting such witness on cross-examination, and for that purpose only. It does not, therefore, prove the truth thereof, ***Madumere and Ors vs. Okafor and Ors* (supra); *Alade vs. Aborishade* [1960] SCNLR 398; (1960) 5 FSC 167, 171; *Asuquo Udo Enang and Anor vs. Edem Udo Ekanem and Ors* (1962) 1 All NLR 530; *Ariku vs. Ajiwogbo* [1962] 2 SCNLR 369; (1962) 1 All NLR 629, 631-632.**

I On the other hand, under Section 34 of the said Evidence Act, [The Act which was applicable at the time], evidence given by a witness in a previous judicial proceedings, whether the witness was a party or not to the previous proceedings, was admissible in a subsequent judicial proceeding to prove the truth of the facts it stated when the conditions specified by the section had been satisfied.

J The said section codified the Latin maxim, *Res inter alios acta alteri nocere*

- A** *non debet*, meaning, a man ought not to be prejudiced by what has taken place between others, **Akaninwo and Ors vs. Nsirim and Ors (2008) LPELR -321 (SC) 39 – 40; B – A; Yusuf vs. Adegoke [2007] II NWLR (Pt. 1045) 332; Nahmanv.Odutola (supra); Alade vs. Aborishade (supra); Sanyaaolu vs. B Coker [1983] 3 SC 124, 155; Lawal vs. Dawodu (1972) LPELR -1761 (SC) 17 – 18; F – D; Eghobamien vs. FMBN (2002) LPELR -1045 (SC) 9 – 11; G – A; Dada vs. Banlola (2008) LPELR – 907 (SC) 11 – 12; E; Sanyaolu vs. Coker (1983) All NLR 157; Okonji vs. Njokanma [1999] 14 NWLR (Pt. 638) C 250; Onu vs. Idu [2006] 12 NWLR (Pt. 995) 657.**

This Section was worded thus:

- D stage of the same judicial proceeding, the truth of the facts³⁴(1) Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or when his presence cannot be obtained without an amount of delay or expense which, in the circumstances of the case, the court considers unreasonable:**

F

Provided:

- a.** That the proceeding was between the same parties or their representatives in interest;
- G b.** That the adverse party in the first proceeding had the right and opportunity to cross examine; and
- c.** That the questions in issue were substantially the same in the first as in the second proceedings.

H

The above mandatory provisions were adjudged un-waivable, **Eghobamien vs. FMBN (2002) LPELR -1045 (SC) 9 11; G – A; Menakaya vs. Menakaya [2001] 16 NWLR (Pt. 738) 203, 236 and 263.** That was held to be so for the

- I** section postulated the reception in evidence of a transcript of the evidence witness in previous judicial proceedings between the same parties where the conditions prescribed under the proviso were complied with, **Lawal vs. Dawodu and Anor (1972) LPELR -1761 (SC) 17 18; F – D; Dada and Ors vs. Bankole and Ors (2008) LPELR -907 (SC) 11 12; E; Obawole and Anor vs. Coker (1994) J**

A LPELR -2157 (SC) 30 - 31; G – B Alade vs. Aborishade (supra); Enang and Anor vs. Ukanem and Ors. (1962) 1 All NLR 530; Arikun vs. Ajiwogo [1962] 2 SCNLR 369.

As this court explained in **Akaninwo and Ors vs. Nsirim and Ors (2008)LPELR -321 (SC) 39 -40; B A**; The reasons for rejecting such piece of evidence ... are not far-fetched. Similar facts though often cogent, moral and weighty, that is, logically relevant are rejected as legal evidence on the grounds of policy and fairness; since they tend to waste time, embarrass the enquiry with collateral Issues, prejudice the parties and even the court and, equally encourages attack without notice.

It is for these, and the more detailed, reasons in the leading judgement that I, too, shall enter an order dismissing this appeal. Appeal dismissed.

**D Chima Centus Nweze,
Justice, Supreme Court**

AMIRU SANUSI, (JSC): I had the advantage of reading the judgement just delivered by my learned brother Rhodes-Vivour (JSC). His lordship has adequately and painstakingly dealt with all the salient issues raised in this appeal. I am at one with his reasoning and conclusion that this appeal is unmeritorious and must be dismissed. I accordingly dismiss it and have nothing useful to add.

F Appeal dismissed.

**Amiru Sanusi
Justice, Supreme Court**

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J