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15th FEBRUARY 2017
JSCNLR VOL. 5

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**ADAMU DAUDA
AND
FEDERAL REPUBLIC OF NIGERIA**

SC.442/2014

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

FRIDAY, 10TH MARCH, 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**

*CONSTITUTIONAL LAW: Explanation of charge to an accused – S. 36(6)
Constitution of FRN 1999 – Imperatives*

*CRIMINAL LAW AND PROCEDURE: Invalid arraignment of an accused –
Implication.*

*CRIMINAL LAW AND PROCEDURE: Arraignment – Conditions for a valid
arraignment*

PRACTICE AND PROCEDURE: Findings of two lower courts – How challenged

*CRIMINAL LAW AND PROCEDURE: Arraignment – Components of a valid
arraignment – S.215 of Criminal Procedure Act – Considerations thereof.*

Issue for Determination

Whether from the records of proceedings, there was a proper arraignment of the appellant before his trial, conviction and sentence by the trial court.

Facts of the Matter

The appellant was convicted by the trial court and sentenced to various terms of imprisonment for offences under Section 518(5) of the Criminal Code Sections 5(1) and 27(1) of the Firearms Act and Section 15(2) of the Economic and Financial Crimes Commission Act, 2004.

The appellant is satisfied with the judgment of the trial court delivered on 16th December, 2010 and affirmed by the Court of Appeal on 23rd May, 2014. The only complaint of the appellant is that his arraignment in the trial court was fundamentally flawed, thereby rendering the whole trial a nullity and so entitling him to an acquittal.

Dissatisfied with the judgment of the trial court, the appellant filed an appeal before the Court of Appeal Jos Division. That court affirmed the decision of the trial court.

Still not satisfied with the conviction by the trial court, affirmed by the Court of Appeal the appellant has appealed to the Supreme Court on one ground of appeal.

Held: *(Unanimously dismissing the appeal)*

1. *Where an arraignment does not comply with the law, the trial will be a nullity.*

Once an arraignment of an accused person fails to comply with Section 215 of the Criminal Procedure Act, the trial which follows, no matter how well conducted and decided is a nullity. It is therefore fundamental that the trial judge ensures that he complies strictly with the provisions of Section 215 of the Criminal Procedure Act when an accused person is arraigned before him to take his plea, and the judge must make correct recordings to show that there was compliance. (P 8 paras E–F)

2. *The conditions for a valid arraignment*

For there to be a valid arraignment of the accused person, the following conditions, contained in Section 215 (supra) must be satisfied:

1. **the accused person shall be placed before the court unfettered unless the court is satisfied that for safety concerns he should be fettered;**
2. **the charge shall be read and explained to the accused person in the language he understands to the satisfaction of the court by the registrar or any other officer of court;**
3. **the accused person shall then be called upon to plead to each**

- charge; and**
4. the plea of the accused person shall be instantly recorded.

Failure to comply with any of the above renders the whole trial a nullity. (Lufadeju vs. Johnson (2007) ALL FWLR (Pt. 371) p. 1532; Timothy vs. FRN (2012) 6 SC (Pt. III) p. 159; Madu vs. State (2012) 6 SC (Pt. I) P. 80 (P 9 paras B – E)

3. *The appellant was properly arraigned*
Per Rhodes-Vivour, (JSC)

“There were fifteen accused persons arraigned before the Federal High Court Jos on 15th June, 2010. The appellant was one of them. He was accused person number 3. All of them were charged on three counts as stated earlier in this judgment.

There is an irrebutable presumption after examining proceedings before the court on 15th June, 2010 that the appellant was placed before the court unfettered. The charge was read and explained to him in Hausa language (the language he understands) to the satisfaction of the court, more-so, as neither him nor his counsel at that time complained of not understanding the charge.

The appellant entered a plea of not guilty to the three counts charge and his plea was recorded as not guilty. I am in the circumstances satisfied that the learned trial judge complied with the provisions of Section 215 of the Criminal Procedure Act. By complying with Section 215 of the Criminal Procedure Act, the learned trial judge ensured that the appellant was given a fair hearing as provided by Section 36(6) of the Constitution”. (Pp 10 – 11 paras H – B)

4. *Where there are concurrent findings by two lower courts the appellant cannot displace those findings unless they are perverse.*

This is an appeal against the concurrent findings of fact by two lower courts. Having failed to establish that these findings are in any way perverse and occasioning miscarriage of justice, the appellant must fail. [(Ibhafidon vs. Igbinosun (2001) 8 NWLR (Pt. 716) 653 and Jackie Philips vs. EbaOdan Commercial & Industrial Company Ltd (2012) LPELR-(9718) SC). (P 11 paras H–I)]

5. *There are two components of a valid arraignment.*

On the question of a valid arraignment, this court per Kutigi (CJN), in the case of Lufadeju vs. Johnson (2007) All FWLR (Pt. 371) 1537 at 1532, had the following to say:

“Arraignment involves two things. One, the reading of the charge or information to the accused. Two, the response to the charge or information by a plea from the accused. The plea can either be guilty or not guilty. It is only when the above procedure is followed that a court of law will be said to have taken arraignment proceedings”.

In other words, there cannot be a valid arraignment without the accused being in court because he must plead to the charge personally. The court must also be satisfied that the accused person was not before it in a representative capacity.

It is also mandatory that the accused should be told and understands the nature of the charge brought against him. The obligation is only discharged if the court is fully satisfied that the accused is in fact well acquainted of the reason why he is brought to court. (Pp 12–13 Paras I–D).

6. *The final stage of arraignment*

The final stage is where the accused must plead to the charge. The plea must be voluntary and free from all forms of inhibitions or external detractions. The reason for the requirements and the strict compliance are to ensure a fair trial of an accused person and also to safeguard his interest at such a trial. The failure to satisfy any of the essential criteria will render the whole trial incurably defective null and void. (Kajubo vs. State (1988) 1 NWLR (Pt. 73) 721; Erekanure vs. State (1993) 5 NWLR (Pt. 294) 385; and Kalu vs. State (1998) 13 NWLR (Pt. 583) (531). (P 13 Paras D–F)

Per Ogunbiyi (JSC):

“With reference to pages 6768 of the record of appeal, the arraignment of the appellant was carried out in the trial court. I agree with the submission by the learned counsel for the respondent that the requirement of the law was followed at the trial court. The procedure followed was indeed in strict accordance with the provisions of Section 215 of the Act and Section 36(6) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). In this case, there is nothing on the record to suggest that the trial court was not satisfied with the explanation of the charge to the appellant. See the case of *Ogunye vs. State* (1999) 5 NWLR (Pt. 604) 548 at 553. In summary, I agree with the learned respondent's counsel that Section 215 of the Criminal Procedure Act was substantially complied with by the learned trial judge. (P 13 paras F – I)

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Ewe vs. The State (1992) LPELR – 1179 (SC);
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Josiah vs. State [1985] 1 NWLR (Pt. 1) 125; [1985] 1 SC 406;
Kajubo vs. State [1988] 1 NWLR (Pt 73) 721, 731; [1988] 3 SCNJ (Pt. 1) 1179;

- A** *Kalu vs. State* (1998) 13 NWLR (Pt. 583) 531;
Kayode vs. State (2008) 1 NWLR (Pt. 1068) p. 281;
Lufadeju and Anor vs. The State (2007) LPELR 1795 (SC);
Lufadeju vs. Johnson (2007) All FWLR (Pt. 371) 1537;
- B** *Madu vs. The State* (2012) LPELR – 7867 (SC);
Ogunye vs. The State (1999) 5 NWLR (Pt. 604) 548;
Ogunye vs. State (1999) 5 NWLR (Pt. 604) 548;
Okoli vs. State (2012) 1 NWLR (Pt. 1281) p. 385;
- C** *Olabode vs. The State* (2009) LPELR – 2542 (SC);
Omokuwajo vs. FRN (2013) LPELR – 20184 (SC);
Onuoha Kalu vs. The State [1998] 13 NWLR (Pt. 583) 531;
Rufai vs. The State (2001) LPELR – 2963 (SC);
- D** *Sharfal vs. The State* (1992) LPELR – 3038 (SC) 11;
Timothy vs. FRN (2012) 6 SC (Pt. III) p. 159; and
Yerima vs. State (2010) 14 NWLR (Pt. 1231) p. 25.
- E Nigerian Statutes cited in this Judgment**
The Constitution of the Federal Republic of Nigeria, 1999 (as amended); – S. 36(6)
The Criminal Code – S. 518(5)
- F** *The Criminal Procedure Act*; – S. 215
The Economic and Financial Crimes Commission Act, 2004. – S. 15(2)
The Firearms Act; – S 5(1) and S. 27(1)
- G Representations**
R. George for the Appellant, with him, **B. Damilare**.
C.U. Ihua-Maduenyi for the Respondent, with him, **C. Ihua-Maduenyi**.
- H RHODES-VIVOUR, (JSC) (Delivering the Lead Judgment):** This is an appeal from the decision of the Court of Appeal, Jos Division delivered on 23rd May, 2014, which affirmed the conviction and sentence of the appellant by a Jos Federal High Court.
- I** The appellant was convicted by the trial court and sentenced to various terms of imprisonment for offences under Section 518(5) of the Criminal Code Sections 5(1) and 27(1) of the Firearms Act and Section 15(2) of the Economic and Financial Crimes Commission Act, 2004.
- J** Dissatisfied with the judgment of the trial court, the appellant filed an

A appeal before the Court of Appeal, Jos Division. That court affirmed the decision of the trial court.

Still not satisfied with the conviction by the trial court, affirmed by the Court of Appeal the appellant has appealed to the Supreme Court on one ground of appeal from which he formulated a sole issue for determination of this appeal. The sole issue reads:

C **Whether from the records of proceedings, there was a proper arraignment of the appellant before his trial, conviction and sentence by the trial court.**

D Learned counsel for the respondent adopted the sole issue formulated by the appellant.

The sole issue formulated by the appellant's learned counsel shall be considered in resolving this appeal.

E At the hearing of the appeal on 15th December, 2016 learned counsel for the appellant, R. George Esq, adopted the appellant's brief filed on 25/8/14 and urged the court to allow the appeal, while learned counsel for the respondent C. Ihua-Maduenyi Esq, adopted the respondent's brief filed on 8/9/14 and urged the court to dismiss the appeal and affirm concurrent findings.

F Learned counsel for the appellant observed that the appellant, as one of the accused persons was not properly arraigned before the trial court, contending that the charge was not sufficiently read and explained to him in the language he understands to the satisfaction of the court. He further observed that the appellant's plea to the charge was not recorded as provided by law. He submitted that where there is non-compliance with requirements for valid arraignment the trial is a nullity. Reliance was placed to:

H **Yerima vs. State (2010) 14 NWLR (Pt. 1231) p. 25; Okolie vs. State (2012) 1 NWLR (Pt. 1281) p. 385; and Kayode vs. State (2008) 1 NWLR (Pt. 1068) p. 281.**

I Concluding he submitted that the effect of failing to comply with Section 187 (1) of the Criminal Procedure Code and Section 215 of the Criminal Procedure Act renders the entire proceedings a nullity. He urged this court to allow the appeal and set aside the conviction and sentence of the appellant.

J On his part learned counsel for the respondent observed that there was

A compliance with Section 215 of the Criminal Procedure Act when the appellant was arraigned and took his plea on 15th June, 2010. Reference was made to pages 67 – 68 of the Record of Appeal. Reliance was placed on:

B **Lufadeju vs. Johnson (2007) ALL FWLR (Pt. 371) p. 1532; and Erekanure vs. State (1993) 5 NWLR (Pt. 294) p. 385.**

C Concluding, he submitted that the appeal is devoid of merit and should be dismissed.

In this appeal the appellant is satisfied with the judgment of the trial court delivered on 16th December, 2010 and affirmed by the Court of Appeal on 23rd May, 2014. The only complaint of the appellant is that his arraignment in the trial court was fundamentally flawed, thereby rendering the whole trial a nullity and so entitling him to an acquittal.

D Indeed once an arraignment of an accused person fails to comply with Section 215 of the Criminal Procedure Act, the trial which follows, no matter how well conducted and decided is a nullity.

E It is, therefore, fundamental that the trial judge ensures that he complies strictly with the provisions of Section 215 of the Criminal Procedure Act when an accused person is arraigned before him to take his plea, and the judge must make correct recordings to show that there was compliance.

Section 36(6) of the Constitution states that:

G **“Every person who is charged with a criminal offence shall be entitled to**
(a) be informed promptly in the language that he understands and in details of the nature of the offence.”

H Section 215 of the Criminal Procedure Act provides that:

I **“The person to be tried upon any charge or information shall be placed before the court unfettered unless the court shall see cause otherwise to order, and the charge or information shall be read over and explained to him to the satisfaction of the court by the registrar or other officer of the court and such person shall be called upon to plead instantly thereto unless where the**
J **person is entitled to service of a copy of the information he**

A objects to the want of such service and the court finds that he has not been duly served therewith.”

B For there to be a valid arraignment of the accused person, the following conditions, contained in Section 215 (supra) must be satisfied:

- C 1. the accused person shall be placed before the court unfettered unless the court is satisfied that for safety concerns he should be fettered;**
- 2. the charge shall be read and explained to the accused person in the language he understands to the satisfaction of the court by the registrar or any other officer of court;**
- 3. the accused person shall then be called upon to plead to each charge; and**
- 4. the plea of the accused person shall be instantly recorded.**

D Failure to comply with any of the above renders the whole trial a nullity. See Lufadeju vs. Johnson (2007) ALL FWLR (Pt. 371) p. 1532; Timothy vs. FRN (2012) 6 SC (Pt. III) p. 159; and Madu vs. State (2012) 6 SC (Pt. I) P. 80.

E I shall now reproduce relevant extracts from the record of appeal to see if there was compliance with the provisions of section 215 of the Criminal Procedure Act, when the appellant was arraigned before a Jos Federal High Court on 15th June, 2010.

F The record of proceedings for 15th June, 2010 runs as follows:

“All the accused person are present:

G Ihua – Maduenyi C.U. and A.S. Garba – appearing with A. Aminu for all the accused persons.

H Ihua – Maduenyi: This matter is coming up for the 1st time; we humbly apply that the accused be allowed to take their plea.

All the accused persons indicated that they do not understand English.

I Mr. Peter Sani is called interpreter on Oath.

Plea – charge is read to all the accused persons in English Language and translated by the interpreter from English to

J

A Hausa language.

To count I, all the accused persons acknowledge that they understand the charge and plead not guilty to the charge.

B

To count II, the 1st, 3rd, 5th, 8th, 11th, 13th and 14th accused acknowledge that they understand the charge and plead not guilty as charged.

C

To count III, All the accused persons acknowledge that they understand the charge and plead not guilty.

D

Ihua– Maduenyi: May we apply to come back on the 1st and 2nd to come back to take the trial”

This is what the Court of Appeal had to say on the arraignment.

E

“The appellant has not proved any irregularity in his arraignment before the lower court. He has also not shown how a miscarriage of justice has been occasioned to his disadvantage in the proceedings of the lower court on 15th June, 2010, when he was arraigned before that court. On the whole I hold that the lower court complied with the provisions of section 215 of the Criminal Procedure Act when the appellant was arraigned before it and his plea to the (3) counts charge was taken. In the result, I resolve the lone issue against the appellant”.

F**G**

H There were fifteen accused persons arraigned before the Federal High Court Jos on 15th June, 2010. The appellant was one of them. He was accused person number 3. All of them were charged on three counts as stated earlier in this judgment.

I There is an irrebutable presumption after examining proceedings before the court on 15th June, 2010 that the appellant was placed before the court unfettered. The charge was read and explained to him in Hausa language, (the language he understands), to the satisfaction of the court, more-so, as neither he or his counsel at that time complained of not understanding the charge.

J The appellant entered a plea of not guilty to the three counts charge and his

- A plea was recorded as not guilty. I am in the circumstances satisfied that the learned trial judge complied with the provisions of section 215 of the Criminal Procedure Act. By complying with Section 215 of the Criminal Procedure Act, the learned trial judge ensured that the appellant was given a fair hearing as provided by Section 36(6) of the Constitution.

There is no merit in this appeal.
Appeal dismissed.

Olabode Rhodes-Vivour
Justice, Supreme Court

C

DATTIJO MUHAMMAD, (JSC): On reading in draft the lead judgment of my learned brother Rhodes-Vivour (JSC) just delivered, I share his Lordship's reasoning and conclusion that the appeal lacks merit and that it has to be dismissed.

- Appellant's complaint in the appeal is that his arraignment which is in breach of Section 36(1) of the 1999 Constitution and Section 215 of the Criminal Procedure Act renders the entire proceedings leading to his conviction and sentence, under section 518(5) of the Criminal Code, Section 5(1) and 27(1) of the Firearms Act and Section 15(2) of the Economic and Financial Crimes Commission Act 2004, a nullity. Appellant contends that the head of charge were neither read and explained to him nor were his plea thereto recorded by the court as required by law.

- Learned respondent counsel dutifully opposed the submission and maintains that the record of appeal clearly belies appellant's contention. I agree.
- G My examination of the record shows clearly that the trial court, as required by law, had read, explained the various heads of charge to all those arraigned before it and recorded their respective pleas. The lower court could not have held otherwise.

- H This is an appeal against the concurrent findings of fact by two lower courts. Having failed to establish that these findings are in any way perverse and occasioning miscarriage of justice, the appellants must fail. See **Ibhafidon vs. Igbinosun (2001) 8 NWLR (Pt. 716) 653 and Jackie Philips V. Eba Odan Commercial & Industrial Company Ltd (2012) LPELR-(9718) SC**. I so hold.

- I It is for the foregoing purely made by way of emphasis and more so the fuller reasons in the lead judgment that I also dismiss the appeal and affirm the concurrent decisions of the two courts below.

J

A

Musa Dattijo Muhammad
Justice Supreme Court

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

My brother has outlined the background facts leading to the conviction and sentence of the appellant which was concurrently affirmed by the two lower courts.

The appellant was certainly unhappy with the outcome of the judgment and hence the appeal now before us on the sole issue and posing the question:

Whether from the records of proceedings, there was a proper arraignment of the appellant before the trial, conviction and sentence by the trial court.

It would appear from the foregoing issue that the appellant's bone of contention is against the procedure adopted in respect of the appellant's arraignment. Section 215 of the Criminal Procedure Act is very specific and well spelt out on the subject of what should constitute a valid arraignment as follows:

F

“The person to be tried upon any charge or information shall be placed before the court unfettered unless the court shall see cause otherwise to order, and the charge or information shall be read over and explained to him to the satisfaction of the court by the registrar or other officer of the court and such person shall be called upon to plead instantly, thereto, unless where the person is entitled to service of a copy of the information he objects to the want of such service and the court finds that he has not been duly served therewith.”

G

H

On the question of a valid arraignment, this court per Kutigi (CJN) in the case of **Lufadeju vs. Johnson (2007) All FWLR (Pt. 371) 1537 at 1532**, had the following to say:

I

“Arraignment involves two things. One, the reading of the charge or information to the accused. Two, the response to the charge or information by a plea from the accused. The plea can

J

A

Justice, Supreme Court

CENTUS NWEZE, (JSC): My Lord, Rhodes-Vivour, (JSC), obliged me with the draft of the lead judgment just delivered now. I endorse the conclusion that, as this appeal is unmeritorious, it ought to be dismissed.

My question here revolves around the issue of proper arraignment which this court has dealt with ad nauseam, **Josiah vs. State [1985] 1 NWLR (Pt. 1) 125; [1985] 1 SC 406; Kajubo vs. State [1988] 1 NWLR (Pt. 73) 721-731 [1988] 3 SCNJ (Pt. 1) 1179; Ebem vs. State [1990] 7 NWLR (Pt. 160) 113; Idemudia vs. State [1999] 5 SCNJ 47; Onuoha Kalu vs. The State [1998] 13 NWLR (Pt. 583) 531; Erekanure vs. The State [1993] 5 NWLR (Pt. 294) 385; Omokuwajo vs. FRN (2013) LPELR – (20184) SC; Sharfal vs. The State (1992) LPELR – (3038) SC 11.**

Others include: **Ogunye vs. The State (1999) 5 NWLR (Pt. 604) 548, 567; Ewe vs. The State (1992) LPELR – 1179 (SC); Debie vs. The State [2007] 9 NWLR (pt. 1038) 30; Lufadeju and Anor vs. The State (2007) LPELR – (1795) SC; Olabode vs. The State (2009) LPELR – (2542) SC; Amako vs. The State (1995) LPELR – (451) SC; Joshiah vs. The State (1985) 1 SC 400, 416; Eyorokoomo vs. The State [1979] 8-9 SC 3; Dibie vs. The State [2007] 9 NWLR (Pt. 1038) 30, 61-62; Edibo vs. The State (2007) LPELR – 1012 (SC); Adeniji vs. The State (2001) LPELR – (126) SC; Madu vs. The State (2012) LPELR – (7867) SC; Oguniye vs. The State (1999) 5 NWLR (Pt. 604) 548, 555; Rufai vs. The State (2001) LPELR – (2963) SC; Effiom vs. The State [1995] 1 NWLR (Pt. 373) 507; Adeniji vs. The State [2001] FWLR (Pt. 57) 809; Omokuwajo vs. FRN (2013) LPELR – (20184) SC; Ogunye vs. The State (1999) 5 NWLR (Pt. 604) 548, 567.**

From my perusal of the record of the trial court for June 15, 2010, I am satisfied that the lower court, rightly, affirmed the trial court's approach to the arraignment of the appellant.

It is for these, and the more detailed, reasons in the lead judgment that I, too, shall dismiss this appeal as lacking in merit. Appeal dismissed.

I

Chima Centus Nweze
Justice, Supreme Court

J

**ALH. MUSTAPHA ALIYU WUSHISHI
AND**

- 1. ENGR. MOHAMMED IMAM
CHAIRMAN, ALL PROGRESSIVE
CONGRESS, NIGER STATE CHAPTER**
- 2. ALL PROGRESSIVE CONGRESS (APC)
C/O NATIONAL CHAIRMAN, NATIONAL
SECRETARIATE WUSE II, ABUJA**
- 3. INDEPENDENT NATIONAL ELECTORAL
COMMISSION (INEC)**

SC.123/2016

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

FRIDAY, 3RD MARCH 2017

BEFORE THEIR LORDSHIPS

**WALTER S. N. ONNOGHEN
MARY UKAEGO PETER-ODILI
KUMAI BAYANG AKAAHS
KUDIRAT M. O. KEKERE-EKUN
EJEMBI EKO**

**AG. CHIEF JUSTICE OF NIGERIA
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT**

ACTION: Joinder of parties – Failure to join necessary parties – Implications.

ACTION: locus standi – Challenge of pre -election process – Who is competent to sue – Relevant consideration thereof.

ACTION: Locus standi – Plaintiff must have sufficient interest in the subject matter of the suit.

COURT: Issue of jurisdiction – Where issue of jurisdiction was decided against the appellant – Whether it was necessary for court to consider the substantive matters on merit.

ELECTION: Action to challenge nomination of candidate of a political party – Who can initiate – Relevant consideration thereof.

ELECTION: Nomination of candidate for election – Candidate paid money but was not given application form – Proper remedy.

ELECTION: Section 87(9) of Electoral Act, 2010 – Scope and Extent.

ELECTION: Sponsorship of candidate for election – Internal affair of the party – Section 87(9) of the Electoral Act 2010 – Considerations thereof.

PARTIES: A party who institutes an action must have sufficient interest in order to have necessary locus standi.

PARTIES: Where necessary parties are not joined in an action – Implication.

PRACTICE AND PROCEDURE: Joinder of parties – Party suing on the conduct of nomination process of a political party – Need to join the person that emerged as a winner in the nomination process.

PRACTICE AND PROCEDURE: Preliminary objection – When it can dispose of the entire case – Relevant considerations thereof.

WORDS AND PHRASE: “Locus Standi” – Meaning.

Issues for Determination

1. Considering the fact that appellant did not contest the primary election held on **4th December, 2015** for the nomination of the gubernatorial candidate of 2nd respondent (APC) for Niger State, whether he has the locus standi to challenge the outcome of the primaries under section 87(9) of the Electoral Act, 2010 (as amended). (Distilled from Ground 2).
2. Having found that the trial court was right in declining jurisdiction to entertain the matter challenging the outcome of the primaries of 2nd respondent, whether the Court of Appeal's refusal to go into the merit of the case and/or consider appellant's Exhibits A, B, C, D and E breached appellant's right to fair hearing. (Distilled from Ground 1).

Facts of the Matter

The action was a pre-election matter in which appellant challenged the outcome of the primary election conducted by the All Progressive Congress (APC) for the nomination of its governorship candidate in Niger State for the recently conducted 2015 general election.

Appellant is a card carrying member of the All Progressive Congress (APC) political party who desired to contest nomination of the party as the gubernatorial candidate for the Niger State governorship election of 2015. He obtained the nomination form, Zonal clearance and Expression of Intent Forms, in accordance with the provisions of the All Progressive Congress Constitution and Guidelines for Nomination of Candidates for Public Offices. The above named forms were exhibited to the affidavit in support of the originating summons and marked Exhibits 'A', 'B' and 'C' respectively.

However, appellant did not participate or contest as a candidate at the APC primary election for the nomination of its governorship candidate for the said election held on the 4th day of December, 2014. Appellant was dissatisfied with the outcome of the primary election particularly as he felt wrongly excluded in the contest and consequently instituted an action at the Federal High Court, Minna for the determination of the propriety of his exclusion from contesting and claiming some mandatory and injunctive reliefs.

However, the 1st and 2nd respondents jointly filed a conditional appearance and preliminary objection to the suit on grounds of lack of locus standi and jurisdiction of court which was duly upheld by the trial judge in the judgment delivered on the 25th day of March, 2015 which resulted in the appeal to the lower court which appeal was dismissed. The instant appeal is a further appeal by appellant.

Held: *Unanimously dismissing the appeal)*

1. *A party who contests the conduct of a primary election should join in the action the person who emerged as a winner and other proper parties*

It should be noted that despite the fact that a winner of the primary election had emerged prior to the filing of the suit, appellant did not deem it fit and proper to join him in the suit as constituted even though some of the above reliefs, if granted would adversely affect the interest he had acquired by winning the said primary election. (P 29 paras F – G)

Per Eko, (JSC):

“It is clear that Reliefs 4, 8, 11, 12 and 13 are not strictly about the primary election within the APC. They are directed against the “Upcoming gubernatorial general election” which is a contest inter parties between the candidates sponsored by the APC and the other political parties. Neither the candidates of those other political parties nor the political parties were made parties in this suit. The declaratory and injunctive orders sought in reliefs 8, 11 and 13 will adversely affect those other political parties and/or their candidates. Accordingly, those persons or parties that would be adversely affected, in the interest of justice or fair hearing as required by Section 36(1) of the constitution (as amended), are entitled to be joined and heard. This action, particularly reliefs 8, 11, and 13 as couched, is not properly constituted without those proper and necessary parties. In any case, the appellant, as the plaintiff, has not disclosed his cause of action against those who ultimately would be affected by the grant of reliefs 4, 8, 11, and 13, but who are not parties in the suit.

At the time, on 5th December, 2014, when the originating summons was taken out from the Federal High Court, Minna, the APC had concluded its primary election and a winner, had remerged therefrom. That person who emerged the winner, entitled to be regarded as the APC candidate in the gubernatorial election, was not made a party in this suit, notwithstanding that the grant of the reliefs in this suit would adversely affect his interest. Without his joinder, as a proper and necessary party, the suit was not properly constituted.”

(Pp 54; 56 paras E – H; A – B)

2. *General principle of law is that sponsorship of candidates for an election is the internal affairs of political parties.*
In resolving the issue, it is necessary to take a look at the provisions of Section 87(9) of the Electoral Act, 2010, as amended, which confers

jurisdiction on the court to hear and determine matters arising from nomination of candidates by political parties to contest general elections. I have to, once more point out that the jurisdiction conferred on the court to hear matters arising from political party nomination of candidates is an exception to the general principle of law that sponsorship of candidates by political parties for an election is the prerogative of the political parties concerned and as such the court has no jurisdiction to interfere in such a matter, same being within the internal affairs of the political parties – See *Dalhatu vs Turaki* (2003) 15 NWLR (Pt.843) 310; *Jang vs INEC* (2003) LRECN 299; *P.D.P vs Sylva* (2012) 13 NWLR (Pt.1316) 85 at 148; *Ukachukwu vs PDP* (2014) LPELR 22115; *Nobis – Elendu vs INEC* (2015) 6 SCN 117 at 136; *Uzodinma vs Izunaso* (2011) 17 NWLR (Pt.1275) 28; *Ugwu vs Ararume* (2007) 12 NWLR (Pt.1048) 365; *Onuoha vs Okafor* (1983) 2 SCNLR 244; *Gwede vs INEC* (2014) 18 NWLR (Pt.1438) 56 at 93; *Shinkafi vs Yari* (2016) LPELR 26050. (P 34 Paras B – F).

3. *Consideration of S.87(9) of the Electoral Act 2010.*

In dealing with the above provision in the case of *Ardo vs Nyako* (2014) 10 NWLR (Pt.1461) 591 at 629, I stated the position of the law inter alia, as follows:

“It is in that respect that I have to say that it is settled law that the question as to who is a candidate of a political party remains within the province of the political party over which the courts have no jurisdiction except within the very narrow compass provided under the said Section 87(9) of the Electoral Act, 2010, as amended. Under the said Section 87(9) an aspirant who can invoke the jurisdiction of the court and, as has been held in a long line of cases from this court, is the one who complains that any of the provisions of the Electoral Act and the Guidelines of a political party has not been complied with in the selection or nomination of a candidate of a political party for election – See *Lado vs C.P.C.* (2011) 18 NWLR (Pt.1279) 20 at 59-60; *Emenike vs. P.D.P* (2012) 12 NWLR (Pt.1315) 556;

It follows that for a party/person to qualify or have the locus to institute an action on a matter arising from the nomination of a party's candidate for an election, he must have participated in the nomination exercise of the party and failed irrespective of whether nomination was a process or an event. (Pp 34–35 paras H–D).

4. *A person who did not participate in the nomination exercise do not have the locus standi to sue under S.87(9) supra.*

Where a party did not participate in the primary election of the political party for the nomination of a candidate for an election, he cannot sue on the processes leading to and including the actual primary election because by the provisions of the said section 87(9) supra, the court will have no jurisdiction to hear and determine the action.

In the instant case, appellant did not participate in the primary election conducted by the party to select/nominate its candidate for the gubernatorial election in question neither did he fail in the said exercise.

The above remains the law as this court has not taken a contrary position on the matter.

As found earlier in this judgment, there is no doubt, whatsoever, that appellant was not an aspirant within the provisions of Section 87(9) of the Electoral Act, 2010 (as amended). It should also be noted that the action of appellant is not designed to seek redress for the sum he paid to the respondents towards his intention to participate in the nomination exercise of the respondents for a candidate for the election into the office of the Governor of Niger State.

In the circumstances and having regard to the facts and applicable law I hold the considered view that the lower courts are correct in holding that appellant has no *locus standi* to institute the action for the reliefs claimed and as such the courts have no jurisdiction to entertain same.

(P 35 paras D–I)

5. *Where a court decides the issue of jurisdiction against the appellant, it has no business proceeding any further to consider the substantive matters on their merit.*

It is my further opinion that jurisdiction being a fundamental/ peripheral issue and the lower courts haven determined same against appellant, the courts had no business proceeding any further to consider the substantive

matters on the merit and their failure has not resulted in any miscarriage of justice in the instant case as the appellant's right to fair hearing is in no way adversely affected thereby. (Pp 35–36 paras I–A)

6. *The meaning of “locus standi”*

This court has, time without number, restated the true position on *locus standi*. The term *locus standi* is in my humble view, the legal right of a party to an action to be heard in litigation before the court of law and it entails that capacity to institute or commence or initiate an action in a competent court of law or tribunal without let, hindrance, obstruction or inhibition from any person or body whatsoever. (P 44 paras A–B)

Per Peter-Odili, (JSC):

“I place reliance on *Lado vs. CPC* (2011) 18 NWLR (Pt.1279) 689 per Onnoghen (JSC) (as he then was).

At the risk of repetition it is necessary to reiterate that the term *locus standi* connotes the legal capacity to institute proceeding in a court of law. It is used interchangeably with the term “standing” or “title to sue”. It is often an aspect of justiciability and also an issue of jurisdiction. If a plaintiff is not competent because he has no *locus standi* to bring an action, the court would, in turn be incompetent and without jurisdiction to entertain the plaintiff's action”. [*Adesanya vs. President*, F.R.N. (1981) 2 NCLR 236; *Owodunni vs. Registered Trustee of C.C.C.* (2000) 10 NWLR (Pt.675) 315].

It is really important to note that the *locus standi* to sue does not depend on the success or merits of a claim. That is, it is a condition precedent to a determination in the merits, consequently if a plaintiff has not *locus standi* to sue, it is not necessary to consider whether or not there is a genuine case on the merits, all that matters is whether the party has the leg to stand on while initiating the action”.

(Pp 48–49 paras E–A)

7. *To have locus standi to sue plaintiff must show sufficient interest in the suit.*
The question that does come in is whether or not the party making the approach has an interest to protect or a legal right, what is in issue is whether aggrieved, he has the capacity to approach the court to ventilate his grievance.

This apex court has at every given opportunity restated what the position of things is in *Inakoju vs. Adeleke* (2007) 7 NWLR (Pt.1025) 602, where the Supreme Court held thus:

“To have a locus standi to sue, the plaintiff must show sufficient interest in the suit. One criterion of sufficient interest is whether the party could have been joined as a party to the suit. Another criterion is whether the party seeking the redress or remedy will suffer some injury or hardship from the litigation. If the court is satisfied that he will suffer, then he must be heard as he is entitled to be heard”.

(P. 44 paras B – F)

8. *Nomination of candidate for election is a political matter within the sole discretion of the political party.*

It is clear and at the risk of repetition or echoing again and again what has been said that the nomination or sponsorship of a candidate for election is a political matter within the sole discretion or power of the political party, an internal affair which is not a matter for the public domain being pre-election and therefore domestic. It is after the conduct of the party's primary that an aggrieved contestant at the process can complain about the conduct and it is then that the courts have jurisdiction to hear such a party. A person who has not so contested has no legroom to invoke that jurisdiction of the court.

Having regard to all the circumstances of this case the appellant's redress, at best, lies in a claim for damages against his party. [*Tukur vs Uba & Ors.* (2012) LPELR 9337 (SC) @ 96 – 97; *P.D.P. vs Sylva* (supra) @ 146 C – E]. (*Pp 47; 51 paras D – F; I*)

Per, Eko, (JSC):

“The redress under Section 87(9) of the Electoral Act is only available to the person who participated in the primary election of his party for the nomination of a candidate of the party at the general election. It does not avail those persons, like the appellant, who did not participate in the party primary election. [ARDO vs NYAKO (2014) 10 NWLR (Pt.1461) 591 at 629].

The jurisdiction vested in the Federal High Court is additional jurisdiction to its normal jurisdiction under Section 251 of the Constitution and Section 7 of the Federal High Court Act.

This additional jurisdiction of the Federal High Court vested by Section 87(9) of the Electoral Act, 2010, as amended, cannot be stretched to money had and received for services not rendered or nomination forms not supplied. The grouse of the appellant entitles him to sue his party (APC) for money had and received for nomination forms not supplied. This, he cannot bring under Section 87(9) of the Electoral Act, 2010, as amended”. (P 55 paras F – I).

Nigerian Cases cited in this Judgment

A. G. Federation & Ors vs Atiku Abubakar & Ors 32 NSCQR 1
A.G, Akwa Ibom State vs. Essien (2004) 7 NWLR (Pt.872) 288
Adesanya vs. President, F.R.N. (1981) 2 NCLR 236;
Amaechi vs INEC (2007) 18 NWLR (Pt.1065) 170;
APGA vs. Anyanwu & Ors (2014) 7 NWLR (Pt.1407) 541 78 paras. D – A
Ardo vs. Nyako (2014) 10 NWLR (Pt.1461) 591 .
Dalhatu vs Turaki (2003) 15 NWLR (Pt.843) 310
Daniel vs INEC (2015) 9 NWLR (Pt.1463) 113 H – C; 158 G – H;
Emenike vs P.D.P. & Ors. (2012) 12 NWLR (Pt.1315) 556;
Faleke vs INEC (2016) 9 SCNJ 1;
Guda vs. Kitta (1999) 12 NWLR (Pt.629) 21;
Gwede vs INEC (2014) 18 NWLR (Pt.1438) 56
Inakoju vs. Adeleke (2007) 7 NWLR (Pt.1025) 602
James vs INEC (2015) 12 NWLR (Pt. 1474) 538

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Owodunni vs Registered Trustee of C. C. C. (2000) 10 NWLR (Pt.675) 315.
P.D.P vs Sylva (2012) 13 NWLR (Pt.1316) 85
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Uwazurike vs Nwachukwu (2012) 3 NWLR (Pt.1342) 503
Uzodinma vs Izunaso (No.2) (2011) 17 NWLR (Pt.1275) 30

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All Progressive Congress (APC) Constitution 2013 Article 9.3 Sub(i) (ii), Article 9.1 Sub (i) (ii) (iii).
Constitution of the Federal Republic of Nigeria 1999 (as amended) S. 40, S. 251, S. 36 (1)
Federal High Court Act, S. 7
Section 87(1) of the Electoral Act, 2010 – S. 87 (a)

M.N. Mohammed (Esq.) for appellant with him are **Messrs Isaac Enamodu (Esq) & O. Obikwete (Esq.)**

Yunus Ustas Usman, SAN for 1st respondent with him are **Messrs A.B. Mahmud; J.J. Usman; A.O. Philip; M.K. Bielonwu; J.A. Sambo and C.C. Ifeneman.**

Mahmud A. Magaji, (SAN) for 2nd respondent with him are **Messrs C.K. Udeoyibo; Amina Zukogi; H.M. Tukur; M. Yahaya; S.P. Ashiekaa and A. Matanmi.**

T.M. Inuwa (Esq.) for 3rd respondent with him are **Messrs R.A. Ugbanne; A. Sani; W. Kuku; R. Aminu and B.M. Abubakar.**

- A NKANU ONNOGHEN, AG. CJN (Delivering the Lead Judgment):** This appeal is against the judgment of the Court of Appeal holden at Abuja in appeal No. CA/A/255/2015 delivered on the 4th day of February, 2016 in which the court dismissed the appeal of appellant against the judgment of the Federal High Court holden at Minna in suit No. FHC/MN/CS/EPT/35/2014 delivered on the 25th day of March, 2015 whereby the court struck out the pre-election suit of the appellant, then plaintiff, on grounds of lack of locus standi.

The facts relevant to the appeal include the following:

- C** The action was a pre-election matter in which appellant challenged the outcome of the primary election conducted by the All Progressive Congress (APC) for the nomination of its governorship candidate in Niger State for the recently conducted 2015 general election.
- D** Appellant is a card carrying member of the All Progressive Congress (APC) political party who desired to contest nomination of the party as the gubernatorial candidate for the Niger State governorship election of 2015. He obtained the nomination Form, Zonal Clearance and Expression of Intent Forms, in accordance with the provisions of the All Progressive Congress (hereinafter referred to as APC) Constitution and Guidelines for Nomination of Candidates for Public Offices. The above named forms were exhibited to the affidavit in support of the originating summons and marked **Exhibit 'A', 'B' and 'C'** respectively.

- E** However, appellant did not participate or contest as a candidate at the APC primary election for the nomination of its governorship candidate for the said election held on the 4th day of December, 2014. Appellant was dissatisfied with the outcome of the primary election particularly as he felt wrongly excluded in the contest and consequently instituted an action at the Federal High Court, Minna for the determination.

- H 1.1 Whether considering the provision of Article 9.1, sub 1, ii, iv, Article 9.3, sub 1, and ii, Article 20 sub iv (a) (b) of the Constitution of the All Progressive Congress (APC) 2013 and Section 2, 3, sub 2, Section 4 sub d of the All Progressive Congress draft guidelines for the nomination of candidates for the public offices in Nigeria and Section 40 of the 1999 Constitution of Nigeria, any party member or the appellant was validly qualified to**

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A aspire for the office of governorship position and run
 primaries under the platform of All Progressives
 Congress, having paid the prescribed expression of
B interest nomination fees for the gubernatorial election of
 Niger State under the platform of All Progressives
 Congress.

C **1.2** Whether or not the provision of the All Progressives
 Congress Guidelines on pages 1, 2, 5 and Article 9.3. sub i
 & ii of the All Progressives Congress (APC) Constitution
 2013, the appellant was validly qualified to run the
D primaries for the gubernatorial election of Niger State
 held on 4/12/2014, with other contestants, under the
 platform of All Progressives Congress (APC) in Niger
 State.

E **1.3** Whether or not having observed the provisions of Article
 9.3 sub i & ii, Article 9.1 sub i, (ii) (iv) of the All
 Progressives Congress (APC), 2013 Constitution, the
 appellant was validly shut out by the 1st and 2nd
F respondents by refusing to give the appellant a
 nomination form to contest for the primaries of the
 gubernatorial primaries of the All Progressives
 Congress (APC) held in Niger State on 4/12/2014 by the
G 1st and 2nd respondents.

H **1.4** Whether or not having observed the provisions of the All
 Progressives Congress Constitution, 2013 and all the
 appellant's documentations as exhibited before the trial
 court, a refusal or a denial of the appellant to obtain
 nomination form by the 1st and 2nd respondents and
I having the appellant paid all the requisite fees, for the
 contest of the primaries of the gubernatorial election for
 primaries conducted by the 1st and 2nd respondents on
 4/12/2014 in Niger State as null and void.

J **1.5** Whether by virtue of the provision of Article 9.3 sub 1 of
 the All Progressives Congress 2013 Party Constitution,

- A** the appellant is legible to contest for the primary election
for the post of governorship conducted by the 1st and 2nd
respondents on 4/12/2014 and having the respondents
B failed to give nomination form to the appellant as a
member to contest same can nullify the primaries
conducted by the 1st and 2nd respondents on 4/12/2014
and rerun and rerun same by including the appellant
among the contestant.
- C** **1.6** Whether or not non-observance of party constitution or
Electoral Act, illegally shut out a registered member of a
party or appellant can render the 3rd respondents not to
D recognize the primaries conducted by the 1st and 2nd
respondents on 4/12/2014.

Appellant also sought the following reliefs:

- E** “1. **A DECLARATION** that the 1st and 2nd respondents
illegally excluded the appellant from running the
gubernatorial primaries conducted on 4/12/2014.
- F** 2. **A DECLARATION** that the appellant is a legal and
registered card carrying member of 1st and 2nd
respondents and he is eligible, to contest for any
G position on the platform of All Progressives Congress,
including running the primaries held on 4/12/2014 by
the 1st and 2nd respondents.
- H** 3. **A DECLARATION** that the gubernatorial primary
election conducted by the 1st and 2nd respondents on
4/12/2014 was illegal, having conducted same without
due recourse to Article 9.3 sub 1 of the (APC)
I Constitution 2013, having excluded the appellant from
the primaries race by refusing a registered member
nomination form to contest.
- J** 4. **A DECLARATION** that the 3rd respondent should

- A** **refuse to recognize the gubernatorial primaries conducted by the 1st and 2nd respondents on 4/12/2014.**
- B** 5. **A DECLARATION that the court should nullify the primaries conducted by the 1st and 2nd respondents on 4/12/2014 having excluded a registered and legitimate member as appellant from contesting the same primary election.**
- C** 6. **A DECLARATION that the appellant is also qualified to contest for the primaries held on 4/12/2014 by the 1st and 2nd respondents.**
- D** 7. **A DECLARATION that the appellant be given nomination form, screened by the 1st and 2nd respondents, having the court to nullify the primaries conducted by the 1st and 2nd respondents on 4/12/2014 with the appellant to re-run and re-conduct the said primaries.**
- E**
- F** 8. **A DECLARATION that the 1st and 2nd respondents cannot conduct the upcoming gubernatorial general election without including the appellant, a bonafide member of the All Progressive Congress.**
- G** 9. **A DECLARATION that the Niger State gubernatorial primaries conducted by the 1st and 2nd respondents on 4/12/2014 was a nullity having been in gross breach of the 2nd respondent's Constitution of 2013 and party guidelines for congress by not including the appellant, a legitimate member who paid for the gubernatorial nomination form but was not given the form to contest.**
- H**
- I** 10. **A DECLARATION that the primaries conducted by the 1st and 2nd respondents on 4/12/2014 be nullified and another primaries re-conducted by the 1st and 2nd**
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- A** **breached the appellant's right to fair hearing when they refused to consider the relevant issues raised by the appellant before arriving at their decision?**
- B** **2. Whether the learned justices of the Court of Appeal were right when they declined jurisdiction to entertain the case of the appellant on the ground that the appellant's case before them is within the domestic jurisdiction of the 2nd respondent (APC) and thus the appellant lacks the *locus standi* to question whose party APC chose as candidate for the Office of Governor of Niger State?.....”**
- C**
- D** On the other hand, learned senior counsel for the 1st respondent, YUNUS USTAZ USMAN, (SAN), in the 1st respondent's brief filed on 27/3/16 formulated a single issue for the determination of the appeal, to wit:
- E** **“Whether the Court of Appeal was justified and or right in dismissing the appellant's appeal (Grounds 1 and 2 of the notice and grounds of appeal).**
- F** On his part, learned senior counsel for the 2nd respondent, MAHMUD ABUBAKAR MAGAJI, (SAN), in the 2nd respondent's brief filed on 31/3/2016 submitted the following two issues for determination:
- G** **“i. Considering the fact that appellant did not contest the primary election held on 4th December, 2015 for the nomination of the gubernatorial candidate of 2nd respondent (APC) for Niger State, whether he has the locus standi to challenge the outcome of the primaries under Section 87(9) of the Electoral Act, 2010 (as amended). (Distilled from Ground 2).**
- H**
- I** **ii. Having found that the trial court was right in declining jurisdiction to entertain the matter challenging the outcome of the primaries of 2nd respondent, whether the Court of Appeal's refusal to go into the merit of the case**
- J**

- A and/or consider appellant's Exhibits A, B, C, D and E
breached appellant's right to fair hearing. (Distilled
from Ground 1).**
- B** Looking closely at the two issues formulated by learned counsel for appellant and 2nd respondent, I am of the considered view that the sequence of the issues formulated by learned senior counsel for 2nd respondent is more logical and consequently preferable and this appeal will be considered in accordance with
- C** the sequence of the issues as so presented together.
- I, however, wish to state that though learned counsel for 3rd respondent, T.M. Inuwa, Esq. filed a notice of preliminary objection which was argued in the 3rd respondent's brief filed on 12/4/16, the said notice was withdrawn at the
- D** hearing of the appeal on 7/12/15 and consequently struck out.
- On the appellant's issue 2, learned counsel submitted that appellant was qualified by the Constitution of APC to contest the Niger State gubernatorial primaries on 4/12/14 after satisfying the requirements for the contest but was
- E** never allowed by the respondents "who wilfully refused to issue nomination form to the appellant despite the fact that he fulfilled all the requisite preconditions", that having regard to the constitution of 2nd respondent and its draft guidelines for nomination of candidates for public offices in Nigeria,
- F** appellant was qualified to contest the nomination and ought to have been issued a nomination form to enable him participate in the said primary election to which provisions learned counsel cited and relied on Article 9(3) (1) of the A.P.C. Constitution, 2013 and Article 20 thereof in addition to Sections 2 and 3 of the
- G** draft guidelines for nomination of candidates for public offices in Nigeria; that the respondents received appellant's payment of the sum of N5 million for nomination form but refused to issue the form to appellant despite the fact that appellant also paid the sum of N25,000 = being the sum required for zonal clearance for Niger Zone 'C', etc.
- H** It is the further contention of learned counsel for appellant that the lower court was in error in affirming the decision of the trial court that appellant has no *locus standi* to institute the action when the complaint was on non-compliance with the party's constitution and guideline and in such a case the jurisdiction of
- I** the court cannot be shut out, relying on the provisions of Section 87(9) of the Electoral Act, 2010 as amended; that a complainant who ought to have taken part in his political party's primaries has the locus standi to institute an action under the said Section 87(9) of the Electoral Act, 2010 (as amended); learned counsel
- J**

- A** also relied on the case of **Ukachukwu vs PDP (2014) 17 NWLR (pt.1435) 201**; that “having shown that the trial court has jurisdiction, and that the respondents admitted the case of the appellant, this honourable court has the power to order for a re-run of the primaries to enable the appellant participate”. The above
- B** submission is made notwithstanding the fact that a general election had long been conducted and a winner declared for the office of governor of Niger State!!

With regard to appellant's issue 1, learned counsel submitted that the failure of the lower court to consider his complaint against the trial court's

C decision on the matter without reference to the relevant exhibits, particularly Exhibits A, B, C, D and E, amounted to a denial of his right of fair hearing which renders the proceedings null and void, and urged the court to resolve the issues in favour of appellant and allow the appeal.

- D** On his part, learned senior counsel for 1st respondent stated that by the admission of appellant in paragraphs 7 and 8 of the affidavit in support of the originating summons, appellant did not satisfy all the requirements for him to be regarded as an aspirant of the party as he only paid for an “intent form” of N5
- E** million but was not issued with a nomination form to contest the primary election; that the lower courts were right in holding that appellant was not an aspirant at the primary election of 4/12/14; that appellant not being an aspirant who participated at the said primary election, cannot bring himself within the
- F** provisions of Section 87(9) of the Electoral Act, 2010, as amended, relying on **PDP & Ano vs Sylva & Ors (2012) LPELR 7814; (2012) 13 NWLR (Pt.1316 85 15 148; Nobis Elendu vs INEC (2015) 6 SCM 117 at 136; Uzodinma vs Osita Izunaso (2011) 17 NWLR (Pt.1275) 60; Gwede vs INEC (2014) 18**
- G** **NWLR (Pt.1438) 56 at 93**; that haven not participated in the primary election of the 2nd respondent, appellant has no locus standi to challenge the result of the said primaries.

- Finally, that since appellant lacks the *locus standi* to institute the action as
- H** rightly found and affirmed by the lower courts, the lower courts have no jurisdiction to entertain the action and can, therefore, not go into the merits of the case by examining the exhibits, etc, relying on **James vs INEC (2015) 12 NWLR (Pt. 1474) 538 at 584**; that a court of law cannot make an order binding a
- I** non-party to the action such as the present governor of Niger State who emerged the winner of the governorship election in Niger State following the general election but was not made a party to the action praying for nullification of both the primary election and the general election.

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A Learned senior counsel then urged the court to resolve the issues against appellant and dismiss the appeal.

B On his part, learned senior counsel for 2nd respondent M.A. MAGAJI, (SAN) in the 2nd respondent's brief of argument filed on 31/3/2016 submitted that the trial court haven examined the facts and law and come to the conclusion that appellant had no *locus standi* in instituting the action, was right in striking out the matter and that the lower court was right in affirming that decision, that sponsorship of candidates for election is the primary responsibility of political parties over which the courts have no jurisdiction; that appellant not being a party envisaged by Section 87(9) of the Electoral Act, 2010 as amended, has no locus standi to institute the action neither can he question any irregularity in the primary election in question; that appellant was neither screened nor cleared to contest the primary election nor did he participate in the said primary election to nominate the party's gubernatorial candidate and urged the court to resolve the issue against appellant and dismiss the appeal.

C T.M. INUWA ESQ for 3rd respondent leaves the decision on the merit at the discretion of the court but stated that based on the facts of the case as admitted by appellant, appellant lacks the locus standi to institute the action as found by the lower courts particularly as he was not an aspirant within the provisions of Section 87(9) of the Electoral Act, 2010, as amended.

D From the record, the following facts are not in dispute:

- E** (1) that appellant instituted suit No. FHC/NN/CS/35/2014 on 5/12/14 against the present respondents for reliefs earlier reproduced in this judgment.
- F** (2) that appellant was not an aspirant at the primary election of the 2nd respondent held on 4th December, 2014, the result of which he wants the court to declare a nullity.
- G** (3) that the primary election of the 2nd respondent was duly held and a winner emerged, who proceeded to contest the Niger State Gubernatorial election of 2015 and won.
- H** (4) that the said winner of the said primary and gubernatorial election was not joined or made a party in the action by appellant though some of the reliefs claimed affect his interest.

I

As earlier stated in this judgment, it is the decision of the lower courts that appellant has no *locus standi* to institute and maintain the action and as such the courts have no jurisdiction to hear and determine the said action. The question to

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A be decided herein is therefore whether the lower courts are correct in their determination?

In resolving the issue, it is necessary to take a look at the provisions of Section 87(9) of the Electoral Act, 2010, as amended, which confers jurisdiction on the court to hear and determine matters arising from nomination of candidates by political parties to contest general elections. I have to, once more point out that the jurisdiction conferred on the court to hear matters arising from political party nomination of candidates is an exception to the general principle of law that sponsorship of candidates by political parties for an election is the prerogative of the political parties concerned and as such the court has no jurisdiction to interfere in such a matter, same being within the internal affairs of the political parties. See **Dalhatu vs Turaki (2003) 15 NWLR (Pt.843) 310**; **Jang vs INEC (2003) LREC 299**; **P.D.P vs Sylva (2012) 13 NWLR (Pt.1316) 85 at 148**; **Ukachukwu vs PDP (2014) LPELR 22115**; **NobisElendu vs INEC (2015) 6 SCN 117 at 136**; **Uzodinma vs Izunaso (2011) 17 NWLR (Pt.1276) 60**; **Ugwu vs Ararume (2007) 12 NWLR (Pt.843) 310**; **Onuoha vs Okafor (1983) 2 SCNL 244**; **Gwede vs INEC (2014) 18 NWLR (Pt.1438) 56 at 93**; **Shinkafi vs Yari (2016) LPELR 26050** etc. Now to the provisions of section 87(9) of the Electoral Act, 2010, as amended which provides as follows:

F “(a) Notwithstanding the provisions of the Act or rules of a Political Party, an aspirant who complains that any of the provisions of this Act and the guidelines of a political party have not been complied with in the selection or nomination of a candidate of a political party for election, may apply to the Federal High Court or the High Court of a State or FCT for redress”.

H In dealing with the above provision in the case of **Ardo vs Nyako (2014) 10 NWLR (pt.1461) 591 at 629**, I stated the position of the law inter alia, as follows:

I “It is in that respect that I have to say that it is settled law that the question as to who is a candidate of a political party remains within the province of the political parties over which the courts have no jurisdiction except within the very narrow compass provided under the said section 87(9) of the Electoral Act, 2010, as amended. Under the said section 87(9) an aspirant who can

- A** invoke the jurisdiction of the court and, as has been held in a long line of cases from this court, is the one who complains that any of the provisions of the Electoral Act and the Guidelines of a political party has not been complied with in the selection or nomination of a candidate of a political party for election See **B** *Lado vs C.P.C. (2012) 17 NWLR (Pt.1275) 20 at 59-60; Emenike vs. P.D.P (2012) 12 NWLR (Pt.1315) 556;.....*
- C** It follows that for a party/person to qualify or have the locus to institute an action on a matter arising from the nomination of a party's candidate for an election, he must have participated in the nomination exercise of the party and failed irrespective of whether nomination was a process or an event.
- D** Where a party did not participate in the primary election of the political party for the nomination of a candidate for an election, he cannot sue on the processes leading to and including the actual primary election because by the provisions of the said Section 87(9) supra, the court will have no jurisdiction to hear and determine the action. In the instant case, appellant did not participate in the primary election conducted by the party to select/nominate its candidate for the gubernatorial election in question neither did he fail in the said exercise.
- E** The above remains the law as this court has not taken a contrary position on the matter.
- F** As found earlier in this judgment, there is no doubt, whatsoever, that appellant was not an aspirant within the provisions of Section 87(9) of the Electoral Act, 2010 as amended. It should also be noted that the action of appellant is not designed to seek redress for the sum he paid to the respondents towards his intention to participate in the nomination exercise of the respondents for a candidate for the election into the office of the governor of Niger State.
- G** In the circumstances and having regard to the facts and applicable law I hold the considered view that the lower courts are correct in holding that appellant has no *locus standi* to institute the action for the reliefs claimed and as such the courts have no jurisdiction to entertain same.
- H** It is my further opinion that jurisdiction being a fundamental/peripheral issue and the lower courts haven determined same against appellant, the courts had no business proceeding any further to consider the substantive matters on the merit and their failure has not resulted in any miscarriage of justice in the instant case as the appellant's right to fair hearing is in no way adversely affected thereby.
- I** In conclusion, I find no merit whatsoever in this appeal which is
- J**

A consequently dismissed by me.
I, however, make no order as to costs.

Appeal dismissed.

B **Walter Samuel Nkanu Onnoghen**
Ag. Chief Justice of Nigeria

Appearances

C M.N. MOHAMMED (ESQ) for appellant with him are messrs ISAAC
ENAMODU (ESQ) & O. OBIKWETE (ESQ).

D YUNUS USTAS USMAN, (SAN) for 1st respondent with him are messrs A.B.
MAHMOUD; J.J. USMAN; A.O. PHILIP; M.K. BIELONWU; J.A. SAMBO
and C.C. IFENEMAN.

E MAHMUD A. MAGAJI, (SAN) for 2nd respondent with him are Messrs C.K.
UDEOYIBO; AMINA ZUKOGI; H.M. TUKUR; M. YAHAYA; S.P.
ASHIEKAA and A. MATANMI.

F T.M. INUWA (ESQ) for 3rd respondent with him are messrs R.A. UGBANE; A.
SANI; W. KUKU; R. AMINU and B.M. ABUBAKAR.

PETER-ODILI, (JSC): I agree in totality with the judgment and reasonings
just delivered by my learned brother, Walter Nkanu Onnoghen Ag. CJN and to
register my support, I shall make some remarks.

G This is an appeal against the judgment of the Court of Appeal sitting in
Abuja delivered on 4th day of February, 2016 wherein that court dismissed the
appellant's appeal against the judgment of the Federal High Court, Minna
Division per A. I. Chikere J, that struck out the appellant's suit in a judgment
delivered on the 25th day of March, 2015.

H Briefly, this appeal emanated from a pre-election matter that challenged
the outcome of a primary election conducted by the All Progressives Congress
(APC) for the nomination of its governorship candidate, for Niger State for the
I 2015 general election. The trial court in its judgment refused all the reliefs and
struck out the case on the basis of the preliminary objection of the 1st and 2nd
respondents on the ground that plaintiff/appellant lacked the locus standi to
question who the party, APC chose as candidate for the office of governor of
J Niger State.

A The suit was initiated by an originating summons with a supporting affidavit but the 1st and 2nd respondents filed a conditional appearance with a notice of preliminary objection challenging the competence of the suit on the ground that appellant lacked the locus standi to approach the court and therefore
B the jurisdiction of the court was queried. The fuller details of the facts and backgrounds are well set out in the lead judgment and so no need to repeat them.

On the 7th day of December, 2016 when the hearing took place, learned counsel for the appellant, M.N. Mohammed Esq. adopted his brief of argument
C filed on 15/2/16 and in it raised two issues for determination which are as follows:

D 1. **Whether the learned justices of the Court of Appeal breached the appellant's right to fair hearing when they refused to consider the relevant issues raised by the appellant before arriving at their decision? Ground one).**

E 2. **Whether the learned justices of the Court of Appeal were right when they denied jurisdiction to entertain the case of the appellant on the ground that the appellant's case before them is within the domestic jurisdiction of the 2nd respondent (APC) and thus the appellant lacks the *locus standi* to question who his party APC chooses as candidate for the office of governor of Niger State? (Ground two).**
F

G Mr. Yusuf Ustaz Usman (SAN) adopted 1st respondent's brief of argument filed on the 24/3/16 and he identified a single issue being:

H **Whether the Court of Appeal was justified and or right in dismissing the appellant's appeal?**

I Learned counsel for the 2nd respondent, Mahmud Abubakar Magaji SAN adopted its brief of argument filed on 31/3/16 and in it formulated two issues for determination which are thus:

J **I. Considering the fact that appellant did not contest the Primary Election held on 4th December, 2015 for the**

A nomination of the Gubernatorial Candidate of 2nd respondent (APC) for Niger State, whether he has the *locus standi* to challenge the outcome of the primaries under Section 87(9) of the Electoral Act, 2010 (as amended).

B ii. Having found the trial court was right in declining jurisdiction to entertain the matter challenging the outcome of the primaries of 2nd respondent, whether the Court of Appeal's refusal to go into the merit of the case and/or consider appellant's Exhibit A, B, C, D and E breached appellant's right to fair hearing.

D For the 3rd respondent, learned counsel, T.M. Inuwa adopted its brief of argument filed on 12/4/16 and adopted the issues as framed by the appellant.

E I shall make use of issue two as crafted by the appellant in the determination of this appeal and that is as follows:

ISSUE TWO

F Whether the learned justices of the Court of Appeal were right when they declined jurisdiction to entertain the case of the appellant on the ground that the appellant's case before them is within the domestic jurisdiction of the 2nd respondent APC and thus the appellant lacks the *locus standi* to question who its party APC choose as candidate for the office of governor of Niger State.

H For the appellant, M.U. Mohammed Esq. submitted that the appellant established that he had the competence to sue as can be gleaned from the supporting affidavit to the originating summons wherein he stated the following:

I That he is a registered member of the 2nd respondent as shown in Exhibit A. That he sought to contest for the position of governor of Niger State under the platform of the 2nd defendant and paid N5 Million Naira for nomination form via Exhibit B, and that the respondents collected this money and refused to issue out nomination form to enable the appellant to contest the

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- A** **primaries with other aspirants. The appellant also paid N25,000.00 via Exhibit C to the respondent being the money for the zonal clearance and the respondent despite this refused to issue nomination for to the appellant.**
- B**
- C** **The appellant also paid the sum of N500,000 Naira via Exhibit D to the respondents for intent form to run for the position of the Governor of Niger State under the platform of APC, but the respondent collected this money and refused to issue out nomination form to the appellant to be screened and run for the primaries with other aspirants held on 4/12/2014 in Niger State.**
- D** **That the appellant also obtained a clearance form, Exhibit E of which the appellant's ward Chairman signed, the Local Government Chairman and Zonal Chairman signed, but the 1st respondent deliberately refused to sign and issue the appellant the gubernatorial aspirant nomination form.**
- E**
- F** **The appellant also paid N50,000.00 via Exhibit F being the APC branch charges and despite this, the respondent refused to include him among others to participate in the 2nd respondents primaries in Niger State.**
- G** **That the APC constitution provided for equal treatment of party members and the respondents prejudiced the appellant despite fulfilling all the requirements to contest for the primaries. That the appellant exhausted all avenues to seek redress within the party to no avail. That it would serve the**
- H** **interest of justice if the primaries conducted by the respondents on 4/12/14 is nullified and a re-run ordered, to enable the appellant to participate with other contestants.**
- I** **It was submitted that considering the Constitution of the 2nd respondent (APC) and the Draft Guidelines for Nomination of Candidates of the said party, the appellant was qualified to contest the Niger State gubernatorial primaries of the APC and as such ought to have been issued with a nomination form to enable him**
- J** **participate in the said primaries.**

A That the appellant met all the conditions precedent listed in the said guidelines and so failure of the 2nd respondent to issue him with the nomination form and the implication of being excluded from the primaries vitiated the process of the primaries held on the 4/12/14 and so another primary ought to be
B conducted by the 1st and 2nd respondents to give the appellant and other parties equal opportunity to participate.

That the trial court had jurisdiction to make the order for a re-run of the primaries.

C Learned counsel for the 1st respondent, Yusuf Ustaz Usman SAN submitted that the appellant did not clear the mandatory hurdles set up by the APC in the first place on his own admission and so was not in a position to ask for the reliefs he has prayed for. That the suit is non justifiable and so the appellant
D has no *locus standi* to contest the questions he raised in court as he was not an aspirant. He cited **Guda v Kitta (1999) 12 NWLR (Pt.629) 21; Jang vs. INEC & Ors (2003) LREC 299; PDP & Anor vs. Timipre Sylva & Ors (2012) 13 NWLR (Pt.1316) 85 at 148.**

E Learned senior counsel Mahmud Magaji for the 2nd respondent contended that the peculiar facts of the concurrent judgments of the two courts below did not deny appellant fair hearing to warrant the invocation of the principle of fair hearing to enable the appellant be accorded the reliefs he seeks.

F T.M. Inuwa for the 3rd respondent submits to whatever decision the court would make as the 3rd respondent is the umpire and would want to keep within an unbiased stance. He cited **Uzodinma vs. Izunaso (No.2) (2011) 17 NWLR (Pt.1275) 30; A. G. Federation & Ors vs. Atiku Abubakar & Ors 32 NSCQR 1 at 174 – 175.**
G

H The dispute before the court centres on the appellant asking that the primary election conducted by the 1st and 2nd respondents on 4/12/2014 be nullified and another such process conducted to give the parties including the appellant equal opportunity to participate. On the other hand the 1st and 2nd respondents contend that the trial court indeed lacked jurisdiction to entertain the matter as the appellant lacked the *locus standi* to institute it.

I The learned trial judge had no hesitation in dispatching the application on the ground that the plaintiff does not have the *locus standi* to question who his party, APC choose as candidate for the office of governor of Niger State. She also held that the nomination and sponsorship of a candidate to run for a political office is the internal affair of the party. The court of First instance relied on
J Section 87(1) of the Electoral Act, 2010.

A On appeal, the court below per Abdu Aboki JCA as seen at pages 250 – 255 in affirming what the court of trial did stated as follows:

B **“The only person who has locus standi to complain that any of the provisions of Electoral Act and the guideline of a political party has not been complied with in the selection or nomination of a candidate of a political party for election, is the dissatisfied aspirant who participated in the primary election concerned, in this case it is those who participated in the gubernatorial primary election conducted by the 1st and 2nd respondents on 4/12/2014”.**

D The Court of Appeal stated further thus:

E **“It is my view that the appellant is not an aspirant and/or a dissatisfied contestant at the gubernatorial primaries election conducted by the 1st and 2nd respondents on 4/12/2014. Therefore has no locus under Section 87(9) of the Electoral Act, 2010 (as amended) to challenge his party's primaries by instituting this action”.**

F The appellant at the court of trial had agitated the jurisdiction of that court asking for the following reliefs:

G 1. **“A DECLARATION that the 1st and 2nd respondents illegally excluded the appellant from running the gubernatorial primaries conducted on 4/12/2014.**

H 2. **A DECLARATION that the appellant is a legal and registered card carrying member of 1st and 2nd respondents and he is eligible to contest for any position on the platform of All Progressive Congress, including running the primaries held on 4/12/2014 by the 1st and 2nd respondents.**

I 3. **A DECLARATION that the gubernatorial primary election conducted by the 1st and 2nd respondents on**

J

- A** **4/12/2014 was illegal, having conducted same without**
due recourse to Article 9.3 sub 1 of the (APC)
B **Constitution 2013, having excluded the appellant from**
the primaries by refusing a registered member
nomination from to contest.
- C** **4. A DECLARATION that the 3rd respondent, should**
refuse to recognize gubernatorial primaries conducted
by the 1st and 2nd respondents on 4/12/2012.
- D** **5. A DECLARATION that the court should nullify the**
primaries conducted by the 1st and 2nd respondents on
4/12/2014 having excluded a registered and legitimate
member as appellant from contesting the said primary
election held on 4/12/2014 by the 1st and 2nd respondents.
- E** **6. A DECLARATION that the appellant is also qualified to**
contest for the primaries held on the 4/12/2014 by the 1st
and 2nd respondents.
- F** **7. A DECLARATION that the appellant be given**
nomination form, screened by the 1st and 2nd respondents,
having the court to nullify the primaries conducted by
G **the 1st and 2nd respondents on 4/12/2014 with the**
appellant to re-run and re-conducted the said primaries.
- H** **8. A DECLARATION that the 1st and 2nd respondents**
cannot conduct the upcoming gubernatorial general
election without including the appellant, a bonafide
member of the All Progressive Congress.
- I** **9. A DECLARATION that the Niger State gubernatorial**
primaries conducted by the 1st and 2nd respondents on
4/12/2014 was a nullity having been in gross breach of the
2nd respondent's Constitution of 2013 and party
J **guidelines for congress by not including the appellant, a**
legitimate member who paid for the gubernatorial

- A nomination form but was not given the form to contest.**
- 10. A DECLARATION that the primaries conducted by the 1st and 2nd respondents on 4/12/2014 be nullified and another primaries re-conducted by the 1st and 2nd respondents including the name of the appellant.**
- 11. AN ORDER OF THIS HONOURABLE COURT directing the 3rd respondent not to deal with and or recognize the conduct of the primaries conducted by the 1st and 2nd respondents on 4/12/2014 for the general incoming gubernatorial election of Niger State.**
- 12. AN ORDER OF THIS HONOURABLE COURT directing the 3rd respondent not to accept any party activity or decisions emanating from the actions of the 1st and 2nd respondents gubernatorial primaries held on 4/12/2014 having and excluded the appellant from participating in the said primaries.**
- 13. AN INJUNCTION RESTRAINING the 1st, 2nd and 3rd respondents from conducting the general gubernatorial election of Niger State (APC) until final determination of this substantial matter before the court.**

The respondents 1st and 2nd in response through a preliminary objection opposed the appellant's approach to the court contending he lacked the *locus standi* to so enter the court and ask for the reliefs above stated. This naturally threw up the question whether in fact the appellant had the right he assumed and if the answer was in the affirmative, the court's jurisdiction would be properly ignited and if the answer was in the negative then the court's vires would not be in existence to enable the court get into the adjudication being sought. This court has, time without number, restated the true position on *locus standi*. The term *locus standi* is in my humble view, the legal right of a party to an action to be heard in litigation before the court of law and it entails that capacity to institute or commence or initiate an action in a competent court of law or tribunal without let, hindrance,

A obstruction or inhibition from any person or body whatsoever. The question that does come in is whether or not the party making the approach has an interest to protect or a legal right, what is in issue is whether aggrieved, he has the capacity to approach the court to ventilate his grievance.

B This apex court has at every given opportunity restated what the position of things is in **Inakoju vs. Adeleke (2007) 7 NWLR (Pt.1025) 602**, where the Supreme Court held thus:

C **“To have a *locus standi* to sue, the plaintiff must show sufficient interest in the suit. One criterion of sufficient interest is whether the party could have been joined as a party to the suit. Another criterion is whether the party seeking the redress or**
D **remedy will suffer some injury or hardship from the litigation. If the court is satisfied that he will suffer, then he must be heard as he is entitled to be heard”.**

E The appellant has gone to great lengths to refer to the constitution and guidelines of the 2nd respondent, the APC and contending that the appellant being qualified within the criteria of those guidelines and constitution ought to be granted the prayers he seeks.

F My reaction in the prevailing circumstances is, not so fast as the first hurdle must be tackled, that is if the court can enter into the qualification or otherwise of the appellant within those guidelines and constitution. The court must first have jurisdiction before that can happen and that vires is predicated on
G the appellant's legal capacity to have his cry heard. The situation on ground is really very narrow as it anchors on the specific provisions of Section 87(9) of the Electoral Act, 2010 as amended and a lot has been said in that regard already and I shall refer to what my learned brothers have said on it as guide.

H In **APGA vs. Anyanwu & Ors (2014) 7 NWLR (Pt.1407) 541 at 577-578 paras. D – A**, this Court per KEKERE-EKUN, JSC held thus:

I **“Since the sponsorship of candidates is the prerogative of the political party, it would be absurd to interpret the provisions of section 31 (5) above as permitting members of the same political party to challenge the party's choice in court.**

This brings me to Section 87(9) of the Act which provides:

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- A** “Notwithstanding the provisions of the Act or rules of a political party, an aspirant who complains that any of the provisions of the Act and the guidelines of a political party has not been complied within the selection or nomination of a candidate of a political party for election, may apply to the Federal High Court or High Court of a State for redress”.
- B**
- C** It has been held that the jurisdiction of the court to entertain a complaint under this section is very narrow in scope. A complainant must bring himself squarely within the confines of the provision. He must be an aspirant who participated in the primary and his complaint must relate to non-compliance with the provisions of the Electoral Act or the guidelines of the political party. See *Uwazurike vs Nwachukwu* (2012) 3 NWLR (Pt.1342) 503 at 526; *PDP vs Sylva* (2013) 13 NWLR (Pt.1316) 85 at 148 C D; *Lado vs CPC* (2012) All FWLR (Pt.607) 598 at 622-623 F-H”.
- D**
- E**
- The appellant had by his own admission in the process at the trial court conceded that he did not participate at those primaries aforesaid. On such a situation Rhodes-Vivour (JSC) had this to say in: **Daniel vs. INEC** (2015) 9 NWLR (Pt.1463) 113 at 153-154 paras. H-C,
- F**
- G** “An admission, clearly and unequivocally made is the best evidence against the person making it. Paragraphs 26 and 30 are conclusive evidence that the appellant did not participate in the re-run primaries conducted by PDP on the 15th January, 2011. They are clear admissions by the appellant. Since the appellant did not participate in the re-run primaries there was no way he could complain about the conduct of the primaries and so had no *locus standi* to institute an action as provided by Section 87(9) of the Electoral Act. Put in another way, before a candidate for the primaries can have the *locus standi* to sue on the conduct of the primaries, he must be screened, cleared by his political party and participate at the said primaries. Anything short of that, the candidate who did not participate in
- H**
- I**
- J**

A the primaries could conveniently be classified as a meddlesome interloper with no real interest in the primaries.

B The Court of Appeal to my mind was wrong. The appellant has no locus to institute this suit because he did not participate in the re-run primaries. Notwithstanding his irreconcilable pleadings and his outlandish claims the appellant remains doggedly resolute, and undeterred in proceeding with this appeal which is dismally devoid of any merit whatsoever. The appeal is dismissed with no order on costs".

D In his contribution to this judgment at page 155 paragraphs B-D, His Lordship, Fabiyi, JSC held thus:

E *"...the real determinant issue is whether the appellant/cross-respondent who admitted that he did not physically participate in the re-run primary election of 15/1/2011 has the requisite locus standi to complain in respect of same.*

F *Let me make some remarks on the provision of Section 87(9) of the Electoral Act, 2010 (as amended). It is an aggrieved aspirant who physically participated in a primary election conducted by the National Executive Committee of his party that is imbued with locus standi to raise a finger of complaint. See Peoples Democratic Party vs. Sylva & 2 Ors (2012) 13 NWLR (Pt.1316) 85; Lado vs. C.P.C. (2011) 18 NWLR (Pt.1279) 689".*

H Aka'ahs JSC in his own contribution stated at page 158 of the said judgment as follows:

I *"He was clearly excluded from the re-run primaries. The party has a right to exclude a candidate from participating in primaries even after he has been screened and cleared to contest the primaries and the candidate so excluded has no legal remedy against the action taken by the party.*

J

A See PDP vs. Sylva & 2 Ors (2012) 13 NWLR (Pt.1316) 85. The minority decision of Tur, JCA which agreed with the decision of the trial that the appellant lacked the locus standi to institute the action is right since he did not participate in the re-run he cannot question the conduct or result of the re-run. Consequently, the main appeal fails and it is dismissed while the cross-appeal of 2nd and 3rd respondents have merit and they are followed accordingly”.

C It is clear and at the risk of repetition or echoing again and again what has been said that the nomination or sponsorship of a candidate for election is a political matter within the sole discretion or power of the political party, an internal affair
D which is not a matter for the public domain being pre-election and therefore domestic. It is after the conduct of the party's primary that an aggrieved contestant at the process can complain about the conduct and it is then that the courts have jurisdiction to hear such a party. A person who has not so contested
E has no legroom to invoke that jurisdiction of the court.

What I am labouring to put across has been effectively laid to rest by this court in many decided cases but the one that seems to have had the present occasion in mind is that of **Lado vs. CPC (2011) 18 NWLR (Pt.1279) 692,**
F Onnoghen JSC (as he then was) at pages 718-719 that:

G “The power of an aggrieved aspirant who is not satisfied with the conduct of the primaries by his party to elect a candidate must bring himself within the purview of Section 87(b) (ii); and (9) of the Electoral Act 2010 (as amended) supra. It is only if he can come within the provisions of those sub-sections that his complaints can be justiciable as the courts cannot still decide as
H between two or more contending parties which of them is the nominated candidate of a political party; that power still resides in the political parties to exercise. The enactment is not designed to encourage factions emerging from the political
I parties with each electing its candidates but claiming same to be candidates of the political party concerned.

J Although the National Assembly has attempted to infuse internal democracy in the political parties by ensuring that

A candidates who have been nominated to the stand elections are not substituted arbitrarily, nonetheless the party still retains the right to set the parameters for nomination/selection of the candidates”.

B

It follows that the issue herein had been in effect answered and I would say that the appellant does not qualify, has no *locus standi* to initiate an action on the matter arising from the nomination of a party's candidate for an election as he has not participated in the nomination exercise of the party. He cannot therefore sue on the processes leading to and including the actual primary election and the implication is that the court has no jurisdiction to hear and determine what he has to say in regard to those processes and the primary. He therefore shouts in vain as

D his noise cannot be heard. “I place reliance on Lado vs CPC (2011) 18 NWLR (Pt.1279) 629 per Onnoghen JSC (as he then was).

E At the risk of repetition it is necessary to reiterate that the term *locus standi* connotes the legal capacity to institute proceeding in a court of law. It is used interchangeably with the term “standing” or “title to sue”. It is often an aspect of justifiability and also an issue of jurisdiction. If a plaintiff is not competent because he has no *locus standi* to bring an action, the court would, in turn be incompetent and without jurisdiction to entertain the plaintiff's action”. See Adesanya vs. President, F.R.N. (1981) 2 NCLR 236; Owodunni vs. Registered Trustee of C.C.C. (2000) 10 NWLR (Pt.675) 315.

H It is really important to note that the *locus standi* to sue does not depend on the success or merits of a claim. That is, it is a condition precedent to a determination in the merits, consequently if a plaintiff has no *locus standi* to sue, it is not necessary to consider whether or not there is a genuine case on the merits, all that matters is whether the party has the leg to stand on while initiating the action”.

I

See Adesanya vs. President (supra); A.G, Akwa Ibom State vs. Essien (2004) 7 NWLR (Pt.872) 288”.

J

A Finally, I see no basis for going outside of what the concurrent findings and decisions of the two courts below showcased and in line with the better and well articulated reasoning in the lead judgment conclude that this appeal lacks merit and is dismissed. I abide by the consequential orders made.

B **Mary Ukaego Peter-odili**
Justice, Supreme Court

BAYANG AKAAHS, JSC: I read in draft the judgment of my learned brother, **C** Onnoghen AG. Chief Justice of Nigeria, affirming the decisions of the two lower courts and dismissing the appeal as lacking in merit. I am in total agreement that the appellant had no *locus standi* to institute the action since he did not participate in the primaries that produced the gubernatorial candidate of the APC in Niger **D** State for the 2015 General Elections. The fact that he is a registered member of the party who paid for the nomination form and also obtained the Zonal Clearance and Expression of Intent Forms did not qualify him as an aspirant so as to bring him within the contemplation of section 87(9) of the Electoral Act, 2010 **E** as amended. This court has handed down several judgments that it is only when a person has contested the primaries for an elective position that will enable him approach the court to complain that any of the provisions of the Electoral Act and the guidelines of a political party have not been followed in the selection or **F** nomination of a candidate of the party for an election. In other words, a person cannot approach the court to complain that the political party prevented him from participating in the primaries of the party since sponsorship of candidates by political parties for an election is the prerogative of the political parties **G** concerned and the court lacks jurisdiction to interfere in such a matter which is an internal affair of the political parties. See **Lado vs. C.P.C. (2011) 18 NWLR (Pt.1279) 689; PDP vs.. Sylva (2012) 13 NWLR (Pt.1316) 85; Ardo vs. Nyako (2014) 10 NWLR (Pt.1416) 591; Gwede vs. INEC (2014) 18 NWLR (Pt.1438) 56.** **H** The appellant falls in the category of those two were excluded from contesting the primaries and the court cannot entertain the action. The two lower courts were right to decline jurisdiction. For this and the more comprehensive reasoning contained in the lead judgment of my lord Onnoghen AG. CJN, **I** I find no merit in the appeal and it is accordingly dismissed. I also make no order on costs.

J **K. B. Akaahs**
Justice, Supreme Court

- A KEKERE-EKUN, JSC:** I have had the benefit of reading in draft the judgement of my learned brother, WALTER SAMUEL NKANU ONNOGHEN, AG. CJN just delivered. I am in complete agreement with the manner in which the issues in contention in this appeal have been resolved and the reasoning and conclusion reached.

- The facts giving rise to this appeal have been aptly summarised in the lead judgment. Suffice it to say that the trial court dismissed the appellant's suit instituted vide originating summons on the ground that having not participated in his party's primary election into the office of Governor of Niger State, the appellant lacked the *locus standi* to question who his party, the ALL PROGRESSIVES CONGRESS (APC) chooses as its candidate for the office. The appellant's complaint as deposed to in paragraphs 6,7,8,9,10,13,18 & 19 of the originating summons is that his party refused to sponsor him or unlawfully excluded him from contesting for the office of Governor of Niger State notwithstanding the fact that he had paid the sum of N5 million for expression of intent form and the amount charged for the Zonal Clearance for Niger State Zone C.

- The trial court held, relying on Section 87(9) of the Electoral Act, 2010 as amended, that the nomination and sponsorship of a candidate to run for political office is that internal affair of the party. That the APC having nominated and sponsored its candidates for the primary and the name of the winner submitted to INEC, the appellant lacked the *locus standi* to challenge the decision. The appellant's reliefs were accordingly refused. The lower court affirmed the decision.

- As my learned brother did in the lead judgment, I adopt the 2nd respondent's issues in making my contribution in support thereof.

- I must start by stating that the long settled position of the law is that the nomination and sponsorship of a candidate at an election is a matter within the internal affairs of a political party and therefore not justiciable, except in the limited circumstances provided in Section 87(9) of the Electoral Act 2010, as amended, where a co-aspirant alleges that the relevant guidelines of the political party or the provisions of the Electoral Act were not complied with. **See: Faleke vs INEC (2016) 9 SCNJ 1 @ 104 – 105; Ukachukwu vs P.D.P. (2014) 17 NWLR (Pt.1435) 134; Amaechi vs INEC (2007) 18 NWLR (Pt.1065) 170 @ 203 A – C; P.D.P. vs Onwe (2011) 4 NWLR (Pt.1230) 166 @ 172 – 173 C – B.**

Section 87(9) of the Electoral Act provides:

J

- A** “87 (9). Notwithstanding the provisions of this Act or rules of a political party, *an aspirant* who complains that any of the provisions of this Act and the guidelines of a political party has not been complied with in the selection or nomination of *a candidate of a political party* for election, may apply to the Federal High Court or the High Court of a State or FCT, for redress”. (Underlining mine for emphasis).
- B**
- C** This court, in a plethora of decisions has settled the question as to who qualifies as an aspirant within the meaning of Section 87(9) of the Electoral Act. He is a person who participated in the primaries. A person who has been screened and cleared by his political party to participate in the primaries.
- D** See: **Daniel vs INEC (2015) 9 NWLR (Pt.1463) 113 @ 153 – 154 H – C; 158 G – H; Lado vs C.P.C. (2011) 18 NWLR (Pt.1279) 689 @ 723 – 724 H – A; Emenike vs P.D.P. & Ors. (2012) 12 NWLR (Pt.1315) 556; P.D.P. vs Sylva (2012) 13 NWLR (Pt.1316) 85 @ 126 C; 141 – 142 E – A.**
- E** By his own showing in paragraphs 7, 8 & 9 of the affidavit in support of his Originating Summons, the appellant was never screened, cleared nor nominated by his party to contest the aforesaid primaries. He therefore failed to bring himself within the purview of Section 87(9) of the Electoral Act.
- F** I am therefore in full agreement with the two lower courts that the appellant lacked the *locus standi* to institute the action at the trial court.
- Apart from lacking the *locus standi* to institute the action, the appellant failed to join the person who emerged as the winner of the primary election and eventually won the governorship election of Niger State, a person whose interest would certainly have been adversely affected by a favourable decision in the appellant's favour.
- G**
- Having regard to all the circumstances of this case the appellant's redress, at best, lies in a claim for damages against his party. See **Tukur vs Uba & Ors. (2012) LPELR – 9337(SC) @ 96 97; P.D.P. vs Sylva (supra) @ 146 C – E.**
- H**
- For these and the fuller reasons advanced in the lead judgment, I find the appeal to be devoid of merit. it is accordingly dismissed with no order as to costs.
- I**
- Kudirat M. O. Kekere-ekun**
Justice, Supreme Court
- J** **EJEMBI EKO, (JSC):** I had the privilege of reading in draft the judgment just

A delivered by my learned brother, W.S.N. Onnoghen, Ag. CJN.

The judgment represents my views on the appeal, and I hereby adopt it. I however wish to put in a few words.

B The All Progressive Congress (APC) conducted its primary election to elect the candidate of the party in the Governorship Election in Niger State on 4th December, 2014. The appellant took out this suit on Originating Summons at the Federal High Court, Minna, claiming a total of 13 reliefs on 5th December, 2014. The said 13 reliefs are:

- C “(1) **A DECLARATION that the 1st and 2nd defendants illegally excluded the plaintiff from running the gubernatorial primaries conducted on 4/12/2014.**
- D (2) **A DECLARATION that the plaintiff is a legal and registered card carrying member of 1st and 2nd defendants and he is eligible to contest for any position in the platform of All Progressive Congress, including to run the primaries held on 4/12/2014 by the 1st and 2nd defendants.**
- E
- F (3) **A DECLARATION that the Gubernatorial primaries election conducted by the 1st and 2nd defendants on 4/12/2014 is illegal, having conducted same without the recourse to Article 9.3 sub 1 of the (A.P.C.) Constitution 2013, having exclude (sic) the – Plaintiff from the primaries race by refusing a register member nomination form to contest.**
- G
- H (4) **A DECLARATION that the 3rd defendant should refuse to recognize the Gubernatorial primaries conducted by the 1st 2nd defendants on 4/12/2014.**
- I (5) **A DECLARATION that the court should nullify the primaries conducted by the 1st and 2nd defendants on 4/12/2014 having excluded a register (sic) and legitimate member as plaintiff from contesting of same primaries**

J

- A election.**
- B (6) A DECLARATION that the plaintiff is also qualified to contest for the primaries held on 4/12/2014 by the 1st and 2nd defendants to contest.**
- C (7) A DECLARATION that the plaintiff be given nomination form, screened by the 1st and 2nd defendants, having (sic) the court to nullify the primaries conducted by the 1st and 2nd defendants on 4/12/2014 with the plaintiff to re-run and re-conduct the said primaries.**
- D (8) ADECLARATION that the 1st and 2nd defendants cannot conduct the incoming gubernatorial general election without including the plaintiff a bonafide member of the All Progressive Congress.**
- E (9) A DECLARATION that the Niger State Gubernatorial primaries conducted by the 1st and 2nd defendants on 4/12/2014 is a nullity having being (sic) in gross breach of the 2nd defendant constitution of 2013 and party guidelines for congress by not including plaintiff legitimate member who paid for gubernatorial nomination fees but was refused given a form to contest without aspirants.**
- F**
- G**
- H (10) ADECLARATION that the primaries conducted by the 1st and 2nd defendants on 4/12/2014 be nullify (sic) and another primaries be reconducted by the 1st and 2nd defendants included the name of the plaintiff.**
- I (11) AN ORDER OF THIS HONOURABLE COURT directing the 3rd defendants not to deal with and or recognize the conduction of the primaries conducted by the 1st and 2nd defendants on 4/12/2014 for the general incoming gubernatorial election of Niger State.**
- J (12) AN ORDER OF THIS HONOURABLE COURT**

**A directing the 3rd defendant not to accept any party
activity or decisions emanating from the actions of the 1st
and 2nd defendant's gubernatorial primaries held on
B 4/12/2014 having excluding the plaintiff from
participating in the said primaries.**

**(13) AN INJUNCTION RESTRAINING the 1st, 2nd and 3rd
defendants from conducting the general gubernatorial
C election of Niger State (APC) until final determination of
this substantial matter before the court”.**

D “It is clear that Reliefs 4, 8, 11, 12 and 13 are not strictly about the primary
election within the APC. They are directed against the “Upcoming gubernatorial
general election” which is a contest inter parties between the candidates
sponsored by the APC and the other political parties. Neither the candidates of
those other political parties nor the political parties were made parties in this suit.
E The declaratory and injunctive orders sought in reliefs 8, 11 and 13 will adversely
affect those other political parties and/or their candidates. Accordingly, those
persons or parties that would be adversely affected, in the interest of justice or fair
hearing as required by Section 36(1) of the Constitution (as amended), are
F entitled to be joined and heard. This action, particularly Reliefs 8, 11, and 13 as
couched, is not properly constituted without those proper and necessary parties.
In any case, the appellant, as the plaintiff, has not disclosed his cause of action
against those who ultimately would be affected by the grant of reliefs 4, 8, 11, and
13, but who are not parties in the suit”.

G The complaint of appellant for the remaining reliefs is that his party, the
APC, prior to the primary election on 4th December, 2014 had demanded from
him and he paid various sums of money to enable him contest in the primary
election. That he was not given the nomination Form that he had paid for. And
H that he was not given an opportunity to contest in the primary election. He did not
participate in that primary election, because all the preliminary prerequisites
were denied to him. In **PDP vs. Sylva (2012) All FWLR (Pt.637) 654 at 666**
I this court had stated, loud and clear, that an aspirant excluded by his political
party from contesting the party primary election, and who in actuality was not a
contestant at the said party primary election, has not *locus standi* to challenge the
outcome of the primary election. The appellant, on this authority and in the
J peculiar circumstances of the case, did not have requisite *locus standi* to bring the

A suit in the terms he took it out on the originating summons at the trial court.

The fact that the appellant paid for nomination forms which were not given to him and in the absence of the duly filled and returned nomination forms he was not placed on the ballot for primary election would give a different

B remedy and not the remedy under Section 87(9) of the Elections Act, 2010, as amended, which provides:

C **“Notwithstanding the provisions of the Act on rules of a Political Party, an aspirant who complains that any of the provisions and the guidelines of a political party have not been complied with in the selection or nomination of a candidate of a political party for election, may apply to the**
D **Federal High Court or the High Court of a State or FCT for redress”.**

E “The redress under Section 87(9) of the Electoral Act is only available to the person who participated in the primary election of his party for the nomination of a candidate of the party at the general election. It does not avail those persons, like the appellant, who did not participate in the party primary election. See **ARDO vs NYAKO (2014) 10 NWLR (Pt.1461) 591 at 629.**

F The jurisdiction vested in the Federal High Court is additional jurisdiction to its normal jurisdiction under Section 251 of the Constitution and Section 7 of the Federal High Court Act.

G This additional jurisdiction of the Federal High Court vested by Section 87(9) of the Electoral Act, 2010, as amended, cannot be stretched to money had and received for services not rendered or nomination forms not supplied. The grouse of the appellant entitles him to sue his party (APC) for money had and received for nomination forms not supplied. This, he cannot bring under Section
H 87(9) of the Electoral Act, 2010, as amended”.

There is a failure to join necessary parties

I At the time, on 5th December, 2014, when the originating summons was taken out from the Federal High Court, Minna, the APC had concluded its primary election and a winner, had remerged therefrom. That person who emerged the winner, entitled to be regarded as the APC candidate in the gubernatorial election, was not made a party in this suit, notwithstanding that the grant of the reliefs in this suit would adversely affect his interest. Without his

J

A joinder, as a proper and necessary party, the suit was not properly constituted.

I have not been shown any good cause to disturb the decision of the Court of Appeal in the appeal No. **CA/A/225/2015** delivered on 4th February, 2016.

The appeal, lacking in substance, is hereby dismissed.

B

Ejembi Eko,
Justice, Supreme Court.

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**DR. UMAR ARDO
AND**

- 1. INDEPENDENT NATIONAL ELECTORAL COMMISSION [INEC]**
- 2. ALL PROGRESSIVE CONGRESS [APC]**
- 3. ALL PROGRESSIVE GRAND ALLIANCE [APGA]**
- 4. PEOPLES DEMOCRATIC PARTY [PDP]**
- 5. SOCIAL DEMOCRATIC PARTY [SDP]**
- 6. SENATOR BINDAWO JIBRILLA**

SC. 153/2016

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

FRIDAY, 10TH MARCH, 2017

BEFORE THEIR LORDSHIPS

**MARY UKAEGO PETER-ODILI
CLARA BATA OGUNBIYI
CHIMA CENTUS NWEZE
AMINA ADAMU AUGIE
SIDI DAUDA BAGE**

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

ACTION: Irregular procedure – Where defendant took steps to participate in the proceedings – Whether defendant can be allowed later to complain about the irregular procedure.

ACTION: Issues relating to interpretation of constitutional provisions cannot be academic in nature. – Considerations thereof.

ACTION: Nature of action that raises academic question. – How determined.

*CASE LAW: Principles in **Odedo vs. INEC (2008) 17 NWLR (pt. 1117) 554 SC** – Considerations thereof.*

CASE LAW: Principles in Pam vs. Mohammed (2008) 16 NWLR (Pt. 1112) 1 – Consideration thereof.

CASE LAW: Principles in Plateau State vs. Att. Gen. Fed (2006) 3 NWLR (pt. 967) 346 – Considerations thereof.

CASE LAW: Principles in Agbakoba vs. INEC (2008) 18 NWLR (pt. 1119) 489 – Considerations thereof.

CONSTITUTIONAL LAW: Concept of fair hearing.

CONSTITUTIONAL LAW: How to determine breach of fair hearing in proceedings. – Relevant considerations.

CONSTITUTIONAL LAW: Principles of Fair hearing Section 36 of the Constitution of Federal Republic of Nigeria 1999 – Whether right of Fair hearing is absolute. – Relevant Considerations.

CONSTITUTIONAL LAW: Principles of fair hearing – Section 36 of the Constitution of Federal Republic of Nigeria 1999 – Available to all parties.

CONSTITUTIONAL LAW: When a party cannot complain of the violation of his right to fair hearing. – Relevant considerations thereto.

CONSTITUTIONAL LAW: Whether there is a breach of fair hearing is a question of fact – Onus of proof on party who alleges breach – How discharged.

COURT: Duty on court where parties have joined issues before it.

JUDGMENT AND ORDERS: Arrest of judgment – Whether cognizable under rules of court. – Relevant considerations thereof.

JUDGMENT AND ORDERS: Delivery of judgment – Date fixed for judgment – Whether any other proceeding is cognizable on that date.

PRACTICE AND PROCEDURE: Court adjourned for judgment – Appellant brings a fresh application on the date for judgment – Attitude of court thereto.

STATUTES: *Section 22 Supreme Court Act* – Scope and application.

WORDS AND PHRASES: “Fair hearing” – Meaning

WORDS AND PHRASES: “Waiver” – Meaning

Issue for Determination

Whether the refusal of the court below to entertain the application filed after it had reserved judgment, amounts to lack of fair hearing.

Facts of the Matter

The appellant, as an indigene of Adamawa State and a politician, who registered to vote and be voted for in the State, instituted an action by way of originating summons at the Federal High Court, Abuja [trial court], wherein he submitted the following questions for determination:

Whether having regard to subsections 178(2) and 180(2) (sic) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), the 1st respondent [i.e. INEC] can legally conduct Governorship election in Adamawa State on Saturday 28 February 2015?

He also sought the following reliefs against the thirteen defendants:

- 1. A DECLARATION that having regard to subsections 178(2) and 180(2) of the Constitution (as amended) the tenure of office of Barrister Bala James Ngilari, who took Oath of Allegiance and Oath of Office, as Deputy Governor of Adamawa State on 13/2/2012 and in that capacity assumed office as Governor of Adamawa State after the impeachment of the Governor, Admiral Murtala Nyako, expires on 12/2/2016.**
- 2. A DECLARATION that having regard to subsection 178(2) of the [1999] Constitution (as amended), the 1st [respondent] (INEC) cannot legally conduct governorship election in Adamawa State on a date earlier than one hundred and fifty**

days before 12/2/2016 when the tenure of office of Barrister Bala James Ngilari expires as Governor of Adamawa State.

- 3. A DECLARATION that the Governorship election scheduled by the 1st [respondent] (INEC) to hold on Saturday, 28/2/2015, is a breach of subsection 178(2) of the Constitution (as amended).**
- 4. AN ORDER OF INJUNCTION restraining the 1st [respondent] from conducting governorship election in Adamawa State on 28/2/2015, which is a date earlier than one hundred and fifty days from 12/2/2016 when the tenure of office of Barrister Bala James Ngilari expires as Governor of Adamawa State.**

The Federal High Court dismissed the case. The Court of Appeal affirmed the decision of the trial court hence this further appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *The Meaning of academic question*
What is an academic question? It is simply an issue that does not require answer or adjudication by a court; hypothetical or moot question – [Agbakoba vs. INEC (2008) 18 NWLR (Pt.1119) 489], where this court, per Chukwuma-Eneh, JSC, further explained that:

An action becomes hypothetical or raises mere academic point when there is no live matter in it to be adjudicated upon or when its determination holds no practical or tangible value for making a pronouncement upon it; it is otherwise an exercise in futility. When an issue in an appeal has become defunct, it does not require to be answered or controverted and leads to the making of bare legal postulations, which the court should not indulge in; it is like the salt that has lost its seasoning. And like the salt in that state, it has no practical value to anybody and so also, a Suit in that state has none.

In simple terms, an academic issue or question does not relate to the live issues in the litigation because it is spent as it will not enure any right or benefit on a successful party – [**Odedo vs. INEC (2008) 17 NWLR (Pt.1117) 554 SC, Adeogun vs. Fashogbon (2008) 17 NWLR (Pt.1115) 149 SC and Plateau State vs. Att. Gen. Fed. (supra) SC**]. (*Pp 81–82 paras F–B*).

2. *The Principles in Agbakoba vs. INEC*

In **Agbakoba vs. INEC** (supra), the issue was whether the court below was right to hold that the election conducted while the appeal was still pending, rendered it a mere academic exercise. This court held that the matter had not become an academic exercise because it was still within the jurisdiction of the Federal High Court, being a pre-election matter. Tabai, (JSC), gave the reason as follows:

The appellant challenged the propriety of his substitution with the 3rd respondent and that remains a live issue until its determination by the final appellate court, notwithstanding any act taken by the respondents. I hold, therefore, that the court below erred in law on this issue. Its jurisdiction remained intact. It has a duty to hear and determine the appeal presented there for adjudication.
(*P 82 paras B–E*).

3. *The Principle in Odedo vs. INEC*

In **Odedo vs. INEC** (supra), dealt with the same issue substitution, and this court arrived at the same conclusion. Tobi, (JSC), insisted that:

The reliefs are not only capable of enforcement but can be enforced. If a court of law comes to the conclusion that the substitution was not in compliance with Section 34 of the Electoral Act, 2006, it will declare it a nullity as was done in the case of Ugwu vs. Ararume (2007) 12 NWLR (Pt.1048) 367. (P82 Paras F–H).

4. *The nature of academic question*

In **Adeogun vs. Fashogbon** (supra), it was the same issue but this time the court below refused the application to strike out the appeal.

In dismissing the appeal, this court, per Tobi, (JSC), pointed out that:

Academic and hypothetical issues or questions do not help in the determination of the live issues in a matter. They are merely on a frolic or they are frolic-some; not touching or affecting the very tangible and material aspects in the adjudication process. As a matter of law, they add nothing to the truth searching process in administration of justice.

This is because they do not relate to any relief.

(Pp 82–83 Paras H–B)

5. *The Principles in Plateau State v. Att. Gen. Fed.*
The 2nd respondent referred this court to **Plateau State vs. Att. Gen. Fed.** (supra), wherein Tobi, (JSC), made the following observation

A suit is academic where it is merely theoretical and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity. A suit is speculative if it is based on speculation. A suit is speculative if it is not supported by facts or very low on facts but very high in guesses. As courts of law are not established to adjudicate on guesses but on facts such actions are struck out. A suit is hypothetical if it is imaginary and not based on real facts. A suit is hypothetical if it looks like a “mirage” to deceive the defendant and the court as to the reality of the cause of action. A suit is hypothetical if it is a semblance of the actuality of the cause of action or relief sought. In this case, the suit filed by the plaintiffs is not academic, speculative or hypothetical. On the contrary, the suit clearly contains reliefs, which are actionable and which a court of law is competent to decide one way or the other. The defendants would appear to miss the declaratory nature of the reliefs and their effect on our adjectival law.

(P 83 Paras B–G).

6. *The Principles in Plateau State vs. Att. Gen Fed.*

Apparently, the 2nd respondent did not read the fine print because the decision in **Plateau State's Case** (supra) can only lead this court to the opposite track from where it wants the court to go. In that case, the defendants raised a similar objection, as in this case, that the suit is devoid of any live issue. Kutigi, (JSC) (as amended) aptly stated:

I think the ground of objection misconceives the nature of the declarations and other reliefs sought in this case. The entire case simply put concerns the constitutionality and or legality of the exercise of the emergency powers conferred on the president under Section 305 of the 1999 Constitution and which powers he exercised in Plateau State from 18/5/2004 to 17/11/2004. The emergency we all know ended or ceased to apply in that State on 17/11/2004. But the constitution, including Section 305 thereof, is still with us. The powers are still there for the president to exercise if and when he deems it necessary. The constitution is alive and so are the emergency powers therein alive. It is therefore of no adverse significance to the case that “suspended structures and public officers” are now back to duty. Issue relating to the interpretation of a living constitution as in this case, cannot in my view be dead, academic speculative or hypothetical.

Tobi, JSC, hammered this principle home, when he firmly held that:

A suit does not necessarily become spent merely because it was heard after the act or conduct, which gave rise to the action. It is clear from the case file that the action was filed on June 24, 2004, about thirty-six days after the declaration of the State of Emergency in the State. That the matter was not heard until the expiration of the emergency is not the fault of the plaintiffs and it will be improper of this court to throw out the suit on that ground. That will be doing injustice to the plaintiffs and I am not prepared to do injustice to them. (Pp 83–84 Paras H–G).

7. *The appellant's questions in the originating summons remain alive*

The decision of this court in the said case speaks directly to this case, and what it says is that the question submitted by the appellant in the originating summons, which touches on the interpretation of Sections 178(2) and 180(2) of the constitution, remains alive, and is not dead.

In other words, the appellant is right; he commenced this action more than two months before the 1st respondent conducted the said gubernatorial election in Adamawa State. He is seeking a declaration *inter alia* that having regard to the said sections of the constitution, *INEC* cannot legally conduct the election on a date earlier than one hundred and fifty days before the tenure of the governor, expired on **8/2/2012**.

It is the interpretation of those sections of the constitution that is in issue, and being constitutional provisions, they are alive and can never be pronounced as dead, otiose, moot, academic or hypothetical.

Besides, the appellant cannot be blamed for the length of time it took the matter to climb to this court from **5/2/2015**, when he filed it, to **18/2/2016**, when he filed the notice of appeal against the decision of the court below. The fact that the said date – **8/2/2016** had come and passed while the matter was still travelling through the courts is not his fault; it is not anyone's fault, and he cannot be penalized for it. The preliminary objection lacks merit, and it is, therefore, overruled. (*Pp 84–85 Paras G–C.*)

8. *Appellant was given opportunity to be heard*

In this case, waving the flag of fair hearing is of no moment.

Fair hearing envisages that parties to a case are given the opportunity by the court of presenting their cases from the beginning to the end **Newswatch Communications Ltd. vs. Atta** (supra). In this case, I agree with the respondents that the appellant cannot complain that he was not given a fair hearing at the court below. He chose to waive requirement of time, and was battle ready to take the appeal that day. (*P 91 Paras D–E*)

Per Augie (JSC):

“I have considered the arguments and there is no escaping the fact that this appeal must be dismissed.

It is there, pomp and plain on the face of the record of appeal; learned counsel for the appellant pointed out that the appellant is entitled to at least three days to respond to the preliminary objection, but with the next breath he said “*we waive the requirement of time*”, and with another breath, he added “*we can take the appeal today*”.

He did not think twice; he did not hesitate, and seemed sure that he was standing on a solid foundation when he urged the court below “to discountenance the objection”. A few days later, this court gave reasons for its decision in APC vs. General Bello Sarkin Yaki and contrary to the position he took at the court below, the requirement for the said NBA Seal is mandatory, although it could be regularized.

That is when learned counsel for the appellant ran back to the court below with the application filed after the court below heard arguments on the said objection and adjourned to write its judgment. If every litigant did that; proffer arguments in court on an issue, and while judgment is being written, discover he is wrong, and rush back to the court with a Motion to change his tune, what will that portend”?

Absolute mayhem and that is why courts deal firmly with what is known as arrest of judgment, which is alien to our rules of court, and connotes brigandage and lawlessness; things abhorred by the law [**Newswatch Comm. vs. Atta** (supra), **Nwankudu vs. Ibeto** (supra)]. (Pp 90–91 Paras G–C).

9. *The meaning of waiver*

To “waive” means to abandon, renounce or surrender a claim, privilege or right, etc., voluntarily, and “waiver” means the voluntary relinquishment or abandonment – express or implied – of a legal right or advantage See *Black's Law Dictionary*, 8th Ed., (P 91 Paras E–F).

10. *Appellant waived his right to time*
In **Amaechi vs. INEC (2008) 5 NWLR (Pt.1080) 227**, where this court held that:

The principle is to the effect that where an action was commenced by any irregular procedure and a defendant took steps to participate in the proceedings as in the instant case, he cannot later be heard to complain of the irregularity as a person will not be allowed to complain against an irregularity, which he himself has accepted, waived or acquiesced. [Katsina-Alu] (JSC).

In this case, the appellant voluntarily chose to waive the time needed to respond to 2nd respondent's objection. It was too late in the day, after the court below had reserved judgment, to expect anything else on the date of Judgment **4/2/2016**, than the delivery of the Judgment. Once an appeal is argued, there is no other pending proceeding save delivery of judgment by the court **Ukachukwu vs. PDP (supra)**. (Pp 91–92 Paras F–A).

11. *The proper application of S. 22 of Supreme Court Act*
It needs be said as first shot that before this court can invoke section 22 of the Supreme Court Act to entertain any matter like the court of first instance or court below there must be a proper appeal before the court. The provision is not devised to revive dead issues. Also where the court below lacks jurisdiction then the Supreme Court is without jurisdiction to do anything else and the invocation of Section 22 of the Supreme Court Act does not arise. [**PPA vs. INEC (2012) 13 NWLR (Pt.1317) 215 at 245 per Adekeye JSC; Hassan vs. Aliyu (2010) 17 NWLR (Pt.1223) 547**]]. (P 100 Paras C–D)

12. *Appellant was given every opportunity to be heard*
Per Peter-Odili (JSC):

“It is to be stated at the risk of restating an otherwise over flogged issue, that the application of the principle of fair hearing is not to be done in vacuo, just by the waving of the flag that fair hearing has been breached. It has to be taken in context and within the balance of the equal opportunities granted the parties as in this instance where from what had

transpired between the parties earlier on, the appellant had had the opportunity to be heard on the matter of the NBA seal. He also had ample time to raise any infraction before that date slated for judgment, he waited just like hunter setting a trap for his prey and when there would be no room for escape in which case, the judgment of that day would be put off by way of a procedure unknown to our law, an arrest of judgment. In this case, the principle of fair hearing cannot be available to such a party. [Ukachukwu vs. PDP (2014) 17 NWLR (Pt.1435) 134; Inakoju vs. Adeleke (2007) 4 NWLR (Pt.1025) 423; Orugbo vs. Una(2002) 16 NWLR (Pt.792) 175; Mbanefo vs. Molokwu (2014) 6 NWLR (Pt.1403) 320 at 418-419”].
(Pp 100–101 Paras I–C)

Per Ogunbiyi (JSC):

“I must say without hesitation that the contention put forth by the learned counsel for the appellant is well taken. The caveat however, is, where the law recognises that no right is absolute and at large. In other words, an individual's or party's right is subject to the right also of the other party. It is pertinent to restate clearly that one's right ends at the point where the exercise encroaches the liberty and right of the other party. The right to fair hearing must therefore be exercised within the legal frame work provided by law for the hearing of a matter”. (P 102 Paras F–G).

13. *Principles of fair hearing are available to all parties*

The learned counsel for the appellant made reference copiously to Section 36 of the **constitution 1999 (as amended)** and sub-section (1) states as follows:

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

independence and impartiality”.

The foregoing provision is very succinct and clear on the concept of fair hearing. The sub-section in my view is open to all parties coming before a court of law or a tribunal. There is no restriction or exclusion of one party against or in favour of the other. By fair hearing in this context it simply denotes giving an equal opportunity to the parties to be heard.
(*Pp 102 – 103 Paras H – B*)

14. *Principles in Pam vs. Mohammed*

This principle was largely expounded by this court in the case of **Pam vs. Mohammed (2008) 16 NWLR (Pt.1112) 1 at 68** wherein Tobi, (JSC) had this to say.

“Fair hearing, in essence means giving equal opportunity to the parties to be heard in the litigation before the court. See INEC vs. Alhaji Musa (2003) 3 NWLR (Pt.806) P.72. Fair hearing means a trial conducted according to all legal rules formulated to ensure that justice is done to the parties. See Ntukidem vs. Oko (1986) 5 NWLR (Pt.45) 909; Union Bank of Nigeria Limited vs. Nwaokolo (1995) 6 NWLR (Pt.400) 127. Fair hearing in relation to a case means the trial of a case or the conduct of the proceedings therein in accordance with the relevant laws, rules of court and principle of natural justice. See Ekpeto vs. Wanogho, (2004) 18 NWLR (Pt.905) 394. Also Brifina Ltd vs. Intercontinental Bank Ltd. (2003) 5 NWLR (Pt.814) 540”].

The community reading and summary of the foregoing authorities lay down the confirmation that fair hearing is that process which is conducted in accordance with the relevant laws or rules. (*P 103 Paras B – G*).

15. *Appellant was not denied fair hearing*

With reference made to the record of proceedings especially at **pages 679 - 682**, there is ample evidence that issues were joined by all the parties on the proprietary or otherwise of the appellant's notice of appeal filed without the NBA seal. Parties also did adopt there respective briefs of argument and judgment was reserved. It is intriguing that having joined issues in this wise

with the objectors, the same appellant can now turn round to claim that he has been denied the right to fair hearing.

The law is well settled that when parties join issues on a particular subject matter, the only duty saddled on the court is to proceed to deliver judgment on those issues. [**Metal construction (W.A.) Ltd & 2 Ors vs. Miglione & Anor (1979) 6 -9 SC (Reprint) 118. See also IBWA Ltd. vs. Imano Nig. Ltd (2001) FWLR (Pt.44) at 443]. (Pp 103 – 104 Paras G – B)**

16. *Where a party wants to arrest judgment of court*

As rightly submitted by the respondents, the appellant's application was meant to stay a judgment, or delay the judgment which was about to be delivered. The lower court, in my view was on a sound footing and could not be faulted when it proceeded to deliver its judgment which was ready on the said date. The appellant wanted to be a clog in a wheel of justice and progress. This should not be allowed to happen. He was stopped rightly. (P 104 Paras B – C)

17. *Where party fails to utilize the opportunity of fair hearing*

The law is well entrenched that where a party in a suit who refused or failed to take advantage of the fair hearing process created by the court, he cannot later turn round to accuse the court of denying him of justice. [**Inakoju vs. Adeleke (2007) 4 NWLR (Pt.1025) P.423]. (P 104 Paras C – D).**

18. *Breach of fair hearing is a question of fact*

It is not out of place to say at this juncture that the appellant did not only waive his right at the time within which to respond to the notice of preliminary objection; rather he also actively participated in the proceeding wherein he urged the court to discountenance the objection. [**Ukachukwu vs. PDP (2014) 17 NWLR (Pt.1435) P.134 at page 197-198]** wherein this court said:

“The question of fair hearing is a matter of fact which must be established by evidence. The *Black's Law Dictionary, Ninth Edition at page 789* defines fair hearing as:

“A judicial or administrative hearing conducted in accordance with due process”.

As rightly submitted by the 1st respondent's counsel, it was too late for the appellant to attempt to move that motion on the day set for no other business

than the delivery of the judgment. (*P 104 Paras D–I*).

19. *How to determine breach of fair hearing*
Per Nweze, (JSC):

My lords, permit me to observe that the touchstone for determining the observance of fair hearing in trials is the question whether an opportunity of hearing was afforded to parties entitled to be heard, *J.C.C. Inter Ltd. vs. N.G.I. Ltd.* (2002) 4 WRN 91, 104. Thus, where, as in this case, counsel had the opportunity of being heard but prostituted it, *Omo vs. JSC, Delta State* (2000) 7 KLR (Pt.108) 2623 or decided to filibuster just to delay the trial, *Oyedeki vs. Akinyele* (2002) 3 NWLR (Pt.755) 586, 613 or, deliberately, failed to avail himself of the opportunity of delivering his address, *Chidoka vs. First City Finance Co. Ltd.* (2001) 2 NWLR (Pt.697) 216, 227, he cannot be heard to complain of want of hearing, *J.C.C. Inter Ltd. vs. N.G.I. Ltd.* (supra); *Momo vs. JSC, Delta State* (supra).

Indeed, this prescription applies with equal force to the litigants themselves, *Oketeha vs. Herwa Ltd.* (2000) 15 NWLR (Pt.690) 249, 258; *Adebayo vs. AG, Ogun State* (2008) 7 NWLR (Pt.1085) 210; *Mirchandani vs. Pinhero* (2001) 3 NWLR (Pt.710) 557; *Abubakar vs. INEC* (2004) 1 NWLR (Pt.854) 207; *Scott Emukpor vs. Ukaube* (1979) 1 SC 6; *Oyeyipo vs. Oyinloye* (1987) 1 NWLR (Pt.50) 356; *Omov. JSC, Delta State* (2000) 12 NWLR (Pt.682) 444; *Nwokocha vs. AG, Imo State* (2016) LPELR -40077 (SC)”.

(P105 Paras D –H).

20. *Wrong use of the concept of fair hearing*
Per Nweze (JSC):

“My lords, this banner, too, cannot sustain his protest. Indeed, the approach of the appellant's counsel reminds me of the eloquent formulation in *Adebayo v. AG, Ogun State*

(2008) LPELR – 80 (SC) 23-24. For its bearing on the fortune of the appellant's case, I crave Your Lordships' indulgence to quote this court's view *in extenso*:

“I have seen in recent times that parties who have bad cases embrace and make use of the constitutional provision of fair hearing to bamboozle the adverse party and the court, with a view to moving the court away from the live issues in the litigation. They make so much weather and sing the familiar song that the constitutional provision is violated or contravened.

They do not stop there. They rake the defence in most inappropriate cases because they have nothing to canvass in their favour in the case. The fair hearing provision in the constitution is the machinery or locomotive of justice; not a spare part to propel or invigorate the case of the user. It is not a casual principle of law available to a party to be picked up at will in a case and force the court to apply it to his advantage. On the contrary, it is a formidable and fundamental constitutional provision *available to a party who is really denied 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”.

(Pp 105–106 Paras I–G)

21. *Definition of fair hearing*

This court in the case of **Deduwa vs Okorodudu 4 LC 894 at 898** defined what is a fair hearing:

“A fair hearing must of course, be a hearing that does not contravene the principles of natural justice. Evershed M.R. said in *Abbot vs Sullivan*. In *Mohammed vs. Kano N.A., Ademola C.J.N.* (delivering the Judgment of the Court) said at page 426:

“We think a fair hearing must involve a fair trial and a fair trial consists of the whole hearing. We therefore see no difference between the two. The true test of a fair hearing it was suggested by counsel is the impression of a reasonable person who was present at the trial whether, from his observation justice has been done in the case. WE feel obliged to agree with this”.
(P 109 Paras D–H)

Nigerian Cases Cited

Abubakar vs. INEC (2004) 1 NWLR (Pt.854) 207;
Adebayo vs. AG, Ogun State (2008) 7 NWLR (Pt.1085) 210;
Adebayo vs. AG, Ogun State (2008) LPELR – 80 (SC) 23-24.
Adeogun vs. Fashogbun (2008) 17 NWLR (Pt.1115) 149 SC
Agbakoba v. INEC (2008) 18 NWLR (Pt.1119) 489
Amaechi vs. INEC (2008) 5 NWLR (Pt.1080) 227,
Brifina Ltd vs. Intercontinental Bank Ltd. (2003) 5 NWLR (Pt.814) 540”.
Chidoka vs. First Class Finance Co. Ltd. (2001) 2 NWLR (Pt.697) 216,
Deduwa vs. Okorodudu 4 LC 894
Ekpeto vs. Wanogho, (2004) 18 NWLR (Pt.905) 394
Hassan vs. Aliyi (2010) 17 NWLR (Pt.1223) 547).
IBWA Ltd. vs. Imano Nig. Ltd (2001) FWLR (Pt.44)
Inakoju vs. Adeleke (2007) 4 NWLR (Pt.1025) 423;
Inakoju vs. Adeleke (2007) 4 NWLR (Pt.1025) P.423.
INEC vs. Alhaji Musa (2003) 3 NWLR (Pt.806) P.72
J.C.C. Inter Ltd. vs. N.G.I. Ltd. (2002) 4 WRN 91, 104.
Mbanefo vs. Molokwu (2014) 6 NWLR (Pt.1403) 377
Metal construction (W.A.) Ltd & 2 Ors vs. Miglione & Anor (1979) 6 -9 SC (Reprint) 118.
Mirchandani vs. Pinhero (2001) 3 NWLR (Pt.710) 557;
Ntukidem vs. Oko (1986) 5 NWLR (Pt.45) 909;
Nwokocha vs. AG, Imo State (2016) LPELR -40077 (SC).
Odedo vs. INEC (2008) 17 NWLR (Pt.1117) 554 SC,
Okotha vs. Herwa Ltd. (2000) 15 NWLR (Pt.690) 249;
Omo vs. JSC, Delta State (2000) 12 NWLR (Pt.682) 444;
Orugbo vs. Una(2002) 16 NWLR (Pt.792) 175;
Oyedeji vs. Akinyele (2002) 3 NWLR (Pt.755) 586,

Oyeyipo vs. Oyinloye (1987) 1 NWLR (Pt.50) 356;
Pam vs. Mohammed (2008) 16 NWLR (Pt.1112) 1
PPA vs. INEC (2012) 13 NWLR (Pt.1317) 215;
Scott Emukpor vs. Ukaube (1979) 1 SC 6;
Ugwu vs. Ararume (2007) 12 NWLR (Pt.1048) 367.
Ukachukwu vs. PDP (2014) 17 NWLR (Pt.1335) 134;
Ukachukwu vs. PDP (2014) 17 NWLR (Pt.1435) P.134
Union Bank of Nigeria Limited vs. Nwaokolo (1995) 6 NWLR (Pt.400) 127.

Nigerian Statutes Cited

The Supreme Court Act – S.22
The 1999 Constitution – S. 36(1)

Representations

A. Amuda-Kannike (SAN) **with**
A.O. Yusuf, (Esq.), for the **Appellant**

T.M. Inuwa, (Esq.), **with** R.A. Ugbanne (Mrs).
R. Aminu (Mrs), A.N. Makwe (Mrs),
M. Ibrahim (Mrs) and C.C. Nnamah (Miss)
For the **1st Respondent**

Yemi Pitan, (Esq.), **with** Samuel Shagba, (Esq.)
For the **2nd Respondent**

Kenneth Ahia, (Esq.), **with**
Luther K. Onyenkpa, (Esq.)
For the **3rd Respondent**

Dr. Soni Ajala, (Esq.) **with**
Constance O. Afekhai (Miss) and
Nadia Oka (Mrs) for the **4th Respondent**

J.J. Usman, (Esq.), with M.K. Bielonwu, (Esq.) and
C.C. Ifemenam (Esq.), for the **5th Respondent**

Chief Chris Uche SAN, **with**

- A James Odiba, (Esq.), Emmanuel Okorie, Esq.
 Chukwudi Maduka, (Esq.), Oluwatoyin Runsewe (Mrs)
 Emeka Jessica (Miss), Angela I. Uche (Miss),
 James Ebbi, (Esq.) Chijindu Okwuhie (Miss), and
 B Crystal Enujuba (Miss), for the **6th Respondent**

ADAMU AUGIE, (JSC) (Delivering the Lead Judgment): This appeal relates to the gubernatorial election conducted by the 1st respondent [INEC] in Adamawa State on **28/2/2015**. The appellant, as an indigene of Adamawa State and a politician, who registered to vote and be voted for in the State, instituted an action by way of originating summons at the Federal High Court, Abuja [trial Court], wherein he submitted the following question for determination:

D **Whether having regard to subsections 178(2) and 180(2) (sic) of**
the Constitution of the Federal Republic of Nigeria 1999 (as
amended), the 1st respondent [i.e. INEC] can legally conduct
 E **governorship election in Adamawa State on Saturday 28th**
February 2015?

He also sought the following reliefs against the thirteen defendants:

- F 5. **A DECLARATION that having regard to subsections**
178(2) and 180(2) of the Constitution (as amended) the
 G **tenure of office of Barrister Bala James Ngilari, who**
took Oath of Allegiance and Oath of Office, as Deputy
Governor of Adamawa State on 13/2/2012 and in that
capacity assumed office as Governor of Adamawa State
 H **after the impeachment of the Governor, Admiral**
Murtala Nyako, expires on 12/2/2016.
- I 6. **A DECLARATION that having regard to subsection**
178(2) of the [1999] Constitution (as amended), the 1st
[respondent] (INEC) cannot legally conduct
governorship election in Adamawa State on a date
earlier than one hundred and fifty days before 12/2/2016
 J **when the tenure of office of Barrister Bala James Ngilari**
expires as governor of Adamawa State.

A

7. **A DECLARATION that the governorship election scheduled by the 1st [respondent] (INEC) to hold on Saturday, 28/2/2015, is a breach of subsection 178(2) of the Constitution (as amended).**

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8. **AN ORDER OF INJUNCTION restraining the 1st [respondent] from conducting governorship election in Adamawa State on 28/2/2015, which is a date earlier than one hundred and fifty days from 12/2/2016 when the tenure of office of Barrister Bala James Ngilari expires as governor of Adamawa State.**

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The originating Summons filed on 5/2/2015, was supported by a 24 paragraph affidavit, and 11-paragraph *Further and Better Affidavit*, wherein it was averred as follows in paragraph 7 thereof that:

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The 1st [respondent]'s deposition in its counter-affidavit to the originating summons that Admiral Murtala Nyako (Rtd.) and Barrister Bala Ngilari took the Oath of Allegiance and Oath of Office as Governor and Deputy Governor respectively on 8/2/2012 is correct.

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The originating summons was initially taken out against INEC and twelve political parties, which included the 2nd to 5th respondents, as 2nd, 3rd, 10th and 13th defendants. The 6th respondent, who was then the Governor-Elect of Adamawa State, applied to the trial court and was subsequently joined as the 14th defendant, to the said suit. Whereupon, the appellant filed an amended originating summons, containing the same reliefs and orders sought in the original process.

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In addition to their counter-affidavits, the respondents filed preliminary objections to the originating summons to the effect that the appellant had no *locus standi* to bring the action; that the action is merely academic; and that it constitutes an abuse of court process.

I

In his judgment delivered on 7/7/2015, the learned trial judge, Chukwu, J., noted that what is in the preliminary objection is what is canvassed in the counter-affidavits so determining the objection will “*also mean a determination of the counter-affidavits and without equivocation will mean a determination of the*

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A *substantive suit”.*

In upholding the objections, he agreed with the respondents that the appellant “*does not have a locus standi to institute this case*”, and proceeded to reprimand him in very strong language as follows:

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Let me state the obvious that the claim as framed by the plaintiff is an affront on the judicial processes to wit it is an unbridled act of impunity having in mind the decisions of the Apex Court in the cases of Ladoja vs. INEC (2007) 12 NWLR (PT.1047) 115, FRN vs. Dariye (2011) 13 NWLR (PT.1265) 521 and Marwa vs. Nyako (2012) 6 NWLR (PT.1296) 199. The afore-stated Supreme Court decisions are in equivocal that the term of a governor is for 4 years, even if one is criminally and illegally impeached, his tenure is calculated from when he took the oath of office and not a day will be added to replace or respite the period he was illegally impeached. It is obvious that the plaintiff was aware of the time the said Nyako and his proxy Ngilari took Oath of Office and that by 2015 their tenure had elapsed even with the extra time they claimed in their first tenure. So the plaintiff by instituting this suit is obviously abusing the court process and any contrary opinion or decision from me may amount to introducing or courting anarchy which the apex court had labelled judicial rascality. I don't want to be addressed as one who had committed serious act or judicial impatience.

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I dismiss this suit for being a violent abuse of the judicial process.

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Dissatisfied with the trial court's decision, the appellant appealed to the court below with a notice of appeal filed on **22/7/2015**, and apart from the 4th respondent, the other parties filed briefs of arguments.

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The 1st, 2nd and 6th respondents filed objections to the competency of the appeal. But the 2nd respondent, in particular, prayed for:

AN ORDER dismissing and/or striking out the appellant's

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A notice of appeal as well as the appellant's brief of argument for being incompetent.

The ***Grounds*** of the 2nd respondent's preliminary objection are that:

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1. The appellant's notice of appeal dated 22/7/2015 and filed on the same date as well as the appellant's brief of argument filed on 4/8/2015 do not have affixed Nigeria Bar Association's Seal contrary to Rule 10 of the Rules of Professional Conduct for Legal practitioners, 2007; and

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D

2. The failure to affix the seal on the notice of appeal and appellant's brief knocks the bottom of the appeal purportedly filed by the appellant.

E

At the hearing of the appeal on **10/11/2015**, learned counsel for the 2nd respondent raised and argued the preliminary objection that was not argued in its brief of argument since it was filed after the brief.

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Learned counsel for the appellant urged the court to consider Order 10 rule 1 of its Rules, "as it prescribes what is expected of a respondent to raise a preliminary objection". He went on to say:

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We are entitled to at least three days. Even though we are entitled to three days, we waive the requirement of time needed. We refer the court to Mega Progressives People Party vs. INEC, which we intend to supply after sitting today. The case is unreported. The earlier decision was not considered in the later case it can be said to be overruling where the earlier case was considered. If not it cannot be said to have overruled it. Section 8 of the legal practitioners Act provides for the right of audience of the legal practitioner. A subsidiary legislation cannot take away a right given by a main legislation. We urge the court to discountenance the objection sighted (sic), we can take the appeal today.

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Learned counsel for 1st & 3rd respondents aligned with the appellant' learned counsel for 5th & 6th respondents aligned with the objector.

A As directed by the court below, the appeal was taken along with the preliminary objection, and it, thereafter, reserved the judgment.

This was on **10/11/2015**, however, on **23/11/2015**, the appellant filed an application praying the court below for the following reliefs:

B

1. An order of court extending time within which the applicant may regularise his notice of appeal dated 22/7/2015 and filed on the same day without affixing the NBA Seal.

C

2. An order deeming the notice of appeal and appellant's brief as properly filed and served on the respondents the requisite fees having been paid.

D

The Ground (sic) upon which the said Application is brought is that:

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1. The Supreme Court in Mega Progressive Peoples Party vs. INEC & Others (Unreported) Suit No. (sic) SC.665/2015 delivered on 12/10/2015 held that the requirement of seal affixed to court processes is not mandatory.

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2. On Friday, 14/11/2015, the Supreme Court gave reasons for its decision in All Progressive Congress vs. General Bello Sarkin Yaki (Unreported) Suit No. (sic) SC.772/15 that the requirement for NBA Seal is mandatory.

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3. The Supreme Court advised that processes without seal may be regularized.

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4. The applicant did not affix NBA Seal to his notice of appeal and appellant's brief respectively.

I

The judgment of the court below was delivered on **4/2/2016**, and the supplementary record compiled by the appellant which contains the proceedings of **4/2/2016** the day of judgment, reads as follows:

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Alhassan Ahmadu, Esq.,: My lords we have a motion on notice before this Hon. Court to regularise the notice of appeal and

A appellant's brief.

Court – We are not taking any motion now, you should have done it earlier; today is for judgment.

B

Alhassan Ahmadu, Esq.,: My lords, the motion is just to affix NBA seal on the notice of appeal and appellant's brief.

C Court– Judgment delivered. Appeal struck out.

In the said judgment, the court below, per Aboki, JCA, held that:

**D There was no any formal application or even orally by the
E appellant's counsel to regularise the document/notice of Appeal
 filed, even at the stage of proceedings and adoption of briefs of
 argument by the parties on 10/11/2015 and the appeal was
 adjourned for judgment. In APC vs. General Bello Sarkin Yaki
 (supra) Per Peter-Odili, JSC said as follows:**

**F “A notice of appeal is the originating process at an
 appellate court and the notice of appeal is clearly within
 the ambit of legal documents described in rule 10(2) as
 “any similar document” which must be signed, stamped
 and seal. Therefore a notice of appeal not found with
G these components is an incompetent notice of appeal
 depriving the court of the jurisdiction to determine the
 appeal on the merit. Therefore any non-compliance with
 the rule 10(2) of the RCP with the circular of the Chief
H Justice of Nigeria as a reiteration is visited with the
 sanction that the process is without competence. It
 cannot be excused by taking of the inalienable right of a
 litigant to appeal as that right has to be exercised within
I the necessary prescribed rules of legal practice”.**

I adopt the above statement as mine in this appeal. In whole the lone issues in the preliminary objection is resolved against the appellant. Having resolved the

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A preliminary objection in favour of the 2nd respondent it will amount to an academic exercise for me to consider other issues raised in the main appeal.

The appellant filed a notice of appeal in this court on **18/2/2016**. The parties filed their briefs of arguments, but 2nd respondent also filed a notice or

B preliminary objection praying this court for:

C **An order dismissing and/or striking out the appellant's appeal filed on 18/2/2016 for lack of jurisdiction in that the issues arising from the subject matter are no longer live issues to be adjudicated upon by this court.**

The Ground of the Application (sic) is as follows:

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1. The appellant's claim at the Federal High Court is that the tenure of office of Governor Bala Ngilari, the immediate past governor of Adamawa State expires on 8/2/2016 as against 28/5/2015.

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2. The appellant's claims and reliefs are not longer live issues which can be adjudicated upon this honourable court.

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3. The appeal has become otiose, academic and moot and no longer worthy of adjudication by this court.

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The objection is supported by a 6-paragraph affidavit, wherein it was averred that at the time this appeal was filed on **18/2/2016**, the tenure of office claimed by the appellant to expire on **8/2/2016**, had already expired thereby making the issues in this appeal academic and moot paragraph 4 (g) and (h). It submitted in its Brief that the Issue is:

H

I **Whether having regard to the reliefs claimed by the appellant at the trial court, the issues submitted before this honourable court have not become academic and moot.**

It referred this court to the following authorities on the subject:

J - Plateau State vs. Att. Gen. Fed. (2006) 3 NWLR (Pt.967) 346

- A - Ogbonna vs. President, FRN (1997) 5 NWLR (Pt.504) 281**
- Adepoju vs. Yinka (2012) 3 NWLR (Pt.1288) 567 at 583
- Salik vs. Idris (2014) 15 NWLR (Pt.1429) 36 SC at 54

B And urged the court to dismiss the appeal, as it is a waste of its time.

The appellant argued in his reply brief that the crux of his case is that **INEC** breached section 178 and 180 of the constitution and he used **8/2/2012** for the purpose of calculating the four year tenure of the incumbent governor at the time it conducted the said election; and that if the said election, which produced **6th** respondent as governor, is an infraction against the constitution (as amended), it would be immaterial that the tenure of the incumbent governor is now expired.

Furthermore, that this court has the power and can revisit the entire process leading to the **6th** respondent's election as governor, and nullify the election conducted by **1st** respondent, if it conducted the election in breach of the 1999 Constitution (as amended); and that he commenced this suit on **5/2/2012**, more than two months before the **1st** respondent conducted the said election, therefore, the suit is not academic, and the issues to be determined are alive and germane.

What is an academic question? It is simply an issue that does not require answer or adjudication by a court; hypothetical or moot question – See **F Agbakoba vs. INEC (2008) 18 NWLR (Pt.1119) 489**, where this court, per Chukwuma-Eneh, (JSC), further explained that:

G An action becomes hypothetical or raises mere academic point when there is no live matter in it to be adjudicated upon or when its determination holds no practical or tangible value for making a pronouncement upon it; it is otherwise an exercise in futility. When an issue in an appeal has become defunct, it does not require to be answered or controverted and leads to the making of bare legal postulations, which the court should not indulge in; it is like the salt that has lost its seasoning. And like the salt in that state, it has no practical value to anybody and so also, a suit in that state has none.

In simple terms, an academic issue or question does not relate to the live issues in the litigation because it is spent as it will not enure any right or benefit on a

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- A** successful party – See **Odedo vs. INEC (2008) 17 NWLR (Pt.1117) 554 SC, Adeogun vs. Fashogbun (2008) 17 NWLR (Pt.1115) 149 SC and Plateau State vs. Att. Gen. Fed. (supra) SC.**

- B** All these cases, except the last, dealt with pre-election matters, as in this case. In **Agbakoba vs. INEC (supra)**, the issue was whether the court below was right to hold that the election conducted while the Appeal was still pending, rendered it a mere academic exercise. This court held that the matter had not become an academic exercise because it was still within the jurisdiction of the
- C** Federal High Court, being a pre-election matter. Tabai, JSC, gave the reason as follows:

- D** **The appellant challenged the propriety of his substitution with the 3rd respondent and that remains a live issue until its determination by the final appellate court, notwithstanding any act taken by the respondents. I hold, therefore, that the court below erred in law on this issue. Its jurisdiction**
- E** **remained intact. It has a duty to hear and determine the appeal presented there for adjudication.**

- Odedo vs. INEC (supra)**, dealt with the same issue substitution, and this court
- F** arrived at the same conclusion. Tobi, (JSC), insisted that

- G** **The reliefs are not only capable of enforcement but can be enforced. If a court of law comes to the conclusion that the substitution was not in compliance with Section 34 of the Electoral Act, 2006, it will declare it a nullify as was done in the case of Ugwu vs. Ararume (2007) 12 NWLR (Pt.1048) 367.**

- H** In **Adeogun vs. Fashogbon (supra)**, it was the same issue but this time the court below refused the application to strike out the appeal.

In dismissing the appeal, this court, per Tobi, JSC, pointed out that:

- I** **Academic and hypothetical issues or question do not help in the determination of the live issues in a matter. They are merely on a frolic or they are frolic-some; not touching or affecting the very tangible and material aspects in the adjudication process.**
- J** **As a matter of law, they add nothing to the truth searching**

A process in the administration of justice.

This is because they do not relate to any relief.

B The 2nd respondent referred this court to **Plateau State vs. Att. Gen. Fed. (supra), wherein Tobi, JSC, made the following observation:**

C A suit is academic where it is merely theoretical, and is of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity. A suit is speculative if it is based on speculation. A suit is speculative if it is not supported by facts or very low on facts but very high in guesses. As courts of law are not established to adjudicate on guesses but on facts such actions are struck out. A suit is hypothetical if it is imaginary and not based on real facts. A suit is hypothetical if it looks like a “mirage” to deceive the defendant and the court as to the reality of the cause of action. A suit is hypothetical if it is a semblance of the actuality of the cause of action or relief sought. In this case, suit filed by the plaintiffs is not academic, speculative or hypothetical. On the contrary, the suit clearly contains reliefs, which are actionable and which a court of law is competent to decide one way or the other. The defendants would appear to miss the declaratory nature of the reliefs and their effect on our adjectival law.

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H Apparently, the 2nd respondent did not read the fine print because the decision in **Plateau State's Case (supra) can only lead this court to the opposite track from where it wants the court to go. In that case, the defendants raised a similar objection, as in this case, that the suit is devoid of any live issue. Kutigi, (JSC) (as amended) aptly stated**

I I think the ground of objection misconceives the nature of the declarations and other reliefs sought in this case. The entire case simply put concerns the constitutionality and/or legality of the exercise of the emergency powers conferred on the

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A president under Section 305 of the 1999 Constitution and which
B powers he exercised in Plateau State from 18/5/2004 to
 17/11/2004. The emergency we all know ended or ceased to
 apply in that State on 17/11/2004. But the constitution,
C including Section 305 thereof, is still with us. The powers are
 still there for the president to exercise if and when he deems it
 necessary. The constitution is alive and so are the emergency
 powers therein alive. It is therefore of no adverse significance to
 the case that “suspended structures and public officials” are
 now back to duty. Issue relating to the interpretation of a living
 constitution; as in this case, cannot in my view be dead,
 academic or hypothetical.

D Tobi, (JSC), hammered this principle home, when he firmly held that:

E A suit does not necessarily become spent merely because it was
 heard after the act or conduct, which gave rise to the action. It
 is clear from the case file that the action was filed on June 24,
 2004, about thirty-six days after the declaration of the State of
 Emergency in the State. That the matter was not heard until
F the expiration of the emergency is not the fault of the plaintiffs
 and it will be improper of this court to throw out the suit on that
 ground. That will be doing injustice to the plaintiffs and I am
 not prepared to do injustice to them.

G The decision of this court in the said case speaks directly to this case, and what it
 says is that the question submitted by the appellant in the originating summons,
 which touches on the interpretation of Sections 178(2) and 180(2) of the
H constitution, remains alive, and is not dead.

In other words, the appellant is right; he commenced this action more than
 two months before the 1st respondent conducted the said gubernatorial election in
 Adamawa State. He is seeking a declaration *inter alia* that having regard to the
I said Sections of the Constitution, INEC cannot legally conduct the election on a
 date earlier than one hundred and fifty days before the tenure of the governor,
 expired on 8/2/2012.

It is the interpretation of those sections of the constitution that is in issue,
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A and being constitutional provisions, they are alive and can never be pronounced as dead, otiose, moot, academic or hypothetical.

Besides, the appellant cannot be blamed for the length of time it took the matter to climb to this court from **5/2/2015**, when he filed it, to **18/2/2016**, when he filed the notice of appeal against the decision of the court below. The fact that the said date **8/2/2016** had come and passed while the matter was still travelling through the courts is not his fault; it is not anyone's fault, and he cannot be penalized for it. The preliminary objection lacks merit, and it is, therefore, overruled.

C The main appeal itself hinges on a question of fair hearing and the appellant formulated one Issue for determination, as follows:

D **Whether or not the refusal of the learned justices of the Court of Appeal to hear and determine the appellant's motion on notice dated 20/11/2016 and filed on 23/11/2016 to regularize the appellant's notice of appeal dated and filed on 22/7/2015 and**
E **appellant's brief dated and filed on 4/8/2015 is not a breach of the appellant's fundamental right to fair hearing in Section 36(1) of the [1999] Constitution which renders the judgment of the court delivered on 4/2/2016, void.**

F The 1st respondent also formulated one issue for determination i.e.

G **Whether the refusal of the court below to hear the appellant's motion to regularize his position on the day of the judgment amounts to the breach of the appellant's fundamental right of fair hearing.**

H The 2nd respondent formulated two Issues for determination; that is:

I **1. Whether the lower court breached the appellant's constitutional right to fair hearing by refusing to hear his oral application and motion on notice dated 20/11/2016 (sic) and filed on 23/11/2016 (sic) to regularize the appellant's notice of appeal dated and filed on 22/7/2015 and appellant's brief dated and filed on 4/8/2015.**
J **2. Whether this is a proper case in which this court can**

A invoke its powers under Section 22 of the Supreme Court Act.

The 3rd respondent formulated only one issue for determination i.e.

B Whether or not the refusal of the Court of Appeal to hear and determine the motion on notice dated 20/11/2015 filed after the court has reserved ruling/judgment in the appeal amounts to denial of the appellant's right to fair hearing.

The 4th and 5th respondents adopted appellant's issue as formulated, and 6th respondent formulated one issue for determination; that is:

D Whether the refusal of the court below to hear the appellant's motion on notice dated 20/11/2016 and filed on 23/11/2016 to regularize the appellant's notice of appeal dated and filed on 22/7/2015 and filed on 4/8/2015 after full arguments had already been taken on the objection that the said notice of appeal is incompetent and judgment reserved, is in breach of the appellant's right to fair hearing in Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

In my view, the parties are saying the same thing, and it boils down to whether the refusal of the court below to entertain the application filed after it had reserved Judgment, amounts to lack of fair hearing.

G Naturally, the appellant argued the said Issue in the affirmative.

He argued that it is trite that parties must be given equal opportunity to present their cases and no party should be given more opportunity or advantage in the presentation of his case; that a court is duty bound to determine applications before it, no matter how inconsequential – **Dandume LGA vs. Alhaji Yaro (2011) 11 NWLR (Pt.1257) 159**; and that the court below disregarded the clear guide outlined for such purpose by this court in **APC vs. General Bello Sarki Yaki** (supra).

I The 1st respondent submitted that a calm reading of proceedings of **10/11/2015**, which it set out, will reveal that he was accorded his full right of fair hearing; that a party, who refused or failed to take advantage of the fair hearing process created by the court, cannot turn around to accused the court of denying

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- A him fair hearing **Inakoju vs. Adeleke (2007) 4 NWLR (Pt.1025) 423**; and that his counsel not only waived his right of the time within which to respond to the objection, he actively participated at the hearing, therefore, the appellant cannot be heard to complain that his right of fair hearing had been breached –
- B **Ukachukwu vs. PDP (2014) 17 NWLR (Pt.1435) 134 SC.**

Furthermore, that it was too late for him to attempt to move that application on the day set for nothing else but delivery of judgment, and what he sought to do was to arrest the judgment – **Ameachi vs. INEC (2007) 18 NWLR (Pt.1065) 98, Ukachukwu vs. PDP (supra)**; and that there was no proceeding upon which he can anchor the said application, the appeal having been argued and Judgment reserved.

- C
- D The 2nd respondent also argued that he merely sought to arrest the judgment of the court below; that he waited until after arguments had been taken before he brought the application; that the appellant, who had vociferously argued that NBA seal was not needed suddenly made a volte face and saw reason 13 days later to affix a seal; that a party is expected to be consistent in his case –
- E **N.A.C.H.P.N. & Ors. vs. M. & H.W.U.N. & Ors (2008) 2 NWLR (Pt.1072) 575**; and that the arrest of Judgment is unknown to our jurisprudence, citing **Newswatch Communications vs. Atta (2006) 4 SCNJ 282 at 307.**

- F The 3rd respondent, citing **Otapo vs. Sunmonu (1987) 2 NWLR (Pt.58) 587** and **Newswatch Communications Ltd, vs. Atta (supra)**, conceded that a Court must hear and pronounce on every Motion in the interest of justice and fair hearing. But it argued that appellant's counsel waived his right to be served with the said objection, and he did not apply for an adjournment to enable him regularize his process or orally apply to be allowed to affix the seal, rather parties
- G joined issues on that point and they were heard, it further submitted that:

- H **It is trite that what the court below is entitled to do is to deliver its judgment whenever [its] judgment was ready and nothing more as it will be over-reaching the 2nd respondent's objection by allowing an amendment without deciding the objection, one way or the other. The appellant having joined issues on the preliminary objection cannot be said to have been denied fair hearing when in fact he joined issues with counsel and was heard by the court on the issue. The appellant ought to swim or sink with his decision. [He] opted to wave the magic wand of fair hearing or breach of the fundamental right with the main motive of developing a ground of appeal in the event the**
- I
- J

A judgment of the lower court does not favour it.

He referred this court to the following authorities on fair hearing

- B - Lagos Sheraton Hotel & Towers vs. H.P.S.S.S.A (2014) 14 NWLR (Pt.1426) 45 at 71.**
- **Inakoju vs. Adeleke (supra) wherein this court relied on its decisions in Orugbo vs. Una (2002) 16 NWLR (Pt.792) 175, and Kaduna Textiles vs. Umar (1994) 1 NWLR (Pt.319) 143**
- C - Mbanefo vs. Molokwu (2014) 6 NWLR (Pt.1403) 377 at 418**
- **Newswatch Communications Ltd vs. Atta (supra)**

D The 3rd respondent further submitted as follows:

E The [said] motion filed after the court below has reserved judgment is an attempt to overreach the objection filed and argued by 2nd respondent. The 2nd respondent equally is entitled to fair hearing, as well as all parties who joined issues with [him] on this point. The [said] motion can be described as a motion seeking to arrest the judgment of the Court of Appeal.

F That procedure is not known to be cognisable under the Rules of the lower court. The rules do not make provision for an application to arrest a judgment about to be delivered by a court. Therefore an application not recognised by the rules of

G the court cannot be described as a proper application and failure to allow it does not amount to denial of fair hearing.

H The 4th respondent argued that the appellant is estopped by his conduct from challenging the refusal of the court below to hear the said motion; that is not the law that the issue of fair hearing should become a sword to smash the cardinal of administration of justice i.e. attainment of justice – Adebayo vs. Att. Gen. Ogun State (2008) 4 MJSC 80, E.B. Plc, Awo-Omama vs. Nwokoro (2012) 14 NWLR (Pt.1321) 488; and that the issue of denial of fair hearing he raised is not only scanty, peripheral but totally immaterial in contrast to facts and circumstances of

J his conduct and admission at the court.

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The 5th respondent argued along the same lines as 4th respondent. But it cited *Pam vs. Mohammed* (2008) 16 NWLR (Pt. 1112) 1 on the issue of fair hearing. It submitted that it is trite law that when parties join issues on a subject matter, the only duty the court is saddled with is to proceed to deliver the judgment on those issues, citing *Metal Construction (W.A.) Ltd. & 2 Ors. vs. Migliore & Anor.* (1979) 6-9 SC (Reprint) 118, *IBWA Ltd. vs. Imano Nig. Ltd.* (2001) FWLR (Pt.44) at 443; and parties having joined issues on the propriety or otherwise of the non-affixing of NBA seal, the court below was right to have proceeded to deliver its judgment on the issue. It also cited *Newswatch Communications Ltd. vs. Atta* (supra) and *Ukachukwu vs. PDP* (supra), on the issue of arresting judgments. It also argued

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[That] while it is true that the appellant could have regularised his notice of appeal by affixing the seal even orally that would not be allowed after joining issues with the respondents that he does not require to affix the said stamp on the notice of appeal. If he had applied to regularize at that stage, his reliance on the opinion of His Lordship, Onnoghen, (JSC) in *Yaki vs. Bagudu* (supra) would have sailed through.

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The 6th respondent toed the same line with the other respondents *INEC* and four political parties. He also says that the court below was perfectly right in refusing to countenance the appellant's motion. He argued that the appellate could have brought the application to the court's attention, even if by a letter, and apply for a hearing date before the date fixed for judgment; and that the courts frown at such applications tending to arrest a judgment *Nwankudu vs. Ibeto* (2010) LPELR – 439(CA), *Newswatch Communications vs. Atta* (supra) and *Bob Manuel vs. Briggs* (1995) 7 NWLR (Pt.409) 537.

He submitted, citing *Ikenta Best Ltd. vs. Rivers State* (2008) 5

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- A** NWLR (Pt.1084) 612, that it is a well-established equitable maxim, that *vigilantibus et non dormientibus jura subservient* – the law aids those who are vigilant, not those who are negligent over their rights; and that contrary to the appellants' contentions, the court below gave him fair hearing during the arguments in respect of the said objection, but the appellant, who was faced with two options or choices chose to respond vigorously to the objection instead of applying to bring an application whether orally or in writing to regularize his process.
- B**
- C**
- D** It cited *Bill Construction Co. Ltd. vs. Imani & Sons Ltd. (2006) 19 NWLR (Pt 1013) 1 @ 14* and *Akinduro vs. Alay (2007) ALL FWLR (Pt.381) 1653 @ 1672*, on the subject of fair hearing, and cited the following authorities on when miscarriage of justice occurs:
- E**
- *Nnajofo vs. Ukonu (1984) 4 NWLR (Pt.36) 505*
 - *H. Okonkwo & Anor. vs. G. Udoh (1997) 9 NWLR (Pt.519) 16*
 - *Prince John Okechukwu Emeka vs. Lady Margery Okadigbo & 4 Ors. (2012) 18 NWLR (Pt.1331) 55, 94*
- F**

He insists that the appellant did not suffer any miscarriage of justice.

- G** In a joint reply brief to the respondents' briefs, the appellant disagreed with each and every argument proffered by the respondents and that is to be expected. However, I have considered the arguments and there is no escaping the fact that this appeal must be dismissed.

- H** It is there, pomp and plain on the face of the record of appeal; learned counsel for the appellant pointed out that the appellant is entitled to at least three days to respond to the preliminary objection, but with the next breath he said – “*we waive the requirement of time*”, and with another breath, he added – “*we can take the appeal today*”.

- I** He did not think twice; he did not hesitate, and seemed sure that he was standing on a solid foundation when he urged the court below “to discountenance the objection”. A few days later, this court gave reasons for its decision in **APC vs. General Bello Sarkin Yaki** and contrary to the position he took at the court below, the requirement for the said NBA Seal is mandatory, although it could be
- J**

A regularized.

That is when learned counsel for the appellant ran back to the court below with the application filed after the court below heard arguments on the said objection and adjourned to write its judgment. If every litigant did that; proffer arguments in court on an issue, and while judgment is being written, discover he is wrong, and rush back to the court with a motion to change his tune, what will that portend?

C Absolute mayhem and that is why courts deal firmly with what is known as arrest of judgment, which is alien to our rules of court, and connotes brigandage and lawlessness; things abhorred by the law **Newswatch Comm. vs. Atta** (supra), **Nwankudu vs. Ibeto** (supra).

In this case, waving the flag of fair hearing is of no moment.

D Fair hearing envisages that parties to a case are given the opportunity by the court of presenting their case from the beginning to the end – See **Newswatch Communications Ltd. vs. Atta** (supra). In this case, I agree with the respondents that the appellant cannot complain that he was not given a fair hearing at the court below. He chose to waive requirement of time, and was battle ready to take the appeal that day.

F To “waive” means to abandon, renounce or surrender a claim, privilege or right, etc., voluntarily, and “waiver” means the voluntary relinquishment or abandonment express or implied – of a legal right or advantage – See *Black's Law Dictionary, 8th Ed.*, and **Amaechi vs. INEC (2008) 5 NWLR (Pt.1080) 227**, where this court held that:

G **The principle is to the effect that where an action was commenced by any irregular procedure defendant took steps to participate in the proceedings he cannot later be heard to complain of the irregularity as a person will not be allowed to**
 H **complain against an irregularity, which he himself has accepted, waived or acquiesced. [Aderemi, JSC].**

I In this case, the appellant voluntarily chose to waive the time needed to respond to 2nd respondent's objection. it was too late in the day, after the court below had reserved judgment, to expect anything else on the date of judgment – **4/2/2016**, than the delivery of the judgment. Once an appeal is argued, there is no other pending proceeding save delivery of judgment by the court – **Ukachukwu vs. PDP** (supra).

- A In the circumstances, this appeal lacks merit and is dismissed.
The parties are to bear their respective costs.

Amina Adamu Augie
Justice, Supreme Court

- B **PETER-ODILI, (JSC):** I am in complete agreement with the judgment just delivered by Amina Adamu Augie (JSC) and to underscore my support for the reasoning I shall make some comments.

- C The appellant as plaintiff commenced this suit at The Federal High Court by way of an originating summons filed on the 5th day of February 2015 with the question in the originating summons thus:

- D **“Whether having regard to sub sections 178(2) and 180(2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) the 1st defendant can legally conduct Governorship Election in Adamawa State on Saturday, 28 February 2015”**

- E The trial Federal High Court after hearing on the originating summons dismissed the suit and on appeal to the Court of Appeal or court below, the appeal was struck out hence the current appeal to the Supreme Court. The full facts are well set out in the lead judgment and there is no point repeating them.

- F On the 14th day of December, 2016 date of hearing, learned counsel for the appellant adopted his brief of argument settled by Sylvester Imhanobe Esq. and filed on 8/3/2016. In it was identified a sole issue, viz:

- G **Whether or not the refusal of the learned justices of the Court of Appeal to hear and determine the Appellant's Motion on Notice dated 20/11/2015 and filed on 23rd November 2015 to regularize the appellant's notice of appeal dated and filed on 22 July 2015 and appellant's brief of argument dated and filed on 4th August 2015 is not a breach of the appellant's fundamental right to fair hearing in Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 which renders the judgment of the court delivered on 4th February 2016 void?**

- J Learned counsel for the 1st respondent adopted its brief settled by T.M. Inuwa

A Esq, filed on 5/5/2016 and in it raised a single issue as follows:

Whether the refusal of the court below to hear the appellant's motion to regularize his position on the day of the judgment amounts to the breach of the appellant's fundamental right of fair hearing.

C 2nd respondent had its brief of argument settled by Adeyemi Pitan and filed on 13.4.2016. He argued the preliminary objection therein and the sole issue is thus:

Whether having regard to the reliefs claimed by the appellant at the trial court, the issues submitted before this honourable court have not become academic and moot.

2nd respondent contended that in the event the preliminary objection failed the issue for determination of the appeal would be thus:

Whether the lower court breached the appellant's constitutional right to fair hearing by refusing to hear his oral application and motion on notice dated 20/11/2016 (sic) and filed on 23 November 2016 (sic) to regularize the appellant's notice of appeal dated and filed on 22nd July 2015 and appellant's brief dated and filed on 4th August 2015.

G Whether this is a proper case in which this court can invoke its powers under Section 22 of the Supreme Court Act.

The 3rd respondent had a brief of argument settled by Kenneth Aina Esq. and filed on 20/4/16 and in it distilled a sole issue, viz:

H Whether or not the refusal of the Court of Appeal to hear and determine the motion on notice dated 20th day of November, 2015 filed after the court had reserved ruling/judgment in the appeal amounts to denial of the appellant's right to fair hearing.

I The 4th respondent had its brief of argument settled by Dr. Soni Ajala, filed 1/12/2016 adopted by learned counsel. In it was raised a sole issue thus:

Whether or not the refusal of the learned justices of the Court of

A **Appeal to hear and determine the appellant's motion on notice dated 20/11/2015 and filed on 23rd November 2015 to regularize the appellant's notice of appeal dated and filed on 22nd July 2015 and appellant's brief of argument dated and filed on 4th August 2015 is not a breach of the appellant's fundamental right to fair hearing in Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 which renders the judgment of the court delivered on 4th February 2016 void.**

C The brief of the 5th respondent settled by J.J. Usman Esq. filed on 16/5/2016 was adopted by learned counsel and in it was adopted the appellant's sole issue for determination, to wit:

D **Whether or not the refusal of the learned justices of the Court of Appeal to hear and determine the appellant's motion on notice dated 20/11/2015 and filed on 23rd November 2015 to regularize the appellant's notice of appeal dated and filed on 22nd July 2015 and appellant's brief of argument dated and filed on 4th August 2015 is not a breach of the appellant's fundamental right to fair hearing in Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 which renders the judgment of the court delivered on 4th February 2016 void.**

G Chief Chris Uche (SAN) adopted the brief of argument of the 6th respondent filed on 31/3/2016 and he too raised a single issue as follows:

H **Whether the refusal of the court below to hear the appellant's motion on notice dated 20th November, 2016 and filed on 23rd November 2016 to regularize the appellant's notice of appeal dated and filed on 22nd July 2015 and filed on 4th August 2015 after full arguments had already been taken on the objection that the said notice of appeal is incompetent and judgment reserved, is in breach of the appellant's right to fair hearing in Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).**

J The appellant also filed a reply brief to the 1st, 2nd, 5th and 6th respondents' briefs of argument which reply was filed on 15/6/2016.

A It is stating the obvious to say, the preliminary objection of the 2nd respondent will be dealt with before any other step can be taken as the competence of the appeal and the jurisdiction of the court depend on it.

B PRELIMINARY OBJECTION

Take notice that this court will be moved on the day of 2016 at the hour of 9 O'clock in the forenoon or so soon thereafter as counsel may be heard on behalf of the 2nd respondent/applicant praying the court for the following orders:

- C** 1. An order dismissing and/or striking out the appellant's appeal filed on February 18th, 2016 for lack of jurisdiction in that the issues arising from the subject matter are no longer live issues to be adjudicated upon by this court.
- D** 2. And for such further and other orders as this honourable court may deem fit to make in the circumstances.

GROUNDS OF APPLICATION

- E** 1. The appellant's claim at the Federal High Court is that the tenure of office of Governor Bala Ngilari, the immediate past Governor of Adamawa State expired on February 8, 2016 as against my 28, 2015.
2. The appellant's claims and reliefs are no longer live issue which can be adjudicated upon by this honourable court.
- F** 3. The appeal has become otiose, academic and moot and no longer worthy of adjudication by this court.

G Learned counsel for the 2nd respondent, objector contended that the issue before this court has no life in it and the appeal is a waste of time of the court, having become academic moot and hypothetical. He cited **Plateau State vs. A.G. Federation (2006) 3 NWLR (Pt.967) 346; Ugba vs. Suswan (2014) 14 NWLR (Pt. 1427) etc.**

H That the appeal should be dismissed.

In response, learned counsel for the appellant submitted that the crux of the appellant's case is that the 1st respondent breached Section 178 and 180 of the 1999 Constitution (as amended). That if the Governorship Election in Adamawa State conducted by the 1st respondent (INEC) which produced the 6th respondent as Governor of the State is an infraction against the 1999 Constitution (as amended), it would be immaterial that the tenure of the incumbent Governor at that time is now expired. That this court has power into the entire process leading to the election of Adamawa State and nullify the election conducted by

- A the 1st respondent (INEC) if it conducted the election in breach of the 1999 Constitution CFRN. He stated that appellant commenced this suit on 5th February 2015 more than two months before the 1st respondent conducted the general election and so the suit is not academic as the issues to be determined are alive and germane.

B The relief claimed in this preliminary objection is as follows:

- C **An order dismissing and/or striking out the appellant's appeal filed on February 18th, 2016 for lack of jurisdiction in that the issues arising from the subject matter are no longer live issues to be adjudicated upon by this court.**

- D The objector/2nd respondent had distilled a sole issue for determination, viz:

- E **Whether having regard to the reliefs claimed by the appellant at the trial court, the issues submitted before this honourable court have not become academic and moot.**

- F Canvassing the stance of the 2nd respondent/objector, learned counsel contended that there is no obligation on the court to adjudicate on since the matter is no longer alive and what is at foot is a moot discourse. The appellant disagrees on the ground that since there is an infraction on the rights of the appellant, the court has a duty to offer the redress.

- G The crux of the appellant's case is that the 1st respondent breached Section 178 and 180 of the 1999 Constitution (as amended) and that by 8th February, 2012 the four year tenure of the incumbent, Bala Ngilari, Governor of Adamawa State would start running and end on February, 2006. Based on that calculation, the appellant did not indicate any interest in the general election for Adamawa State Governorship in 2015. However, a general election took place in 2015 and a new Governor elected, thereafter the appellant took out the suit which has culminated into this current appeal. The suit that progressed to this appeal was instituted at the Federal High Court in February 2015.

- I The facts above have brought a foray into what can be taken as an academic discourse under the colour of adjudication. It is to be said that a suit is considered academic where it is merely theoretical, makes an empty sound and of

J

- A** no practical utilitarian value to the plaintiff even if the judgment is given in his favour. A matter unrelated to the practical situation of human nature and humanity. Matters such as described are certainly not for the precious time of the courts which being saddled with more useful adjudicatory issues are clearly
- B** being led a garden path on a useless vainglorious adventure into the academic world which have the Ivory towers meant for such. See **Plateau State vs. Attorney General of the Federation (2006) 3 NWLR (Pt.967) 346; Ugba vs. Suswan (2014) 14 NWLR (Pt.1427); Adepoju vs. Yinka (2012) 1 SC 125 at 147; Salik vs. Idris (2014) 15 NWLR (Pt.1429) 36 at 54.**
- C**

Indeed this preliminary objection is meritorious in that even if at the end of the day the judgment goes in favour of the appellant, the issue under discourse being the matter of who is to be the Governor of Adamawa State has since been

D laid to rest since there is a legally, properly elected and seated Governor in place and no pronouncement of this court can validly be made changing that situation. It falls to reason that the matter of which this appeal is before us is dead, no longer alive and nothing can change it. The objection is upheld.

- E** However to clear whatever webs of doubt that may be I shall enter into the main appeal.

MAIN APPEAL

- F** However looked at, each of the issues as crafted by the parties ask the same question which in effect would be taken to be:

- G** **Whether the refusal of the Court of Appeal to hear and determine the motion on notice of 20/11/2015 filed after the court had reserved ruling/judgment in the appeal amounts to denial of appellant's right to fair hearing.**

- H** Learned counsel for the appellant positing a positive answer to the question raised contended that the Court of Appeal failing to hear that motion to regularize the notice of appeal being in breach of appellant's right to fair hearing rendered the judgment delivered on the 4th February 2016 void. He cited **Dandume Local Government & 9 Ors vs. Alhaji Abdulmutallab Abdu Yaro (2011) 11 NWLR (Pt.1257) 159 at 190.**
- I**

- That this court should invoke the general power under Section 22 of the Supreme Court Act and determine the real issue in controversy between the parties being an issue of law. He referred to **Order 8 Rule 12 (5)** of the Supreme
- J**

A Court Rules, 2008.

Learned counsel for the 1st respondent stated that a calm reading of the proceedings of 10th November, 2015 would show that the fair hearing right of the appellant was not breached. That the appellant not only waived his right of the time within which to respond to the notice of preliminary objection and actively participated at the hearing of the objection and so cannot turn around now to complain of the infraction to his right of fair hearing. He cited **Inakoju vs. Adeleke (2007) 4 NWLR (Pt.1025) 423, Ukachukwu vs. PDP (2014) 17 NWLR (Pt.1435) 134.**

It was further contended that the Supreme Court can only invoke its powers under Section 22 of the Supreme Court Act and Order 8 rule 12(5) of the court's rule when it has jurisdiction to entertain appeal. He referred to **Hassan V. Aliyu (2010) 17 NWLR (Pt.1223) 547.**

For the 3rd respondent, learned counsel said by his volition counsel to the appellant joined issues with the other parties at the hearing of the preliminary objection appellant raised to the briefs of the respondents and they were all heard and so he cannot now talk about a lack of fair hearing. He cited **Lagos Sheraton Hotel & Towers vs. H.P.S.S.S.A (2014) 14 NWLR (Pt.1426) 45 at 71; Mbanefo vs. Molokwu (2014) 6 NWLR (Pt.403) 377 at 418 419.**

That what the appellant was seeking with the said motion of 10th November, 2015 was to arrest the judgment of the Court of Appeal, a procedure unknown to our law. He cited the case of **NewsWatch Communication Ltd vs. Attah (2006) 12 NWLR (Pt.993) 143 at 179.**

Learned counsel for the 4th respondent stated that the appellant has not proffered sufficient materials on which the denial of fair hearing can be substantiated. He relied on **Adebayo vs. A.G. Ogun State (2008) 4 MJJSC 80 at 96.**

For the 5th respondent it was canvassed that when parties have joined issues on a particular subject matter the only duty left for the court is to proceed to deliver judgment on those issues. He cited **Metal Construction Ltd. vs. Miglore & Anor. (1979) 6-9 SC; IBWA Ltd vs. Imano Nig. Ltd. (2001) FWLR (Pt.44) 443.**

Learned counsel for the 6th respondent said what amounts to miscarriage of justice vary from case to case and depending on the facts and circumstances of a particular case. He cited **Emeka vs. Okadigbo (2012) 18 NWLR (Pt.1331) 55 at 94 etc.**

A Learned counsel for the 2nd respondent calls on the court to dismiss this appeal as it is an invitation to assume jurisdiction and adjudicate over a matter that is already dead. See **PPA vs. INEC (2012) 13 NWLR (Pt.1317) 215 at 245.**

B The appellant's position is an invocation of this court's powers under Section 22 of the Supreme Court Act on the grounds, viz:

- 1. That this is a pre-election matter which this court has always afforded priority.**
- C 2. The suit is commenced by originating summons and there is no dispute as to the facts of the case.**
- 3. To remit the case to the lower court would constitute undue delay, which this court does not countenance.**
- D 4. All the processes required to determine this appeal on the merit are before this court.**

E The 1st respondent's view point is that the appellant has failed to establish any grounds for the invocation of the powers under Section 22 of the said Act. All the other respondents towed the same line of thought of the 1st respondent and that is that the conditions under which such an invocation of Section 22 of the Supreme Court Act can be done do not exist. Also that the appellant is a meddlesome interloper in instituting this suit in the first place.

F The law at the base of which the appellant anchors his cry is section 22 of the Supreme Court Act which provision 1 shall quote hereunder, viz:

G The Supreme Court may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and

H certify its findings on any question which the Supreme Court thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any

I necessary inquires or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings has been instituted and prosecuted in the Supreme Court as a court of first instance and

J may rehear the case in whole or in part or may remit it to the

A court below for the purpose of such rehearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court”.

B It needs be said as first shot that before this court can invoke Section 22 of the Supreme Court Act to entertain any matter like the court of first instance or court below there must be a proper appeal before the court. The provision is not devised to revive dead issues. Also where the court below lacks jurisdiction then the

C Supreme Court is without jurisdiction to do anything else and the invocation of Section 22 of the Supreme Court Act does not arise. See **PPA vs. INEC (2012) 13 NWLR (Pt.1317) 215 at 245 per Adekeye JSC; Hassan vs. Aliyi (2010) 17 NWLR (Pt.1223) 547.**

D The appellant had also called attention to a breach of his right to fair hearing in that his motion of 23rd November, 2015, same date of judgment of the court of Appeal was not heard.

 The facts relating to the above issue are that there had been arguments

E taken on a process filed by the appellant without a lawyer's seal which appellant's counsel argued was not of consequence and the court below considered the issue and adjourned for judgment to the 23rd November, 2016. On that date of judgment the appellant flew in a motion contesting that his right to fair hearing

F had breached on the said matter of whether or not the non affixing of the NBA seal vitiated his appellant's briefs.

 The appellant contends that the court below not hearing the motion before proceedings to deliver the judgment infringed his right under Section 36 of

G CFRN.

 The respondents disagreed on the point contending that he had the opportunity which he utilized and cannot turn around to talk of a breach of fair hearing. That what he had set out to do was akin to arresting the judgment slated

H for that day.

 It is to be stated at the risk of restating an otherwise over flogged issue, that the application of the principle of fair hearing is not to be done in vacuo, just by the waving of the flag that fair hearing has been breached. It has to be taken in

I context and within the balance of the equal opportunity granted the parties as in this instance where from what had transpired between the parties earlier on, the appellant had had the opportunity to be heard on the matter of the NBA seal. He also had ample time to raise any infraction before that date slated for judgment, he

J waited just like hunter setting a trap for his prey and when there would be no room

- A for escape in which case, the judgment of that day would be put off by way of a procedure unknown to our law, an arrest of judgment. In this case, the principle of fair hearing cannot be available to such a party. See **Ukachukwu vs. PDP (2014) 17 NWLR (Pt.1335) 134; Inakoju vs Adeleke (2007) 4 NWLR (Pt.1025) 423; Orugbo vs Una(2002) 16 NWLR (Pt.792) 175; Mbanefo vs Molokwu (2014) 6 NWLR (Pt.1403) 377 at 418-419.**

- B In the end, this matter pursued by the appellant has no peg to hang on, there was no breach of his right to fair hearing and even at the issue being canvassed
- C had long died and the court is called upon to resuscitate a dead and buried matter to the utter irritation of court.

From the foregoing and the better reasoning in the lead judgment, this appeal lacks merit and is dismissed, I abide by the consequential orders made.

- D **Mary Ukaego Peter-odili**
Justice, Supreme Court

- E **OGUNBIYI, (JSC):** I have had the privilege of reading in draft the lead judgment of my learned brother Augie, (JSC). I agree that the appeal is devoid of any merit and it should be dismissed.

The suit was commenced by originating summon to determine:

- F **“Whether having regard to sub-section 178(2) and 180(2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) the 1st defendant can legally conduct governorship election in Adamawa State on Saturday, 28th February, 2015”.**

- G The Federal High Court dismissed the appellant/plaintiff's suit. An appeal to the Court of Appeal was also dismissed. A preliminary objection was filed challenging the appellant's brief filed without NBA seal affixed thereto. This was
- H following the decision of this court in **APC vs. General Bello Sarkin Yaki** unreported **suit no. SC.722/15 delivered on 23rd November, 2015.** The appellant filed a motion seeking an order of court extending the time within which he may regularise his notice of appeal filed without affixing the NBA seal. He sought for
- I time also to regularise his appellant's brief and a deeming order of the documents as properly filed.

The lower court struck out the appeal on the ground that there was no NBA seal affixed to the notice of appeal and appellant's brief of argument and hence the

J

A appeal now before us.

I agree with the lead judgment of my brother that the preliminary objection is without substance and is hereby overruled.

B On the merit of the appeal the lone issue before this court and adopted by all the parties is hinged on question of fair hearing. I will hereby adopt the formulation by the 1st respondent which is, in my view very concise and to the point as follows:

C **Whether the refusal of the court below to hear the appellant's motion to regularize his position on the day of the judgment amounts to the breach of the appellant's fundamental right of fair hearing.**

D Emphatically it is submitted on behalf of the appellant that parties must be given equal opportunity to present their cases in the court or tribunal and that no party should be given more opportunity or advantage over and above the other in the presentation of his case.

E I must say without hesitation that the contention put forth by the learned counsel for the appellant is well taken. The caveat however, is, where the law recognises that no right is absolute and at large. In other words, an individual's or party's right is subject to the right also of the other party. It is pertinent to restate clearly that one's right ends at the point where the exercise encroaches the liberty and right of the other party. The right to fair hearing must therefore be exercised within the legal frame work provided by law for the hearing of a matter.

G The learned counsel for the appellant made reference copiously to section 36 of the **constitution 1999 (as amended)** and sub-section (1) states as follows:

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

I The foregoing provision is very succinct and clear on the concept of fair hearing. The sub-section in my view is open to all parties coming before a court of law or a tribunal. There is no restriction or exclusion of one party against or in favour of the other. By fair hearing in this context it simply denotes giving an equal

A opportunity to the parties to be heard.

This principle was largely and expounded by this court in the case of **Pam vs. Mohammed (2008) 16 NWLR (Pt.1112) 1 at 68** wherein Tobi, (JSC) had this to say.

B

“Fair hearing, in essence means giving equal opportunity to the parties to be heard in the litigation before the court. See **INEC vs. Alhaji Musa (2003) 3 NWLR (Pt.806) P.72**. Fair hearing means a trial conducted according to all legal rules formulated to ensure that justice is done to the parties. See **Ntukidem vs. Oko (1986) 5 NWLR (Pt.45) 909**; **Union Bank of Nigeria Limited vs. Nwaokolo (1995) 6 NWLR (Pt.400) 127**. Fair hearing in relation to a case means the trial of a case or the conduct of the proceedings therein in accordance with the relevant laws, rules of court and principle of natural justice. See **Ekpeto vs. Wanogho, (2004) 18 NWLR (Pt.905) 394**. See also **Brifina Ltd vs. Intercontinental Bank Ltd. (2003) 5 NWLR (Pt.814) 540**”.

C

D

E

The community reading and summary of the foregoing authorities lay down the confirmation that fair hearing is that process which is conducted in accordance with the relevant laws or rules.

F

With reference made to the record of proceedings especially at **page 679 - 682**, there is ample evidence that issues were joined by all the parties on the proprietary or otherwise of the appellant's notice of appeal filed without the NBA seal. Parties also did adopt there respective briefs of argument and judgment was reserved. It is intriguing that having joined issues in this wise with the objectors, the same appellant can now turn round to claim that he has been denied the right to fair hearing.

H

The appellant, by his own admission, admitted to have joined issues with the 2nd respondent (**then objector**) thus, and as rightly contended by the respondents, there cannot be any justification that there was a denial of fair hearing.

I

The law is well settled that when parties join issues on a particular subject matter, the only duty saddled on the court is to proceed to deliver judgment on those issues. See **Metal Construction (W.A.) Ltd & 2 Ors vs. Miglione & Anor (1979) 6 -9 SC (Reprint) 118**. See also **IBWA Ltd. vs. Imano Nig. Ltd**

J

A (2001) FWLR (Pt.44) at 443.

As rightly submitted by the respondents, the appellant's application was meant to stay a judgment, or delay the judgment which was about to be delivered. The lower court, in my view was on a sound footing and could not be faulted when it proceeded to deliver its judgment which was ready on the said date. The appellant wanted to be a clog in a wheel of justice and progress. This should not be allowed to happen. He was stopped rightly.

C The law is well entrenched that where a party in a suit who refused or failed to take advantage of the fair hearing process created by the court, he cannot later turn round to accuse the court of denying him of justice. See the case of Inakoju vs. Adeleke (2007) 4 NWLR (Pt.1025) P.423.**D It is not out of place to say at this juncture that the appellant did not only waive his right at the time within which to respond to the notice of preliminary objection; rather he also actively participated in the proceeding wherein he urged the court to discountenance the objection. See also Ukachukwu vs. PDP (2014) 17 NWLR (Pt.1435) P.134 at page 197-198 wherein this court said:**

E “The question of fair hearing is a matter of fact which must be established by evidence. The *Black's Law Dictionary, Ninth Edition at page 789* defines fair hearing as:

F “A judicial or administrative hearing conducted in accordance with due process”.

G As rightly submitted by the 1st respondent's counsel, it was too late for the appellant to attempt to move that motion on the day set for no other business than the deliverance of the judgment.**H With the notice of appeal being incompetent, the court below lacks the jurisdiction to entertain the appeal which was rightly struck out. The lower court was also right to have refused to hear the appellant's motion which was purely meant to delay the delivery of its judgment.****I My learned brother Augie, (JSC) has done justice to the lone issue raised in this appeal. With the few words of mine and while relying especially on the comprehensive reasoning and conclusion arrived at in the lead judgment, I also find no merit in this appeal.****J Same is therefore also dismissed by me and I abide by all orders made in the lead Judgment.**

A

Clara Bata Ogunbiyi
Justice, Supreme Court.

B **CENTUS NWEZE, (JSC):** I had the advantage of reading the draft of the leading judgment which my lord, Augie, JSC, just delivered now. I agree with the conclusion that, since the appellant voluntarily chose to waive the time needed to respond the objection of the second respondent, the invocation of the right to fair hearing in his appeal is unavailing.

C My lords, permit me to observe that the touchstone for determining the observance of fair hearing in trials is the question whether an opportunity of hearing was afforded to parties entitled to be heard, **J.C.C. Inter Ltd. vs. N.G.I. Ltd. (2002) 4 WRN 91, 104.** Thus, where, as in this case, counsel had the opportunity of being heard but prostituted it, **Omo vs. JSC, Delta State (2000) 7 KLR (Pt.108) 2623** or decided to filibuster just to delay the trial, **Oyedeji vs. Akinyele (2002) 3 NWLR (Pt.755) 586, 613** or, deliberately, failed to avail himself of the opportunity of delivering his address, **Chidoka vs. First Class Finance Co. Ltd. (2001) 2 NWLR (Pt.697) 216, 227**, he cannot be heard to complain of want of hearing, **J.C.C. Inter Ltd. vs. N.G.I. Ltd. (supra); Momo vs. JSC, Delta State (supra).**

F Indeed, this prescription applies with equal force to the litigants themselves, **Okotha vs. Herwa Ltd. (2000) 15 NWLR (Pt.690) 249, 258; Adebayo vs. AG, Ogun State (2008) 7 NWLR (Pt.1085) 210; Mirchandani vs. Pinhero (2001) 3 NWLR (Pt.710) 557; Abubakar vs. INEC (2004) 1 NWLR (Pt.854) 207; Scott Emukpor vs. Ukaube (1979) 1 SC 6; Oyeyipo vs. Oyinloye (1987) 1 NWLR (Pt.50) 356; Omo vs. JSC, Delta State (2000) 12 NWLR (Pt.682) 444; Nwokocha vs. AG, Imo State (2016) LPELR -40077 (SC).**

H As shown in the leading judgment, on November 10, 2015, the appellant was accorded the right to be heard. However, counsel chose to waive it. Instead, he subsequently, resorted to an unknown strategy, namely, an attempt to arrest the court's judgment: an attempt which the court rebuffed! Now, ensnared by his own chicanery, he has waved the banner of fair hearing as a trump card.

I My lords, this banner, too, cannot sustain his protest. Indeed, the approach of the appellant's counsel reminds me of the eloquent formulation in **Adebayo vs. AG, Ogun State (2008) LPELR – 80 (SC) 23-24.** For its bearing on the fortune of the appellant's case, I crave Your Lordships' indulgence to quote this court's view *in extenso*:

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 issue 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 cases because they have nothing to canvass in their favour in the case. The fair hearing provision in the constitution is the machinery or locomotive of justice; not a spare part to propel or invigorate the case of the user. It is not a casual principle of law available to a party to be picked up at will in a case and force the court to apply it to his advantage. On the contrary, it is a formidable and fundamental constitutional provision *available to a party who is really denied 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**

- From all indications, the appellant has “nothing useful to advocate in favour of [his appeal] [Accordingly, he is advised to] leave the fair hearing constitutional provision alone because it is not available to [him] just for the asking”.
- G**

- It is for these, and the more detailed, reasons in the leading judgment that
- H** I, too, shall dismiss this appeal. Appeal dismissed.

Chima Centus Nweze
Justice, Supreme Court

- I** **DAUDABAGE, (JSC):** I have had a preview of the Lead Judgment delivered by my learned brother, Augie (JSC), and I agree with all the reasoning and conclusion arrived at. Just to underscore my support for the reasoning, I shall make some comments.

J

A This appeal is against the judgment of the Court of Appeal, Abuja Division delivered on the 4th February, 2016. The judgment struck-out the appellant's appeal on the ground that there is no Nigerian Bar Association (NBA) seal affixed to the notice of appeal and appellant brief respectively.

B The judgment is at pages 683 to 689 of the record while the notice of appeal against same containing two grounds is at pages 699 to 707 thereof. It is dated 18th February, 2016 and was filed the same date. Based on the two grounds contained in the said Notice of Appeal, the appellant propose a sole issue for the determination of this appeal to wit:

D **“Whether or not the refusal of the learned justices of the Court of Appeal to hear and determine the appellant's motion on notice dated 20th November 2016 and filed 23rd November to regularize the appellant notice of appeal dated and filed on 22nd July, 2015 and appellant brief dated and filed on 4th August 2015 is not a breach of the appellant's fundamental right to fair hearing in Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 which renders the judgment of the court delivered on 4th February 2016 void?”.**

F The 1st respondent formulated a sole issue for the appeal to wit:

G **“Whether the refusal of the court below to hear the appellant's motion to regularize his position on the day of the judgment amounts to the breach of the appellant's fundamental right of fair hearing”.**

H The 2nd respondent formulated two issues for the determination of this appeal to wit:

I **“(1) Whether the lower court breached the appellant's constitutional right to fair hearing by refusing to hear his oral applications and motion on notice dated 20th November 2016 (sic) and filed on 23rd November 2015 (sic) to regularize the appellant notice of appeal dated and filed on 22nd July 2015 and appellant brief dated**

J

A and filed 4th August 2015 (ground 1).

B (2) Whether this is a proper case in which this court can invoke its powers under Section 22 of the Supreme Court Act”.

The 3rd respondent has formulated a sole issue for determination, wit:

C “Whether or not the refusal of the Court of Appeal to hear and determine the motion on notice dated 20th day of November, 2015 filed after the court has reserved ruling/judgment in the appeal amount to denial of the appellant's right to fair hearing”.

D

The 4th respondent formulated issue is as follows:

E “Whether or not the refusal of the learned justices of the Court of Appeal to hear and determine the appellant's motion on notice dated 20th November, 2015 and filed on 23rd November, 2015, to regularize the appellant's notice of appeal dated and filed on 22nd July 2015 and appellant's brief of argument dated and filed 4th August, 2015 is not a breach of the appellant's fundamental right to fair hearing in Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 which renders the judgment of the court delivered on 4th February, 2016 void”.

F

G

H The 5th respondent adopts the appellant's sole issue for determination (See appellant's sole Issue).

The 6th respondent also formulated a sole issue for determination to wit:

I “Whether the refusal of the court below to hear the appellant's motion on notice dated 20th November, 2016 and filed on 23rd November 2016 to regularize the appellant's notice of appeal dated and filed on 22nd July 2015 and filed on 4th August 2015

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**A after full arguments had already been taken on the objection
that the said notice of appeal is incompetent and judgment
reserved, is in breach of the appellant's right to fair hearing in
Section 36(1) of the Constitution of the Federal Republic of
B Nigeria 1999 (as amended)".**

MAIN APPEAL

What therefore portends where a motion that was duly filed, served to be heard on
C date of judgment, was refused or denied to be heard, because it was a date
reserved for judgment by the trial court. Put in another way, was the appellant
denied fair hearing by this refusal to hear his motion. This court in the case of
Deduwa vs. Okorodudu 4 LC 894 at 898 defined what is a fair hearing:

**D "A fair hearing must of course, be a hearing that does not
contravene the principles of natural justice. Evershed M.R.
said in Abbot vs. Sullivan. In Mohammed vs. Kano N.A.,
E Ademola C.J.N. (delivering the Judgment of the court) said at
page 426:**

**F "We think a fair hearing must involve a fair trial and a
fair trial consists of the whole hearing. We therefore see
no difference between the two. The true test of a fair
hearing it was suggested by counsel is the impression of a
reasonable person who was present at the trial whether,
G from his observation justice has been done in the case.
We feel obliged to agree with this".**

If, of course, there is no hearing of one party's side of the case especially it is
H through no fault of his own, this may also amount to no **"fair hearing" of his side
of the case and he will not have had a "fair hearing in the determination of
his civil rights and obligations to which he is entitled under Section 22(1) of
the Constitution"**.

**I This court had pronounced that "the right to fair hearing does not stop
with the parties being present in court".** It is a right to be heard at every
material stage of the proceedings. In this case, the appellant voluntarily chose to
waive the time needed to respond to 2nd respondent's objection. it was too late in

J

A the day, after the court below had reserved judgment, to expect anything else on the date of judgment *4/2/2016*, than the delivery of the judgment. Once an appeal is argued, there is no other pending proceeding save delivery of judgment by the court – **Ukachukwu vs PDP (2014) 17 NWLR (Pt.1435) 1334 SC.**

B For a more detail reasoning contained in the lead judgment, I also hold that the appeal lacks merit and it is also dismissed by me. I abide by the order as to costs contained in the lead judgment.

Sidi Dauda Bage,
Justice, Supreme Court.

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**EHIMEN ESENE
AND
THE STATE**
**IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA**

SC. 322/2013

FRIDAY, 10TH MARCH, 2017

BEFORE THEIR LORDSHIPS

**OLABODE RHODES-VIVOUR
MUSADATTIJO MUHAMMAD
CLARA BATA OGUNBIYI
CHIMACENTUS NWEZE
AMIRU SANUSI**

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

APPEAL: Where appellant's complaints are based on the concurrent findings of facts of two lower courts – Duty on appellant.

*CASE LAW: Defence of Alibi – Principles in **Shehu vs. State (2010) 8 NWLR (Pt.1195)1** – Consideration thereof*

CRIMINAL LAW AND PROCEDURE: Unchallenged evidence in a case of armed robbery. – Effect

CRIMINAL LAW AND PROCEDURE: When burden of proof in Criminal Cases is discharged. – Considerations thereof.

CRIMINAL LAW AND PROCEDURE: When conviction of an accused can be based on the evidence of a sole witness.

CRIMINAL LAW AND PROCEDURE: Admissibility – Failure to tender knife used in armed robbery – Whether fatal to the case of prosecution.

CRIMINAL LAW AND PROCEDURE: Armed robbery – When a person can be said to have committed armed robbery.

CRIMINAL LAW AND PROCEDURE: Defence of Alibi – When not necessary to consider.

CRIMINAL LAW AND PROCEDURE: Defence of alibi – When not raised at the earliest opportunity – Effect.

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

CRIMINAL LAW AND PROCEDURE: Identification of accused – Failure of accused to challenge the evidence of his identification – Presumption.

CRIMINAL LAW AND PROCEDURE: Identification of accused – Where evidence of identification is credible – Effect.

CRIMINAL LAW AND PROCEDURE: Identification of accused is a question of fact – Trial court to make findings thereon.

CRIMINAL LAW AND PROCEDURE: Standard of proof in capital offences – What is required of prosecution.

CRIMINAL LAW AND PROCEDURE: The most appropriate mode of identification of accused person.

CRIMINAL LAW: Armed Robbery – Offence of armed robbery – Purport.

CRIMINAL LAW: Defence of Alibi – How investigated – Duty on accused to furnish relevant information.

CRIMINAL LAW: Defence of alibi – How raised

CRIMINAL LAW: Defence of alibi – Imperatives

CRIMINAL LAW: Defence of alibi – Meaning.

CRIMINAL LAW: Defence of alibi – Proof of alibi – Standard of proof required.

CRIMINAL LAW: Defence of alibi – When not raised at the earliest opportunity – Whether police is obliged to investigate.

CRIMINAL LAW: Offence of armed robbery – Ingredients

EVIDENCE: Credibility of a witness – How determined.

EVIDENCE: Standard of proof in criminal cases – Section 135 of the Evidence Act 2011 – Imperatives

EVIDENCE: Failure of accused to challenge a martial evidence against him – Presumption.

WORDS AND PHRASES: “Alibi” – Meaning.

Issue for Determination

Whether the Court of Appeal was right in affirming the decision of the trial court holding that the prosecution did prove the guilt of the appellant beyond reasonable doubt.

Facts of the Matter

On the 23rd day of December 2006 the PW1 (one Franca Okuonurie) whilst returning from Abuja was dropped off by the bus she was travelling in at AP Junction, Irrua. Whilst at the junction, the appellant a commercial motor cyclist rider approach PW1 and offered to give her a ride on his motor bike to Obedu.

In the course of their journey, PW1 asked the appellant to take Akho junction into Irrua, a request which the appellant turned down on the basis that there was Policemen at the junction. So, the appellant took Agric Road instead. The appellant went past Agric Junction and headed into the bush, where the appellant asked PW1 to come down. Thereafter, the appellant beat her and asked her to give him all that she had; otherwise he (appellant) would stab her with the knife he was holding.

The appellant, after forcefully removing the weave on from PW1's head, gave her a bite on her left breast as a result of which she fainted and stayed in the bush all through the night.

The appellant robbed PW1 of the items she was carrying: a bag of rice, bag of salt, cloths, meat, necklace, wrist watch, shoes and the sum of N42,000.00 cash given to her by her brother in respect of the house he was building.

PW1's brother returned from Lagos on the 26th December, 2006. The next day, that is, 27th December, 2006, they (PW1 and her brother) decided to report the incident to the police. On their way to the police station, somewhere around Akho Junction, PW1 saw and identified the appellant as the person, who robbed her on the night of 23rd December, 2006. As soon as the appellant saw PW1, he started to run with his motorbike whereupon PW1 and her brother gave him a chase. They saw the appellant enter a particular building. PW1 and her brother then went and invited policemen. As PW1, her brother and the policemen were coming back to the building where the appellant had run into, the appellant who saw them again ran into a mechanic workshop where the policemen arrested him.

After investigation he was arraigned before a magistrate court for stealing and assault occasioning harm. At the commencement of trial, after going through the facts, the trial magistrate ordered that the matter be further investigated as there were elements of violence in the case.

The case was then transferred to the Anti-Robbery Section of the State CID, Benin City, for that purpose. At the conclusion of investigation, the appellant was charged on information before the Edo State High Court, sitting in Benin City, where the matter was tried and concluded.

At the trial, apart from the PW1, three other prosecution witnesses (PW2, 3 and 4) testified for the prosecution.

The appellant testified in his own defence and called no witness. His case in his trial, the appellant raised the defence of alibi to the effect that at the time of incident (9p.m) he was in his house. Meanwhile, he did not raise this defence in his two statements to the police

The trial court in its considered judgment delivered on the 2nd June, 2010 convicted and sentenced the appellant to death as charged.

His appeal to the Court of Appeal was unsuccessful and dismissed while the trial court's judgment was upheld. Hence the appeal now before the Supreme Court.

Held: (*Unanimously dismissing the appeal*)

1. *The standard of Proof required in Criminal Proceedings*
The law is very well settled, as conceded to by counsel on both sides, that the standard of proof in criminal cases is proof beyond reasonable doubt, whilst the onus of proof of the guilt of the accused person rests squarely on the prosecution. It is static and does not shift. [Onafowokan vs. State (1987) 3 NWLR (Pt. 61) 538, and also section 135 of the Evidence Act

2011].

In the case of Ikem vs. State (1985) 1 NWLR (Part 2) pages 378 for instance, it was held that in serious offences carrying death penalty, a high degree of proof is necessary to secure conviction. (P 134 Paras F–H).

2. *Ingredients of offence of armed robbery*

It is well established in a long line of authorities that, to sustain a conviction in a charge of armed robbery, the prosecution must prove the following ingredients, which are very essential and mandatory:

- a) **That there was a robbery;**
- b) **That the robbery was carried out with the use of offensive weapons;**
- c) **That the accused person participated in the robbery.**

It is imperative to say that all of the above requirements must be consecutively proved beyond reasonable doubt before a conviction can be sustained. [Ogudo vs. State (2011) 18 NWLR (Pt. 1278) 1 at 32; see also Bozin vs. State (1985) 2 NWLR (Part. 8) 465]. (Pp 134–135 Paras H–A)

3. *What is armed robbery?*

In describing the offence of robbery, this court had this to say in the case of Ebeinwe vs. The state under reference supra at page 224:

“..... Robbery is theft or extortion by force or inducing of fear by coercion..... Therefore theft in all its ramifications is robbery if in order to commit the theft or in committing the theft or in carrying away or attempting to carry away property obtained by theft the offender/accused for that end voluntarily causes or attempts to cause any person's death or hurt or wrongful restraint or fear of instant death or hurt or instant hurt or of wrongful restraint”.

Judicial guidance was given also by this court in Fatayi Olayinka vs. The State, 30 NSCQR 149 at pages 162 – 163. It is clear from the foregoing principle that where it is shown that in forcefully taking away the property of another, the assailant either hurts or attempts to put his victim in a state of fear or apprehension of eminent harm or death or restraint, an armed robbery has taken place.

It is also clear from the testimony of PW1, that in the encounter with the appellant, the items mentioned earlier were forcefully taken away from her under restraint, physical assault/harm and fear of instant death with the use of a knife. (P 138 Paras A–E)

4. *Where evidence of armed robbery was not challenged*

It is also pertinent to restate affirmatively that the testimony of PW1 of her robbery which was supported by the evidence of PW2, PW3 and PW4 are all facts which have not been challenged effectively by the defence in any material particular. It is not surprising therefore that the trial court in its evaluation of evidence at page 73 of the record, took the view that:

“Under cross examination, evidence of PW1 was not shaken as to the fact that there was an armed robbery.”

For all intents and purposes, the finding of facts by the trial court was after a thorough and painstaking assessment of the evidence placed before it. The findings as rightly affirmed by the lower court, cannot be faulted. It is absolutely right, I hold. (Pp 138; 144 Paras F–G; A–B)

5. *The best way to identify an accused person*

As rightly submitted also by the learned counsel for the respondent, the lower court was absolutely right when it refrained from disturbing the findings of the trial court.

Without having to argue the point, the law is settled that the best identification of an accused person is the evidence given by the victim of the crime with which the accused is charged. [Okosi vs. The State under reference supra].

It is well established further that the question regarding the proper identification of a party to a crime is one of fact to be determined by the trial court. This legal proposition resonated in the decision of this court in the case of Ukpabi vs. State (2004)11NWLR (Pt. 884) 439 wherein Musdapher, JSC said:

“The law is now settled that, the question whether an accused is properly identified as the one who was a party to the commission of the criminal act is a question of fact to be considered by the trial court on the evidence adduced for

that purpose.”

See also the case of **Osuagwu vs. State (2009) 1 NWLR (Pt. 1123) at 527.**
(*P 144 Paras B – G*)

6. *Appellant did not raise the issue of alibi in his extra judicial statement.*
In Exhibit P-1 which was the first statement made by the appellant as soon as he was arrested on 27/12/2006, he did not raise alibi by stating that he was at home by 9pm. Rather, he stated that he carried a man from Eguare Irrua to Opoji at about 7.30pm on 23/12/2006 and that on their way, they saw a bag containing assorted clothes, money and some items and that the man asked the son to carry the items to his house with a wheel barrow. He neither provided the man's name nor his address.
Exhibit P-2 was the second statement made by the appellant at the state C.I.D, Benin on 8/3/2007. He claimed that he stopped his commercial cycling work at 6.30pm on same day.
It is revealing to say that in both statements, the appellant did not say that he was at home by 9pm on 23/12/2006, which was the time and date the robbery took place. (*P 145 Paras B – E*)
7. *Shehu vs. State (2010) 8 NWLR (Pt1195)12 does not apply.*
Appellant relied on the case of Shehu vs. State (2010) 8 NWLR (Pt. 1195) 12. I agree with the respondent's counsel that the authority is remarkably distinguishable with his case.
In that case, the defence of alibi raised was not investigated at all and the prosecution did not call the investigating police officer in evidence. Hence the court held that the alibi was never investigated by the Police, who never testified in that case.
In the instant case however, the appellant did not raise the alibi at the onset in any of the two extra-judicial statements he made at the earliest opportunity. It was only during his testimony in court that he feebly tried to raise it and for that reason both the lower courts held that it was an afterthought and therefore a defence which is not available. Both courts were ad-idem on their finding. The case of Shehu vs. State (supra) is not on all fours with the case at hand. Consequently, the question of alibi could not have created any doubt in the mind of the Judge as to the guilt of the appellant. (*P 145 Paras E – I*).

8. *The appellant puts up a weak defence of alibi*
The bare denial of the crime and the lame defence of alibi which the appellant put forward for purpose of seeking to confuse the court were not helpful as he failed to account for where he was by 9p.m. on 23/12/2006 when he was said to have robbed PW1. (P 145 Paras I–J).

9. *The defence of alibi was not raised at earliest opportunity*
In Exhibit P-1, accused person stated that he carried a man from Eguare-Irrua to Opeje at about 7.30pm on 23-12-2006. In the said statement, he stated that on their way, they saw a bag containing assorted clothes, money and some food items and that the man carried them away.
In the said statement also, accused did not raise alibi which would have put the Police on investigation as required by law. Similarly in Exhibit P-2 which is the statement made by accused person at the state C.I.D. Benin on 8-3-2007, though accused now claimed he stopped his motorcycle work at 6.30p.m on 23-12-2006 as against the fact that he carried a man from Eguare-Irrua at Opoje at 7.30pm on the same day as stated in Exhibit P-1, he did not also say in Exhibit P-2 that he was at home at 9p.m on 23-12-2006.
With the contradictory statements made in Exhibit P-1 and Exhibit P-2 as to the time he stopped his motor cycle work and as to where he was, the alibi raised by accused person in his evidence in court is an afterthought and it is bound to collapse and I reject same.
(P 146 Paras D–H).

10. *Alibi is properly raised at the earliest opportunity*
The lower court in its review of the evidence affirmed the conclusion arrived at by the trial court and at page 160 of the record and said:

“..... The appellant raised his alibi only during trial, which does not afford him a good defence. By so doing, at the stage of trial, he deprived the police their duty to investigate the alibi raised.”

I seek to point out at this juncture that the lower courts in arriving at their decisions relied on the case of Ukwunnenyi vs. The State (1989) 4 NWLR (Pt.114) 131 where it was held that “the best defence and evidence of alibi is one pleaded at the first opportunity and not at the trial.”
(Pp 146–147 Paras H–A)

11. *The trial court did not rely only on the evidence of PW1*

Contrary to the contention borne out on behalf of the appellant supra, I hold the view that the respondent's counsel was right on his submission that the trial court did not rely only on the evidence of PW1 in finding that the robbery on PW1 amounted to an armed robbery. This is because when regard is had to the records at pages 72 and 73, same reveal that the trial court clearly relied on the evidence of PW3 and PW4 in reaching the conclusion that the robbery was an armed robbery.

The lower court at pages 146 – 147 of the records also arrived at the same conclusion when it said thus:

“---Based on those facts as contained in the evidence of PW1 and those investigations which followed the report made to the police and the subsequent evidence of PW3, and PW4, the investigations of police officers, the (1st) ingredient in the proof of the offence of armed robbery was established by the prosecution.”

The evidence given by PW3 and PW4, the Police officers who investigated the armed robbery, were unchallenged. (P 147 Paras D–H)

12. *When Court can rely on evidence of sole witness to convict*

I further wish to restate that the law is firmly established that the trial court could have relied even on the sole evidence of PW1, which is credible and unchallenged. See the case of Igbo vs. State (1975) 9 NSCC page 415 at 418 wherein Obaseki, (JSC) (as he then was) held and said:

“If the evidence of a single witness sufficiently proves the case against an accused person and the trial court accepts the evidence, there is no rule of law or practice dissuading the court from convicting on the evidence.”

The same principle was applied also in the case of Abogede vs.. State (1996) 5 NWLR (Pt. 448) 270 at 280.

Credibility of evidence does not therefore ordinarily depend on a number of witnesses. The determining yardstick is credibility and question of belief. (Pp 147–148 Paras H–C).

13. *The appellant did not challenge material evidence*

The appellant, who had the opportunity never deemed it important to cross-examine PW1 on the nature of the knife and how she was able to see the weapon at the time and place in question. He was also represented by counsel all through the trial. He must be deemed to have admitted that indeed he employed the knife in robbing PW1 on 23/12/2006. See the case of Amadi vs. Nwosu (1992) 5 NWLR (Pt. 241) 273 at 248 where this court held:

“Where an adversary or a witness called by him testifies on a material fact in controversy in a case, the other party should, if he does not accept the witness’s testimony as true, cross-examine him on that fact, or at least show that he does not accept the evidence as true. Where as in this case, he fails to do either, a court can take his silence as an acceptance that the party does not dispute the fact.” (P 148 Paras C–F)

14. *Failure to tender the Knife used in armed robbery*

It is a settled principle therefore that the failure of the prosecution to tender the knife used by the appellant in attacking PW1 did not in any way water down the credible and unchallenged evidence that the appellant committed armed robbery against PW1 on 23/12/2006. (P 149 Para A)

15. *Evidence of identification of the appellant was not challenged*

Furthermore and on the question of identification, I seek to restate emphatically that the Court of Appeal was correct in upholding the decision of the trial judge who believed the evidence of PW1 that the appellant was correctly identified by her as having taken part in the robbery in question.

All through the cross-examination of the PW1 by the appellant’s counsel during trial, counsel made no serious effort to destroy the evidence of identification of the appellant by the PW1 and this was the very foundation of the case of the prosecution. Again see the case of Moses Jua vs. State (supra) where the significance of cross-examination in criminal proceedings was stressed by this court. (P 149 Paras B–D)

16. *There is no doubt in the case of the Prosecution*
Contrary to the submission made by the appellant's counsel, the doubt he alleged on the prosecution's case is non-existent. As a consequence all the reference made to the cases of Queen vs. Obiasa (1962)1 All 645, Shehu vs. The State (2010) 8 NWLR (Pt. 1195) 112 and Almu vs. The State (2009) 10 NWLR (Pt. 1148) 31 are not applicable or relevant to the appellant's case. (P 149 Paras D–E)
17. *Evidence of identification is credible*
Contrary to the contention held by the appellant there was light at both the station and supported by the headlight on the appellant's motor bike for clear identification of the appellant where he picked the PW1. The witness was not cross-examined on this. It is established firmly therefore and the court can act on it.
Further still and on the issue regarding providing further particulars in respect of the clothes of the appellant. (Exhibits P-3 and P-4) which PW1 identified as the clothes he wore on that day, I agree with the respondent's counsel that there was enough identification. In other words, with the level of the interaction between the appellant and PW1 which was also enhanced by the lighting at the AP station and the appellant's motor bike headlight, PW1 was sufficiently afforded the opportunity to have seen the appellant enough to know the clothes he was wearing on the day of the incident. (P 150 Paras B–C, F–H)
18. *Concurrent findings of facts*
I seek to say also that the premises on which the arguments of the appellant are based are all findings of facts on which both the trial court and the lower court made a concurrent finding. Accordingly, the conclusions drawn by the two lower courts therein are final with there being no evidence that same were perverse or occasioned a miscarriage of justice or based on wrong principles.
The concurrent finding of the two courts below on the fact that the ingredients of armed robbery were proved beyond reasonable doubt by the prosecution is clearly supported by the evidence given by the PW1 also by the evidence of PW2, PW3 as well as PW4 and indeed corroborated by the evidence of the appellant himself. The witnesses were not shaken at all during cross-examination. Their evidence is neither

perverse, erroneous nor a violation of any known principle of law.

The lower court, as clearly borne out on the record, concurred with the trial court on all the issues that: there was robbery on PW1; the robbery was an armed robbery and that it was the appellant who robbed PW1. The rejection of the alibi put forward by the appellant was also based on a sound decision. (P 151 Paras A – D)

19. *Onus on appellant where there are concurrent findings*

It is well settled by numerous decided cases that this court will not disturb a concurrent finding of fact by the courts below unless the decision is perverse or erroneous and cannot be supported having regard to the evidence adduced by the prosecution or is a violation of some principles of law. See *Olaiya vs. State* (2010) 3 NWLR (Pt. 1181) 423 at 438, where this court held and said:

“This appeal being one against concurrent findings of facts of two courts below, the appellant is very far from discharging the burden the law places on him of showing that the decisions of the courts below were perverse or cannot be supported having regard to the evidence adduced by the prosecution. In situation such as this, in the present case, I see no reason whatsoever to disturb the findings of the trial court which were affirmed by the court below that the appellant was indeed guilty of the charge.”

Also on the same principle are the cases of *Attah vs. State* (2010) 10 NWLR (Pt. 1201) 190 at P. 226 and *Archibong vs. The State* (2006) 14 NWLR (Pt. 1000) 346 wherein this court relied on its earlier decision in *Olokotintin vs. Sarumi* (2002) 13 NWLR (Pt. 784) 307 at 317.

The Court of Appeal concurred with the trial court on all the issues that there was robbery on PW1, the robbery was an armed robbery and that it was the appellant who robbed PW1.

On the totality of the foregoing, I hold the view also that this court has no reason to disturb these findings of fact as they have not been shown by the appellant to be either perverse, unsupported by the evidence led or a violation of any known principle of law. (Pp 151; 152 Paras E – I; C – E)

20. *The Prosecution proved the offence of armed robbery beyond reasonable doubt*

On the community reading of the entire evidence and the circumstances surrounding this case, the concurrent findings of the two courts below on the fact that the ingredients of armed robbery were proved beyond reasonable doubt by the prosecution is very overwhelming. The evidence which is unshaken under cross-examination is neither perverse, erroneous nor a violation of any known principle of law.

There is nothing weighty enough placed before this court to disturb the concurrent findings of fact by the trial court and affirmed by the Court of Appeal with respect to the evidence of the prosecution witnesses which the trial court found as credible having had the opportunity of seeing and observing the demeanor of the witnesses. (P 152 Paras A – C).

21. *Meaning of Alibi*

Alibi means elsewhere. When the defence of alibi is raised the accused person is simply saying that he was at a different place on the date of the incident.

Alibi is one of the best defences available provided it is raised with detailed particulars at the earliest opportunity and not at trial.

When an accused person is arrested by the police and accused of committing an offence, e.g. murder, armed robbery etc, and he intends to rely on the defence of Alibi, such a defence must be raised at the earliest opportunity, i.e. timeously. This is done when he is called upon by the investigating Police officer to write his statement.

(Pp 152 – 153 Paras I – B)

22. *What to investigate in alibi*

For an alibi to be worth investigating by the investigating police officer the accused person must give full details (particulars) of where he was when the offence was committed. Where defence of alibi is put forward timeously, the prosecution is expected to investigate it. Failure to investigate an alibi may cast some doubt on the probability of the case for the prosecution, but such doubt quickly disappears when there is credible and compelling evidence fixing the accused person at the scene of the crime. (P 153 Paras B – C).

23. *On Standard of proof on defence of alibi*

The burden of proving an alibi is on the prosecution and not on the accused person, and the standard of proof required to establish the defence of alibi is one based on balance of probabilities. The defence succeeds when the trial judge is satisfied that it is probable that the accused was not at the scene of crime on the day the crime was committed. He was somewhere else. See *Osuagwu vs. State* (2013) 1-2 SC (Pt. 1) p. 37, *Adebiyi vs. State* (2016) 1-2 SC (Pt. IV) p. 95.

Both statements Exhibits P-1 and P-2 were written by the appellant on 27/12/2006 and 8/3/2007 when the events of 23/12/2006 were supposed to be fresh in his memory. He never said where he was at 9pm on 23/12/2006 when he robbed PW1 of her property. It was on 11/1/2010, over three years after the robbery that he gave evidence in court saying that on 23/12/2006 he was at home at 9pm. This to my mind is clearly an afterthought. (P 153 Paras C–E; H–I)

Per Rhodes-Virous (JSC):

“In the present case the evidence of PW1 fixes the appellant as the person who gave her a ride while he was plying the streets as a commercial motorcyclist (in local parlance Okada) on 23/12/2006 at 9pm, assaulted and robbed her. A few days after the incident she, in company of her brother saw the appellant, and on sighting them took to his heels but was later arrested by the police. The evidence was accepted by the learned trial judge and although his statement to the police was produced, he did not call any witness. It was clear to the trial court, Court of Appeal and this court that on the totality of evidence before the trial court and accepted by it, the prosecution had established that the testimony of the appellant that he was elsewhere on the day and time of the crime cannot be true. The defence of alibi raised by the appellant cannot be sustained since it was raised too late, and there is overwhelming evidence from PW1 which makes the defence incredible and worthless”.

In the face of overwhelming evidence that the appellant committed the offence of armed robbery on 23/12/2006 at 9pm consideration of the defence of alibi becomes a futile exercise.” (Pp 153 – 154 Paras I–D).

Per Nweze (JSC):

“My lords, it has become fashionable for accused persons who have no defence whatsoever to the case which the prosecution made against them to conjure the bogus defence of alibi. It would appear that they resort to this disingenuous ploy in the vain hope that, like the magical incantation of open sesame by the fictional Ali Baba and his forty thieves', such a sham defence could open the doors to their freedom.

However, this is not the juridical rationale for the said defence. For the umpteenth time, it ought to be emphasized that, to be entitled to the beneficent effect of the defence of alibi, an accused person must raise it at the earliest opportunity, Hassan vs. The State (2001) 6 NWLR (Pt. 709) 286, 305, which would, preferably, be in his extra-judicial statement. This is to offer the police an opportunity either to confirm or confute its availability to the accused person, [Ibrahim vs. The State [1991] 4 NWLR(Pt. 186) 399; Nwabueze vs. The State [1988] 4 NWLR (Pt. 86); Ikemson vs. The State [1989]3 NWLR (Pt. 110) 455].

What is more, the said defence must be unequivocal as to the particulars of his whereabouts and those present with him, [Onyegbu vs. The State [1995] 4 SCNJ 275, 285 – 286; Ibrahim vs. State (supra); Balogun vs. AG, Ogun State [2002] 6 NWLR (Pt. 763) 512, 535 – 536; Eke vs. The State (2011) LPELR – 1133 (SC) 16].

It is only where an accused person, such as the appellant, raised the said defence at the earliest opportunity without any ambiguity that a burden is cast on the Prosecution to

investigate it, Eyisi vs. State [2000] 4 NSCQR 60 and to disprove same, Eke vs. The State (supra).

Failure to investigate the defence of alibi raised in such circumstance will lead to an acquittal, [Yanor vs. The State (1965) ANLR (Reprint) 199; Bello vs. Police [1956] SCNLR 113; Odu and Anor vs. The State [2001] 5 SCNJ 115, 120; [2001] 10 NWLR (Pt. 772) 668].

However, the said defence would be unavailing in a situation, as in this case, where the accused person raised it during the trial, [Hassan vs. State [2001] 6 NWLR (Pt. 709) 305]. (Pp 154 – 155 Paras H–E)

Nigerian Cases Cited

Abogede vs. State (1996) 5 NWLR (Pt. 448) 270.
Adebiyi vs. State (2016) 1- 2 SC (Pt. IV) p. 95
Almu vs. The State (2009) 10 NWLR (Pt. 1148) 31
Amadi vs. Nwosu (1992) 5 NWLR (Pt. 241) 273
Archibong vs. The State (2006) 14 NWLR (Pt. 1000) 346
Attach vs. State (2010) 10 NWLR (Pt. 1201) 190
Balogun vs. AG, Ogun State [2002] 6 NWLR (Pt. 763) 512;
Bello vs. Police [1956] SCNLR 113;
Bozin vs. State (1985) 2 NWLR (Part. 8) 465.
Eke vs. The State (2011) LPELR – 1133 (SC) 16.
Eyisi vs. State [2000] 4 NSCQR 60
Fatayi Olayinka vs. The State, 30 NSCQR 149
Hassan vs. State [2001] 6 NWLR (Pt. 709) 305.
Hassan vs. The State (2001) 6 NWLR (Pt. 709) 286;
Ibrahim vs. The State [1991] 4 NWLR (Pt. 186) 399;
Igbo vs. State (1975) 9 NSCC page 415
Ikemson vs. The State [1989] 3 NWLR (Pt. 110) 455.
Ikemson vs. State (1985) 1 NWLR (Part 2) pages 378
Moses Jua vs. The State (2010) 4 NWLR (Pt. 1184) 217.
Nwabueze vs. The State [1988] 3 NWLR (Pt. 86);
Odu and Anor vs. The State [2001] 5 SCNJ 115, 120; [2001] 10 NWLR (Pt. 772) 668.
Ogudo vs. State (2011) 18 NWLR (Pt. 1278) 1;
Olaiya vs. State (2010) 3 NWLR (Pt. 1181) 423
Olokotinti vs. Sarami (2002) 13 NWLR (Pt. 784) 307.

- A** *Onafowokan vs. State* (1987) 3 NWLR (Pt. 61) 538,
Onyegbu vs. The State [1995] 4 SCNJ 275;
Osuagwu vs. State (2013) 1 -2 SC (Pt. 1) p. 37,
Osuagwu vs. State (2009) 1 NWLR (Pt. 1123) ;
- B** *Queen vs. Obiasa* (1962) 1 All NLR 645,
Shehu vs. State (2010) 8 NWLR (Pt. 1195).
Shehu vs. The State (2010) 8 NWLR (Pt. 1195) 112
Ukpabi vs. State (2004) 11 NWLR (Pt. 884) 439
- C** *Ukwunnenyi vs. The State* (1989) 2 NWLR (Pt. 114) 131
Yanor vs. The State (1965) ANLR (Reprint) 199;

Nigerian Statute Cited

- D** Evidence Act 2011, S. 135.

APPEARANCES

EMMANUELACHUKWU for the appellant with him: B.C Hezes and J.N.

- E Okongwu.**

GODWIN OMOAKA, (ESQ.) for the respondent with him: Solomon Babajide.

- F**

OGUNBIYI, (JSC) (Delivering the Lead Judgment): This is an appeal against the judgment of the Court of Appeal, Benin Division, in criminal appeal CA/B/374C/2010, delivered on the 28th day of May, 2013 by which said judgment the court affirmed the conviction and death sentence passed on the appellant by the High Court of Edo State, sitting at Benin City.

- G**

Dissatisfied with the judgment of the Court of Appeal, the appellant appealed against same to this court vide a notice of appeal dated and filed the

- H**

same day on 12th June, 2013 and raising two grounds of appeal.

SUMMARY OF THE FACTS

- I** The facts of this case as may be gleaned from the evidence on record are that on the 23rd day of December 2006 the PW1 (one Franca Okuonurie) whilst returning from Abuja was dropped off by the bus she was travelling in at AP junction, Irrua. Whilst at the junction, the appellant – a commercial motor cyclist rider approach PW1 and offered to give her a ride on his motor bike to Obedu 1 at a fare of
- J** N300.00. PW1 and the appellant eventually settled for N200.00.

A In the course of their journey, PW1 asked the appellant to take Akho junction into Irrua, a request which the appellant turned down on the basis that there were Policemen at the junction. So, the appellant took Agric Road instead. The appellant went past Agric junction and headed into the bush, where the
B appellant asked PW1 to come down. Thereafter, the appellant beat her and asked her to give him all that she had; otherwise he (appellant) would stab her with the knife he was holding.

The appellant, after forcefully removing the weave on from PW1's head,
C gave her a bite on her left breast as a result of which she fainted and stayed in the bush all through the night.

The appellant robbed PW1 of the items she was carrying: a bag of rice, bag of salt, cloths, meat, necklace, wrist watch, shoes and the sum of N42,000.00 cash
D given to her by her brother in respect of the house he was building.

PW1's brother returned from Lagos on the 26th December, 2006. The next day, that is, 27th December, 2006, they (PW1 and her brother) decided to report the incident to the police. On their way to the police station, somewhere around
E Akho junction, PW1 saw and identified the appellant as the person, who robbed her on the night of 23rd December, 2006. As soon as the appellant saw PW1, he started to run with his motorbike whereupon PW1 and her brother gave him a chase. They saw the appellant enter a particular building. PW1 and her brother
F then went and invited policemen. As PW1, her brother and the policemen were coming back to the building where the appellant had run into, the appellant who saw them again ran into a mechanic workshop where the policemen arrested him.

The appellant was initially taken to Irrua police station and after
G investigation he was arraigned before a Magistrate Court for stealing and assault occasioning harm. At the commencement of trial, after going through the facts, the trial magistrate ordered that the matter be further investigated as there were elements of violence in the case.

H The case was then transferred to the Anti-Robbery Section of the State CID, Benin City, for that purpose. At the conclusion of investigation, the appellant was charged on information before the Edo State High Court, sitting in Benin City, where the matter was tried and concluded.

I At the trial, apart from the PW1, three other prosecution witnesses (PW2, 3 and 4) testified for the prosecution. They were: Mr. Cletus Okuonurie, PW1's elder brother (PW2), Kemi Cyril Abudu, the Policewoman who investigated the matter when it was incidented at Irrua police station (PW3), and Mr. Victor
J Ernest, a Police sergeant, attached to the State CID, Benin City (PW4).

A The appellant testified in his own defence and called no witness. His case was a complete denial of his involvement in the armed robbery of the PW1. In his trial, the appellant raised the defence of alibi to the effect that at the time of incident (9p.m) he was in his house. Meanwhile, he did not raise this defence in his two statements to the police which were admitted in evidence as Exhibits P1 and P2 at pages 33 to 34 and 19 to 22 of the records of appeal, respectively.

The trial court in its considered judgment delivered on the 2nd June, 2010 convicted and sentenced the appellant to death as charged.

C His appeal to the Court of Appeal was unsuccessful and dismissed while the trial court's judgment was upheld. Hence the appeal now before us.

In compliance with the rules of court, briefs were exchanged by the parties. The appellant's brief was settled by one Emmanuel O. Achukwu of counsel and filed on the 18th September, 2013.

The respondent's brief of argument was however settled by one AdewaleAtake Esq. and filed on 14/11/13.

E On the 15/12/2016 when the appeal was heard, the counsel, Mr. Emmanuel Achukwu, represented the appellant and Godwin Omoaka, Esq. appeared for the respondent. Both learned counsel, adopted and relied on their respective brief of argument.

F While the counsel for the appellant urged that the appeal be allowed, a dismissal was sought for by the respondent.

For the determination of this appeal, the lone issue raised on behalf of the appellant from the two grounds of appeal is as follows:

G **Whether the court of appeal was right in affirming the decision of the trial court holding that the prosecution did prove the guilt of the appellant beyond reasonable doubt.**

H The foregoing issue was adopted also by the respondent. Submitting to substantiate his argument, the appellant's counsel related copiously to the settled law which restates the standard of proof in criminal cases which learned counsel argues, is proof beyond reasonable doubt; also that the onus of proof of the guilt of the accused person rests squarely on the prosecution. The onus, counsel argues, is static and does not shift. Counsel cites the case of **Ikemson vs. State (1985) 1 NWLR (Pt. 2) page 378.**

J It is clear on the record, counsel argues, that the trial court relied solely on the evidence of PW1 in finding that the alleged incident that occurred on the night

A of 23rd December, 2006, amounted to an armed robbery. This finding, he restates, was affirmed by the Court of Appeal. Copious reference was made to the witness PW1's evidence, which learned counsel argues, is not reliable, that the prosecution failed to prove an essential ingredient of the offence wherein it did not tender in evidence the weapon allegedly used in the attack or at least furnished good explanation as to why it could not do so.

It is the submission of counsel further that, the evidence of PW1, given all the surrounding circumstances, could not have been sufficient, credible and probable to have warranted the finding that the appellant was properly identified by PW1, as the assailant who robbed her. The counsel drew reference to the case of **Ochiba vs. State (2011) 17 NWLR (Pt. 1277) 663 at 694 – 695** wherein this court stated the principles that should guide the court when dealing with evidence of identification.

As a matter of fact, counsel submits that the appellant gave unchallenged evidence that he was somewhere else at the material time. Counsel cites the case of **Abudu vs. State (1985) 1 NWLR (Pt. 1) 55** where it was held that when the sole defence is an alibi, great care must be taken in relying on identification by a single witness and the facts of such identification must be carefully dealt with in the summing up.

In summary, it is the submission by the appellant's counsel that the prosecution failed to prove very essential ingredients of the offence for which the appellant was convicted to wit: that the alleged robbery was carried out with the use of offensive weapon and that the appellant participated in the robbery. This, the learned counsel argues, is because the only evidence upon which the appellant was convicted, (is the testimony of PW1, being the prosecutor's star witness), which is manifestly unreliable and should be viewed by the court with great caution; this is given that she was the victim of the alleged robbery and desired to revenge at any cost.

It is the submission of learned counsel further that the evidence of identification of the appellant by PW1, as has been demonstrated herein before, is fundamentally flawed and could not be safely relied upon. That the totality of the foregoing is to cast doubt seriously on the case of the prosecution and the doubt which ought to be resolved in favour of the appellant. Counsel cites the case of **Queen vs. Obiasa (1962) 1 All NLR 645** wherein it was held that any doubt arising in a criminal matter must be resolved in favour of the accused. Again see the case of **Shehu vs. The State (2010) 8 NWLR (Pt. 1195) 112 at 141; also Almu vs. The State (2009) 10 NWLR (Pt. 1148) 31 at 50 and 53.**

A A further authority of **Kalu vs. State (1988) 4 NWLR (Pt.90) 503 at 510** was also cited in support. The learned counsel solicits for the acquittal and discharge of the appellant in the circumstance of the case therefore.

B The counsel urges that the sole issue be resolved in favour of the appellant, who in the circumstance should be acquitted and discharged.

C In his submission in response to the appellant, the learned counsel for the respondent applauded the lower court in affirming the decision of the trial court in convicting the appellant of the offence of armed robbery and sentencing him to death by hanging. This is contrary to the contention held by the appellant's counsel, that the prosecution did prove the guilt of the appellant beyond reasonable doubt. Reliance was made on the case of **Moses Jua vs. The State (2010) 4 NWLR (Pt. 1184) 217**.

D The learned counsel concedes to the argument by the appellant's counsel on the necessary ingredients of the offence of armed robbery which the respondent is expected to prove beyond reasonable doubt as specified in the case of **Awosika vs. State (2010) 9 NWLR (Pt. 1198) page 4 (a) at 71 – 73**.

E On the question of proof beyond reasonable doubt, the learned counsel related to the evidence of PW1 which counsel qualified as very vivid, graphic and unchallenged during trial in support of the fact that she was robbed of the following items: a bag of rice, a bag of salt, cloths, meat, necklace, wrist watch, **F** shoe and the sum of 42,000.00 cash on 23rd December, 2006. She also testified that her assailant (the appellant) threatened to kill her with the knife he was holding.

G Reference was made also to the evidence by PW2, PW3 and PW4 who further corroborated the fact that PW1 was indeed robbed and that the robbery was armed robbery. The learned counsel cited the following authorities to buttress his submission: **Ebeinwe vs. The State (2011) Vol. 201 LRCN 220 – 238 at 224**; also the judicial guidance given in the case of **Fatayo Olayinka vs. The State 30 NSCQR 149 at 162 – 163**; that it is clear from the testimony of PW1, that in the encounter with the appellant, the items mentioned earlier in the course of this judgment were forcefully taken away from her under restraint, physical assault/harm and fear of instant death with the use of a knife.

I It is the submission of the learned counsel further that the evidence of PW2, PW3 and PW4 was not challenged and was therefore rightly acted upon by the trial court. Counsel cites again the case of **Ebeinwe vs. The State (supra)**; that the learned trial judge was therefore right when he held as he did at page 72 to 73 **J** of the records of appeal and which the lower court also endorsed at pages 147,

A 150 – 151 of the record of appeal.

It is the submission of the learned counsel further that, given the evidence of PW1, which is materially supported by the evidence of PW2 and PW3, and which evidence was not in any way disturbed by the defence even under cross examination, that there was a reasonable basis to hold that the prosecution proved its case beyond reasonable doubt.

The learned counsel urges this court to endorse the conclusion arrived at by the trial court at pages 75 and 76 of the record of appeal herein; that the findings of facts by the trial court after thorough and painstaking assessment of the evidence placed before it and supported out rightly by the lower court, cannot be faulted.

In addition to the light at the petrol station, for enough identification, the learned counsel took into consideration the time spent on haggling the bike fare by the appellant and PW1. This, counsel argued, gave PW1 an opportunity of seeing the appellant clearly; that is highly improbable to imagine that PW1 could have simply jumped on the appellant's motor bike without making efforts to see the face of who was going to carry her at the time of the night; that it is part of personal security initiatives. The Court of Appeal, counsel submits, rightly supported and endorsed the view held by the trial court and hence did not see it necessary to disturb the finding in that behalf.

Again, and still on the question of identification, counsel argues that the best identification of the accused person is the evidence given by the victim of the crime for which the accused is charged. See **Okosi vs. The State (1998) 1 ACLR 281 at 284.**

On the question of alibi which the appellant tried to raise in the open court during his defence the respondent's counsel argued that no such defence was raised by the appellant soon on his arrest by the police on 27/12/2006. Rather, that, in his statement exhibit P1, he only said that he carried a man from Eguare-Irrua to Opoji at about 7.30p.m. on 23/12/2006 and that on their way they saw a bag containing assorted cloths, money and some items; that the man asked the son to carry the items to his house with a wheelbarrow; that he (appellant) never provided the man's name nor his address.

The learned counsel for the respondent related also to Exhibit P-2, the appellant's 2nd statement made to the police on 8/3/2007, wherein he claimed that he stopped his commercial cycling work at 6:30pm on the same day; that in both statements, the appellant did not say that he was at home at 9pm on 23/12/2006, which was the time and date the robbery took place; that the alibi raised was

A rightly rejected by the two lower courts. Counsel urges this court to reject same also as an afterthought. This court, learned counsel submits, should not disturb the concurrent findings by the two lower courts.

B It is the submission by the appellant's counsel extensively that the knife ought to have been tendered in evidence if at all it was used that night as alleged, that the failure of PW1 to have described the nature of the knife and production of same have rendered the prosecution's case defective by failing to prove an essential ingredient of the offence of robbery.

C In refuting the foregoing submission, the respondent's counsel drew the court's attention that contrary to the contention held by the appellant's counsel, the trial court did not rely solely on the evidence of PW1 in finding that the robbery on PW1 amounted to an armed robbery. The learned counsel made

D reference to pages 72 and 73 of the records of appeal where the trial court clearly relied on the evidence of PW3 and PW4 in reaching the conclusion that the robbery was an armed robbery. This finding, counsel argues, was sustained by both the trial and lower courts; that the contention of the appellant that the trial

E court ought to have ensured that the evidence was credible and probable before placing reliance on it, is, learned counsel submits, misplaced and holds no ground.

Accordingly, it is submitted by the respondent's counsel therefore, that the

F two courts below complied rightly with the decision of this court decision in **Gonzee (Nig) Ltd vs. NERDC (2005) 13 NWLR (Pt. 943) 634** at 650 relied on by the appellant. In other words that even where evidence is unchallenged and uncontradicted, the trial court has a duty to evaluate same and be satisfied that it is

G credible and sufficient to sustain the claim.

On the submission by appellant that prosecution ought to have produced the knife to prove that the robbery was an armed robbery, the respondent's counsel argues vehemently that there is no legal obligation on the prosecution to

H produce or tender the knife in evidence. Counsel emphasized strongly that the failure by the prosecution to tender the knife used by the appellant in attacking PW1, did not in any way water down the credible and unchallenged evidence that the appellant committed armed robbery against PW1 on 23/12/2006.

I In summary, the respondent's counsel re-iterates with great emphasis that the prosecution led credible evidence via the PW1 in identifying the appellant as the robber who robbed her on the date in question, thus fixing the appellant by the scene of crime; that this evidence was supported by the testimonies of PW3 and

J PW4 who are the police officers that investigated the crime of robbery.

A It is the submission of counsel further that the trial court believed the evidence of PW1 in its entirety and rightly rejected the defence of alibi set up by the appellant; that the identification of the appellant by the PW1 was in order and was not shaken in any material particular by the fire of cross examination. The court, learned counsel re-affirms correctly assessed this evidence and rightly relied thereon.

C What is more, counsel argued, the total cumulative effect of the admissions made by the appellant in his testimonies in chief and under cross examination, to the effect that he rode on the type of motor bike which PW1 stated was ridden by the assailant on the day PW1 was attacked and robbed plus the fact that he is a commercial motorcycle driver lend credence to the fact that the courts below were correct in their findings.

D In totality, the respondent's counsel urges this court to resolve the issue in favour of the respondent and affirm the decision of the trial court and the Court of Appeal in convicting and sentencing the appellant to death by hanging.

E **“The lone issue for determination is whether the Court of Appeal was right in affirming the decision of the trial court holding that the prosecution did prove the guilt of the appellant beyond reasonable doubt”.**

F The law is very well settled, as conceded to by counsel on both sides, that the standard of proof in criminal cases is proof beyond reasonable doubt, whilst the onus of proof of the guilt of the accused person rests squarely on the prosecution.

G It is static and does not shift. See the case of **Onafowokan vs. State (1987) 3 NWLR (Pt. 61) 538, and also section 135 of the Evidence Act 2011.**

H In the case of **Ikemson vs. State (1985) 1 NWLR (Part 2) pages 378** for instance, it was held that in serious offences carrying death penalty, a high degree of proof is necessary to secure conviction.

It is well established in a long line of authorities that, to sustain a conviction in a charge of armed robbery, the prosecution must prove the following ingredients, which are very essential and mandatory:

- I**
- a) That there was a robbery;
 - b) That the robbery was carried out with the use of offensive weapons;
 - c) That the accused person participated in the robbery.

J

- A** It is imperative to say that all of the above requirements must be consecutively proved beyond reasonable doubt before a conviction can be sustained. See **Ogudo vs. State (2011) 18 NWLR (Pt. 1278) 1 at 32; see also Bozin vs. State (1985) 2 NWLR (Part. 8) 465.**
- B** Proof required in a criminal trial, no matter how serious the offence might be, is always proof beyond reasonable doubt; it is not proof beyond the shadow of a doubt. See the case of **Moses Jua vs. The State (2010) 4 NWLR (Pt. 1184) 217 at page 243.**
- C** The question to pose at this juncture is, whether in the light of the findings by the trial court and affirmed by the lower court, it can be said rightly that the prosecution did satisfy the standard of proof as laid down by the authorities under reference supra?
- D** The answer to the question raised will necessitate recalling the judgments by the two lower courts in convicting the appellant. Specific reference should be made for instance to pages 73, 74, 75 and 81 of the record of appeal respectively wherein his Lordship at the trial court held and said:
- E**
- F** **“That the PW1 having stated in her evidence that in the bush, accused person demanded for all she had on her and threatened to stab her with a knife he was holding, the robbery on PW1 was an armed robbery.**
- G** **-----**
That the story of events that took place on 27-12-2006 and leading to the arrest of the accused person as narrated by PW1 was substantially corroborated by PW2 who was with PW1 on the said 27-12-2006. PW1 was quite positive and her evidence was direct and unequivocal that the appellant was the person that robbed her on 27-12-2006.
- H** **-----**
That given the graphic nature of the evidence of PW1, the fact that she interacted with the appellant she was in position to recognize him, did recognize him indeed and that therefore an identification parade was unnecessary.
- I** **-----**
That on the basis of the evidence before the Honourable Court, the prosecution proved the charge of armed robbery against the appellant.”
- J**

A The appellant's appeal against the foregoing findings was dismissed by the Court of Appeal. In affirming the conviction and death sentence on the appellant, the lower court made the following far reaching conclusions and said:

B **“That the appellant did not bring in a better defence to counter the evidence of PW1 and therefore, the second ingredient of the offence i.e. that the robbery was an armed robbery stood proved against the appellant.**

C **That the appellant made no answer to the fact that, at the time of haggling the fare to board the motorbike, light from electricity at the AP filing station was on, and it took some moment to agree on the fare which afforded PW1 the opportunity to see the appellant well and that the head light from the motor bike also assisted in bringing out the appellant.**

E **That the evidence of the identification of the appellant PW1 was quite strong and positive considering the level of interaction between the two, before and during the time of the commission of the offence and it would not disturb the trial court's finding on the identification of the appellant.”**

H On whether there was robbery and if the robbery qualified as armed robbery, PW1, the victim of the robbery herself gave very vivid, graphic and unchallenged evidence during trial in support of the fact that she was robbed of the various item; she enumerated earlier in the course of this judgment, inclusive of cash amount, on the 23rd December, 2006. She also testified that her assailant (the appellant) threatened to kill her with the knife he was holding. This was her evidence at page 37 to 39 of the record:

I **“..... As we were going, accused passed the Agric road, I shouted where are you taking me to, where are you taking me to? Accused drove into the bush, he told me to come down, that my life will end that day.**

J **Accused started beating me inside the bush. He asked me to give him all I had otherwise he will stab me with the knife he was**

A holding, I gave him all I had. He also demanded my phone. I told him I had none and he continued beating me. The weave-on I fixed he used his hand to remove it. He gave a bite on my left breast. He gave bite on my left breast. I then fainted.”

B

In continuation further PW1 said:

C “..... on that day I was carrying a bag of rice, a bag of salt, a bag containing clothes, meat, I had N42,000 inside my bag which my brother gave to me in respect of his house, a necklace, wrist watch and shoes.”

D PW2, PW3 and PW4 in their testimonies also gave credence to the evidence given by PW1 that she was indeed robbed and that the robber exerted force of violence on her resulting in bodily injuries. PW2, the victim's brother, testified that although he did not witness the robbery, upon his return from Lagos on
E 26/12/2006 (three days after the robbery) he met PW1 in a critical condition with a swollen face and that upon his enquiry, PW1 narrated the incident of the robbery to him. The witness PW2 gave a very clear evidence at page 40 of the records.

F PW3 and PW4 who conducted investigation into the matter, also gave evidence to the effect that PW1 was indeed robbed and that the robbery was armed robbery. At page 40 of the record, this was what PW3 had to say:

G “.... I visited the scene of crime with both parties. I called a photographer who snapped the complainant because of the human bite she alleged accused gave her. I refer the complainant to Otibho Okha Teaching Hospital, for treatment.”

H

Also at page 44-45 of the record, this was what PW4 had to say:

I “.... I observed that the victim (i.e. PW1) sustained injury on her breast which was being treated. I also observed that a medical report issued by a doctor in Irrua was also attached. After our investigation, accused was charged to court for the offence of armed robbery.”

J

A In describing the offences of robbery, this court had this to say in the case of **Ebeinwe vs. The State** under reference supra at page 224:

B “..... Robbery is theft or extortion by force or inducing of fear
by coercion..... Therefore theft in all its ramifications is
robbery if in order to commit the theft or in committing the
theft or in carrying away or attempting to carry away property
obtained by theft the offender/accused for that end voluntarily
C causes or attempts to cause any person's death or hurt or
wrongful restraint or fear of instant death or hurt or instant
hurt or of wrongful restraint”.

D Judicial guidance was given also by this court in **Fatayi Olayinka vs. The State**,
30 NSCQR 149 at pages 162 – 163. It is clear from the foregoing principle that
where it is shown that in forcefully taking away the property of another, the
assailant either hurts or attempts to put his victim in a state of fear or apprehension
E of eminent harm or death or restraint, an armed robbery has taken place.

It is also clear from the testimony of PW1, that in the encounter with the
appellant, the items mentioned earlier were forcefully taken away from her under
restraint, physical assault/harm and fear of instant death with the use of a knife.

F It is also pertinent to restate affirmatively that the testimony of PW1 of her
robbery which was supported by the evidence of PW2, PW3 and PW4 are all facts
which have not been challenged effectively by the defence in any material
particular. It is not surprising therefore that the trial court in its evaluation of
G evidence at page 73 of the record, took the view that:

**“Under cross examination, evidence of PW1 was not shaken as
to the fact that there was an armed robbery.”**

H The law is well settled again and again that evidence which is neither challenged
nor debunked remains good, credible and should be relied upon by a trial judge,
who would in turn ascribe probative value thereon. The view held by this court in
I the case of **Ebeinwe vs. The State** (supra).

Predicated on the facts presented before it, the trial court at pages 72 to 73
of the records arrived at this conclusion and said:

J

**A “In the instant case, PW1 gave evidence and stated graphically
B how she was carried on a motor cycle, taken into the bush and
 robbed of her belongings with threats of stabbing her. She
 stated that she was abandoned in the bush and only found her
C way to the village the following morning.**

**C As a matter of fact and by her evidence, PW1 is the victim of the
 armed robbery. Under cross examination, evidence of PW1 was
 not shaken as to the fact that there was armed robbery.**

**D PW3 stated in her own evidence that she visited the scene of the
 robbery. PW4 equally stated that his team of investigators
 visited the scene.**

**E I find and I hold that there is evidence before me which I accept
 and believe that PW1 was robbed of the various items she listed
 on 23-12-2006.”**

**F Their lordships of the Court of Appeal, upon their review of the foregoing
 findings, did not find it difficult in agreeing with the learned trial judge. At page
 147 of the record of appeal for instance, the lower court therefore found as
 follows:**

**G “Based on those facts as contained in the evidence of PW1 and
 those investigations which followed the report made to the
 police and the subsequent evidence of PW3, and the PW4; the
 investigation police officers, the first (1st) ingredient in the proof
 of the offence of armed robbery was established by the
 prosecution, i.e. there was robbery on the 23rd of December,
 2006, and that the PW1 was the victim.”**

**I In further review of the evidence the lower court continued at page 150 151 of the
 record and also said:**

**J “..... PW1 the victim mentioned the appellant at the first stop in
 the bush, brought out a knife, which put her into great fear. Her
 evidence on the said use of the knife as a weapon for the**

- A** **commission of the offence was never discredited at cross-examination by the appellant. The appellant on his part did not bring in a better defence to counter that evidence of PW1. That piece of evidence therefore stands unimpeached. In that regard**
- B** **therefore, the second (2) ingredient of the offence that the robbery was an armed robbery stands proved against the appellant.”**
- C** The third element of the offence is whether it was the appellant who robbed PW1.
 At page 156 of the record of appeal their lordships of the lower court held and said thus in their judgment.
- D** **“In the instant appeal, the evidence of the identification of appellant by the PW1 is quite strong and positive, considering the level of interaction between the two, before and during the time of the commission of the crime. This court is in agreement**
- E** **with the trial court, with respect to its findings on the identification of the appellant as the person who robbed the PW1 on the 23/12/2006.”**
- F** It is submitted by the appellant's counsel that the evidence of PW1, given all the surrounding circumstances could not have been sufficient, credible and probable to have warranted the finding that the appellant was properly identified by PW1 as the assailant who robbed her.
- G** The learned counsel submits further that even if there was electricity light of the AP Junction as testified by PW1, that the testimony of the same PW1, under cross-examination, to the effect that her alleged assailant was wearing a face cap, which was bent on his face, is to call into serious question the probability of PW1's identification of the said assailant at the AP Junction.
- H** In further contemplation, the learned counsel for the appellant threw a poser that questions whether PW1 could have clearly seen through the face cap that she argues was covering the assailant's face so as to have recognized the face.
- I** The counsel re-iterates also that PW1 did not furnish any further particulars as to how she came to identify the clothes picked up from the appellant's house as those worn by her assailant at the time of the incident.
- It is borne on the record emphatically that the witness PW1, in order to
- J** demonstrate that she knew that it was the appellant who robbed her of her

A belongings under very violent circumstances and apprehension of imminent death, had this to say in her evidence at page 37 of the records:

B **“----- Accused brought a motor bike ridden by accused. Accused charged me N300 to take me to Obedu. I told him N200 which he agreed.”**

C In further testimony, PW1 also had this to say extensively at page 38 of the record:

D **“----- There was light in AP station where accused picked me and he also put on the light on his bike that is how I was able to recognize accused.”**

At the same page 38 also PW1 said:

E **“----- On the 27/12/2006 as we were going to Irrua Police Station to report the incident as we got to Akho junction at Irrua I identified accused and I showed him to my brother as the boy that robbed me. When accused saw me he started**
F **running with his bike. We followed. He entered a house. My brother and I then went to the Police Station to bring Police. As we were coming, we saw accused when he saw us, he ran into a mechanic workshop. The Police arrested him there.”**

G In further evidence, PW1 continued and said:

H **“At the accused house, I saw the clothes accused wore on the day he robbed me. I showed it to my brother, we took it. The clothes were hung on a rope outside. The clothes were handed over to the Police.”**

I Under cross-examination PW1 stated at page 39 thus:

“The bike accused rode is cargo motorcycle.”

J

A PW2 was with PW1 at the time PW1 saw and identified the appellant as the person who robbed her. At page 40 of the record, PW2 also said:

B **“On 27/12/06 I took PW1 to Irrua to report the incident to the**
C **Police on our way to Akho junction, PW1 saw accused and she**
D **identified him as the person who robbed her on 23/12/06.**
E **Immediately accused saw us he drove off in his bike. Unknown**
F **to the accused we traced him to a certain compound in**
G **Irrua.....”**

In continuation of his further evidence, which lent credence to the account given by PW1, the witness PW2 also said:

D **“..... In the house, PW1 identified some clothes hung on the**
E **rope in the compound which she said the accused was wearing**
F **on the day of the incident, a jacket and a jean trouser. PW1 took**
G **the clothes and I quickly took her to report the incident to the**
H **Police. A Policeman was sent to follow us to arrest the accused.**
I **As we were going, we saw accused on the way, when he saw us,**
J **he ran into a mechanic workshop. It was there the Policemen**
K **arrested him and took him to the Police Station.”**

PW3 was one of the Investigation Police Officers. She testified that it was the appellant who assisted them in locating the place (scene of crime which was the bush where the appellant robbed PW1). In the witness's words at page 42 of the record, she said:-

G **“The day we visited the scene of crime, we found it difficult to locate the place but**
H **as we were leaving the place it was accused who showed us the quickest way out**
I **of the place.”**

The evidence by PW3 was not controverted and it leaves a very strong question mark on the appellant. He knew the quickest way out of the place!!

I The appellant in his evidence in chief and under cross-examination
J admitted that the clothes which PW1 identified as the clothes the appellant was wearing on the day of incident Exhibits P-3 and P4 (Jacket and trousers) were his own. He merely stated under cross-examination that he did not put them on, on the day of the incident. Also under cross-examination, the appellant further admitted riding the particular motorbike which PW1 stated was ridden and used

A in conveying her by her attacker on the day of the incident.

Given all circumstances above, the trial court at page 75 of the record held and said:

B **“In the instant case, PW1 recognized the accused person. She**
said there was light, they spent time to haggle and negotiate the
price with which accused person as the rider of the motor cycle
C given the graphic nature of the evidence of PW1, the fact that
she interacted with the accused person, she was in a position to
recognize him. Therefore, I hold that identification parade was
unnecessary.”

D Further still and at page 76 of the record, the learned trial Court judge continued in the same tone and said:

E **“Apart from the fact that PW1 was able to recognize accused**
person as the person who robbed her, there is also the evidence
adduced by the prosecution that in the house of the accused
F found and PW1 recognized them. The clothes were tendered as
Exhibits P-3 and P-4. Also tendered was a face cap which PW1
said accused person wore on the day of incident but abandoned
G the recognition of the accused by PW1 is direct and
unassailable and as such identification parade unnecessary.”

H The lower court in the circumstances after a full review of the entire evidence, did not hesitate but agreed squarely with the trial court's finding when it said thus at page 156 of the record:

I **“In the instant appeal, the evidence of the identification of the**
appellant by PW1 is quite strong and positive considering the
level of interaction between the two, before and during the time
of the commission of the crime. This court is in agreement with
J the trial court, with respect to its finding on identification of the
appellant, as the person who robbed the PW1 on the

A 23/12/2006. This court will not disturb that finding.”

For all intents and purposes, the finding of facts by the trial court was after a thorough and painstaking assessment of the evidence placed before it. The findings as rightly affirmed by the lower court, cannot be faulted. It is absolutely right, I hold.

As rightly submitted also by the learned counsel for the respondent, the lower court was absolutely right when it refrained from disturbing the finding of the trial court.

Without having to argue the point, the law is settled that the best identification of an accused person is the evidence given by the victim of the crime with which the accused is charged. See the case of **Okosi vs. The State** under reference supra.

It is well established further that the question regarding the proper identification of a party to a crime is one of fact to be determined by the trial court. This legal proposition resonated in the decision of this court in the case of **E Ukpabi vs. State (2004)11NWLR (Pt. 884) 439** wherein **Musdapher**, JSC said:

F “The law is now settled that, the question whether an accused is properly identified as the one who was a party to the commission of the criminal act is a question of fact to be considered by the trial court on the evidence adduced for that purpose.”

G See also the case of Osuagwu vs. State (2009) 1 NWLR (Pt. 1123) at 527.

It is pertinent to restate the following salient facts which were given by the appellant but corroborative of the evidence given by the PW1. In other words, it is on record that the appellant, although he denied robbing PW1, admitted however that he was a commercial motor bike rider; that he used a red cargo motorcycle for commercial purpose on 23rd December, 2006 the day PW1 was robbed. He also admitted that the clothes, Exhibits P-3 and P-4 which PW1 identified as the clothes he was wearing on the day of the incident were his but he did not put the cloths on the day in question.

Exhibits P-1, and P-2 are the two extra judicial statements made by the appellant to the Police as soon as he was arrested on 27/12/2006. In his evidence in open court at page 48 of the record he said:

J

A “On 23/12/2006, I went to work as a bike rider in the morning of that day. I closed from work at 6pm on that day. I know PW1 who is also complainant in the case. On 23/12/2006 at 9pm, I was in my house.”

B

In Exhibit P-1 which was the first statement made by the appellant as soon as he was arrested on 27/12/2006, he did not raise alibi by stating that he was at home by 9pm. Rather, he stated that he carried a man from Eguare Irrua to Opoji at about 7.30pm on 23/12/2006 and that on their way, they saw a bag containing assorted clothes, money and some items and that the man asked the son to carry the items to his house with a wheel barrow. He neither provided the man's name nor his address.

C

D Exhibit P-2 was the second statement made by the appellant at the state C.I.D, Benin on 8/3/2007. He claimed that he stopped his commercial cycling work at 6.30pm on same day.

E It is revealing to say that in both statements, the appellant did not say that he was at home 9pm on 23/12/2006, which was the time and date the robbery took place.

F Appellant relied on the case of *Shehu vs. State (2010) 8 NWLR (Pt. 1195)*. I agree with the respondent's counsel that the authority is remarkably distinguishable with his case.

G In that case, the defence of alibi raised was not investigated at all and the prosecution did not call the investigating police officer in evidence. Hence the court held that the alibi was never investigated by the police, who never testified in that case.

H In the instant case however, the appellant did not raise the alibi at the onset in any of the two extra-judicial statements he made at the earliest opportunity. It was only during his testimony in court that he feebly tried to raise it and for that reason both the lower courts held that it was an afterthought and therefore a defence which is not available. Both courts were ad-idem on their finding. The case of *Shehu vs. State* (supra) is not on all fours with the case at hand. Consequently, the question of alibi could not have created any doubt in the mind of the Judge as to the guilt of the appellant.

I The bare denial of the crime and the lame defence of alibi which the appellant put forward for purpose of seeking to confuse the court were not helpful as he failed to account for where he was by 9p.m. on 23/12/2006 when he was said to have robbed PW1.

J

- A The trial court, did consider Exhibits P-1 and P-2, carefully, in the light of the defence of alibi raised by appellant at the trial and thus the reason why it held thus at pages 76-77 of the record:
- B **“Accused person also tried to put up an alibi by stating that he**
- C **closed from work at 6p.m. and at 9p.m. he was in his house. I**
- D **have considered the alibi raised by accused arising from his**
- statements to Police and evidence in court and I hold that is**
- weak and cannot stand the iron cast evidence fixing him to the**
- crime which is charged. In this regard, the statement of the**
- accused person made on 27-12-2006, a few days after the**
- incident and which was admitted in this proceeding as Exhibit**
- P-1 becomes very relevant and material.**

In Exhibit P-1, accused person stated that he carried a man from Eguare-Irrua to Opeje at about 7.30pm on 23-12-2006. In the said statement, he stated that on their way, they saw a bag containing assorted clothes, money and some food items and that the man carried them away.

In the said statement also, accused did not raise alibi which would have put the Police on investigation as required by law. Similarly in Exhibit P-2 which is the statement made by accused person at the state C.I.D. Benin on 8-3-2007, though accused now claimed he stopped his motorcycle work at 6.30p.m on 23-12-2006 as against the fact that he carried a man from Eguare-Irrua at Opoje at 7.30pm on the same day as stated in Exhibit P-1, he did not also say in Exhibit P-2 that he was at home at 9p.m on 23-12-2006.

With the contradictory statements made in Exhibit P-1 and Exhibit P-2 as to the time he stopped his motor cycle work and as to where he was, the alibi raised by accused person in his evidence in court is an afterthought and it is bound to collapse and I reject same.”

The lower court in its review of the evidence affirmed the conclusion arrived at by the trial court and at page 160 of the record and said:

- I **“..... The appellant raised his alibi only during trial, which**
- does not afford him a good defence. By so doing, at the stage of**
- trial, he deprived the Police their duty to investigate the alibi**
- raised.”**

J

A I seek to point out at this juncture that the lower court in arriving at their decision relied on the case of **Ukwunnenyi vs. The State (1989) 2 NWLR (Pt. 114) 131** where it was held that **“the best defence and evidence of alibi is one pleaded at the first opportunity and not at the trial.”**

B I also find the conclusion arrived at by the lower court as unassailable.

C On the failure to tender the knife at the trial, the appellant submits the absence of any such weapon as damaging to the prosecution's case. It is the appellant's contention that since the incident happened at night and inside the bush that PW1 could not have easily seen the knife or any other weapon in the possession of her attacker; hence her inability to describe the nature of the knife in her evidence. In the circumstance therefore that the prosecution had failed to prove an essential ingredient of the offence of robbery.

D Contrary to the contention borne out on behalf of the appellant supra, I hold the view that the respondent's counsel was right on his submission that the trial court did not rely only on the evidence of PW1 in finding that the robbery on PW1 amounted to an armed robbery. This is because when regard is had to the records at pages 72 and 73, same reveal that the trial court clearly relied on the evidence of PW3 and PW4 in reaching the conclusion that the robbery was an armed robbery.

E The lower court at pages 146 – 147 of the records also arrived at the same conclusion when it said thus:

G **“---Based on those facts as contained in the evidence of PW1 and those investigations which followed the report made to the Police and the subsequent evidence of PW3, and PW4, the investigations of Police officers, the (1st) ingredient in the proof of the offence of Armed Robbery was established by the prosecution.”**

H The evidence given by PW3 and PW4, the Police officers who investigated the armed robbery, were unchallenged.

I I further wish to restate that the law is firmly established that the trial court could have relied even on the sole evidence of PW1, which is credible and unchallenged. See the case of **Igbo vs. State (1975) 9 NSCC** page 415 at 418 wherein **Obaseki, JSC** (as he then was) held and said:

J

- A** **“If the evidence of a single witness sufficiently proves the case against an accused person and the trial court accepts the evidence, there is no rule of law or practice dissuading the court from convicting on the evidence.”**
- B** The same principle was applied also in the case of **Abogede vs. State (1996) 5 NWLR (Pt. 448) 270** at 280.
- C** Credibility of evidence does not therefore ordinarily depend on a number of witnesses. The determining yardstick is credibility and question of belief.
- D** The appellant, who had the opportunity never deemed it important to cross-examine PW1 on the nature of the knife and how she was able to see the weapon at the time and place in question. He was also represented by counsel all through the trial. He must be deemed to have admitted that indeed he employed the knife in robbing PW1 on 23/12/2006. See the case of **Amadi vs. Nwosu (1992) 5 NWLR (Pt. 241) 273** at 248 where this court held:
- E** **“Where an adversary or a witness called by him testifies on a material fact in controversy in a case, the other party should, if he does not accept the witness's testimony as true, cross-examine him on that fact, or least show that he does not accept the evidence as true. Where he fails to do either, a court can take his silence as an acceptance that the party does not dispute the fact.”**
- F**
- G** Further still and to show that the prosecution is not duty bound to produce the knife, there is no legal obligation on the prosecution to produce or tender the knife in evidence. The lower court was clear and could not be faulted on this point when it held at page 148 of the record and said:
- H**
- I** **“Let me mention here and now, that it is not the law, that the firearms, or the offensive weapons used must be tendered in proof by prosecution to commission of armed robbery. The issue has since been settled by the Supreme Court in case of Fatai Olayinka vs. The State, 30 NSCQB 149 at pages 162 163.....”**

J

A It is a settled principle therefore that the failure of the prosecution to tender the knife used by the appellant in attacking PW1 did not in any way water down the credible and unchallenged evidence that the appellant committed armed robbery against PW1 on 23/12/2006.

B Furthermore and on the question of identification, I seek to restate emphatically that the Court of Appeal was correct in upholding the decision of the trial Judge who believed the evidence of PW1 that the appellant was correctly identified by her as having taken part in the robbery in question.

C All through the cross-examination of the PW1 by the appellant's counsel during trial, counsel made no serious effort to destroy the evidence of identification of the appellant by the PW1 and this was the very foundation of the case of the prosecution. Again see the case of **Moses Jua vs. State** (supra) where

D the significance of cross-examination in criminal proceedings was stressed by this court.

Contrary to the submission made by the appellant's counsel, the doubt he alleged on the prosecution's case is non-existent. As a consequence all the reference made to the cases of **Queen vs. Obiasa (1962) 1 All NLE 645, Shehu vs. The State (2010) 8 NWLR (Pt. 1195) 112** and **Almu vs. The State (2009) 10 NWLR (Pt. 1148) 31** are not applicable or relevant to the appellant's case.

E On the evidence by PW1 that her assailant was wearing a face cap which was bent on his face, the appellant's counsel poses a question as to how she could have clearly seen through the face cap that was covering the assailant's face.

As rightly submitted by respondent's counsel, to wear a face cap bent over one's face is not the same thing as to wear a face cap covering ones face. The appellant did drive the motor cycle. His face was therefore not covered completely or else he would not have been able to drive from AP junction to the bush at that time of the night.

G On the question of headlight on the assailant's motor bike, it is the argument of the appellant that it could not have assisted PW1 to recognize him coupled with the fact that PW1 boarded the bike at AP junction, (where unlike a filling station there is no likelihood of having light).

At page 37 of the record, this was what PW1 had to say:

I

“I boarded a bus which drooped me at AP junction, Irrua. Accused came and said I should enter his vehicle to Obedu. I now say accused brought a motor bike ridden by accused.”

J

A At page 38 of the record the witness PW1 also said:

B **“There was light in AP station where accused picked me and he also put on the light his bike that is how I was able to recognize accused.”**

C Contrary to the contention held by the appellant there was light at both the station and supported by the headlight on the appellant's motor bike for clear identification of the appellant where he picked the PW1. The witness was not cross-examined on this. It is established firmly therefore and the court can act on it.

D The appellant's counsel argued further that the period spent between PW1 and the appellant in haggling over the fare wasn't prolonged to aid effective and proper recognition of her assailant.

E In response to the foregoing it is pertinent to recount that in addition to the haggling over the motorbike fare, there is the evidence that PW1 had with her, a bag of salt, a bag of rice and other items which her assailant carried for her on the motor bike. Pages 38 and 39 of the records are evident.

F Having regard to the nature of the items, it could have taken both PW1 and her assailant sometime to arrange those items and also PW1 on the motor bike before embarking on the journey.

I seek to say that the time including their interaction was enough for PW1 to have fully seen the person who was carrying her.

G Further still and on the issue regarding providing further particulars in respect of the clothes of the appellant. (Exhibits P-3 and P-4) which PW1 identified as the clothes he wore on that day, I agree with the respondent's counsel that there was enough identification. In other words, with the level of the interaction between the appellant and PW1 which was also enhanced by the lighting at the AP station and the appellant's motor bike headlight, PW1 was sufficiently afforded the opportunity to have seen the appellant enough to know the clothes he was wearing on the day of the incident.

H It is also relevant to say that the appellant himself admitted that the clothes were his, only that he did not wear them on that day. PW1 was very sure and did not make any mistake in identifying someone else's clothes. The fact that the appellant also rode a cargo motor cycle was established as correct.

I The Court of Appeal in my view was therefore right in concurring with the trial court. I also concur same.

A I seek to say also that the premises on which the arguments of the appellant are based are all findings of facts on which both the trial court and the lower court made a concurrent finding. Accordingly, the conclusions drawn by the two lower courts therein are final with there being no evidence that same were perverse or
B occasioned a miscarriage of justice or based on wrong principles.

The concurrent finding of the two courts below on the fact that the ingredients of armed robbery was proved beyond reasonable doubt by the prosecution is clearly supported by the evidence given by the PW1, also by the
C evidence of PW2, PW3, as well as PW4 and indeed corroborated by the evidence of the appellant himself. The witnesses were not shaken at all during cross-examination. Their evidence is neither perverse, erroneous nor a violation of any known principle of law.

D The lower court, as clearly borne out on the record, concurred with the trial court on all the issues that: there was robbery on PW1; the robbery was an armed robbery and that it was the appellant who robbed PW1. The rejection of the alibi put forward by the appellant was also based on a sound decision.

E It is well settled by numerous decided cases that this court will not disturb a concurrent finding of fact by the courts below unless the decision is perverse or erroneous and cannot be supported having regard to the evidence adduced by the prosecution or is a violation of some principles of law. See **Olaiya vs. State**
F **(2010) 3 NWLR (Pt. 1181) 423** at 438, where this court held and said:

G **“The appeal being one against concurrent findings of facts of two courts below, the appellant is very far from discharging the burden the law places on him of showing that the decision of the courts below were perverse or cannot be supported having regard to the evidence adduced by the prosecution. In situation such as this, in the present case, I see no reason whatsoever to**
H **disturb the findings of the trial court which were affirmed by the court below that the appellant was indeed guilty of the charge.”**

I Also on the same principle are the cases of **Attach vs. State (2010) 10 NWLR (Pt. 1201) 190 at P. 226** and **Archibong vs. The State (2006) 14 NWLR (Pt. 1000) 346** wherein this court relied on its earlier decision in **Olokotinti vs. Sarami (2002) 13 NWLR (Pt.784) 307 at 317.**

J

A On the community reading of the entire evidence and the circumstances surrounding this case, the concurrent findings of the two courts below on the fact that the ingredients of armed robbery were proved beyond reasonable doubt by the prosecution is very overwhelming. The evidence which is unshaken under
B cross-examination is neither perverse, erroneous nor a violation of any known principle of law.

There is nothing weighty enough placed before this court to disturb the concurrent findings of fact by the trial court and affirmed by the Court of Appeal
C with respect to the evidence of the prosecution witnesses which the trial court found as credible having had the opportunity of seeing and observing the demeanor of the witnesses.

The Court of Appeal concurred with the trial court on all the issues that
D there was robbery on PW1, the robbery was on armed robbery and that it was the appellant who robbed PW1.

On the totality of the foregoing, I hold the view also that this court has no reason to disturb these findings of fact as they have not been shown by the
E appellant to be either preserve, unsupported by the evidence led or a violation of any known principle of law.

The lone issue raised for determination is hereby resolved in favour of the respondent and against the appellant. The decision of the trial court which was
F affirmed by the Court of Appeal is also endorsed by me. The conviction and sentence of the appellant to death by hanging is hereby also affirmed.

Appeal is dismissed and appellant is to die by hanging.

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

RHODES-VIVOUR, (JSC): I have had the advantage of reading in draft the leading judgment prepared by my learned brother Ogunbiyi, JSC. I agree that this
H appeal has no redeeming features. I propose to add a few observations on alibi which was raised by the appellant at trial.

The full facts and circumstances of this case have been so well set out by my learned brother, and need not be repeated.

I Alibi means elsewhere. When the defence of alibi is raised the accused person is simply saying that he was at a different place on the date of the incident.

Alibi is one of the best defence available provide it is raised with detail particulars at the earliest opportunity and not at trial.

J

- A** When an accused person is arrested by the police and accused of committing an offence, e.g. murder, armed robbery etc, and he intends to rely on the defence of alibi, such a defence must be raised at the earliest opportunity, i.e. timeously. This is done when he is called upon by the investigating police officer
- B** to write his statement. For an alibi to be worth investigating by the investigating police officer the accused person must give full details (particulars) of where he was when the offence was committed. Where defence of alibi is put forward timeously, the prosecution is expected to investigate it. Failure to investigate an
- C** alibi may cast some doubt on the probability of the case for the prosecution, but such doubt quickly disappears when there is credible and compelling evidence fixing the accused person at the scene of the crime. The burden of proving an alibi is on the prosecution and not on the accused person, and the standard of proof
- D** required to establish the defence of alibi is one based on balance of probabilities. The defence succeeds when the trial judge is satisfied that it is probable that the accused was not at the scene of crime on the day the crime was committed. He was somewhere else. See **Osuagwu vs. State (2013) 1 -2 SC (Pt. 1) p. 37,**
- E** **Adebiyi vs. State (2016) 1- 2 SC (Pt. IV) p. 95.**

- The offence of armed robbery was committed by the appellant at about 9pm on 23 December, 2006. PW1 was the victim. The appellant was arrested on 27 December, 2006. During police investigation the appellant made two
- F** statements, exhibits P-1 and P-2, i.e. within a week after the robbery. In both statements he did not raise the defence of alibi. This is what he said in court:

- G** **“On 23 December, 2006, I went to work as a bike rider in the morning of that day. I closed from work at 6pm on that day. I knew PW1 who is also complainant in this case. On 23 December 2006 at 9pm. I was in my house.”**

- H** Both statements exhibits P-1 and P-2 were written by the appellant on 27/12/2006 and 8/3/2007 when the events of 23/12/2006 were supposed to be fresh in his memory. He never said where he was at 9pm on 23/12/2006 when he robbed PW1 of her property. It was on 11/1/2010, over three years after the robbery that he
- I** gave evidence in court saying that on 23/12/2006 he was at home at 9pm. This to my mind is clearly an afterthought.

- In the present case the evidence of PW1 fixes the appellant as the person who gave her a ride while he was plying the streets as a commercial motorcyclist
- J** (in local parlance Okada) on 23/12/2006 at 9pm, assaulted and robbed her. A few

- A** days after the incident she, in company of her brother saw the appellant, and on sighting them took to his heels but was later arrested by the police. The evidence was accepted by the learned trial Judge and although his statement to the Police was produced, he did not call any witness. It was clear to the trial court, Court of Appeal and this court that on the totality of evidence before the trial court and accepted by it the prosecution had established that the testimony of the appellant that he was elsewhere on the day and time of the crime cannot be true. The defence of alibi raised by the appellant cannot be sustained since it was raised too late, and there is overwhelming evidence from PW1 which makes the defence incredible and worthless.

In the face of overwhelming evidence that the appellant committed the offence of armed robbery on 23/12/2006 at 9pm consideration of the defence of

- D** alibi becomes a futile exercise.

It is for this and the more detailed reasoning in the leading judgment that I too dismiss this appeal.

Olabode Rhodes -Vivour
Justice, Supreme Court

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DATTIJO MUSA MUHAMMAD, (JSC): I read before now the very thorough and incisive lead judgment of my learned brother Ogunbiyi JSC which I hereby adopt as mine in dismissing the appeal and affirming the concurrent decisions of the two courts below.

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Musa Dattijo Muhammad,
Justice, Supreme Court

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CENTUS NWEZE, (JSC): I had the advantage of reading the draft of the leading judgment which my Lord, Ogunbiyi, JSC, just delivered now. I endorse the conclusion that, being unmeritorious, this appeal ought to be dismissed.

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My lords, it has become fashionable for accused persons who have no defence whatsoever to the case which the prosecution made against them to conjure the bogus defence of alibi. It would appear that they resort to this disingenuous ploy in the vain hope that, like the magical incantation of open sesame by the fictional Ali Baba and his forty thieves', such a sham defence could open the doors to their freedom.

I

However, this is not the juridical rationale for the said defence. For the umpteenth time, it ought to be emphasized that, to be entitled to the beneficent effect of the defence of alibi, an accused person must raise it at the earliest

J

- A opportunity, **Hassan vs. The State (2001) 6 NWLR (Pt. 709) 286**, 305, which would, preferably, be in his extra-judicial statement. This is to offer the Police an opportunity either to confirm or confute its availability to the accused person, **Ibrahim vs. The State [1991] 4 NWLR(Pt. 186) 399**; **Nwabueze vs. The State [1988] 3 NWLR (Pt. 86)**; **Ikemson vs. The State [1989]3 NWLR (Pt. 110) 455**.

- B What is more, the said defence must be unequivocal as to the particulars of his whereabouts and those present with him, **Onyegbu vs. The State [1995] 4 SCNJ 275, 285 286**; **Ibrahim vs. State (supra)**; **Balogun vs. AG, Ogun State [2002] 6 NWLR (Pt. 763) 512, 535 – 536**; **Eke vs. The State (2011) LPELR – 1133 (SC) 16**.

- C It is only where an accused person, such as the appellant, raised the said defence at the earliest opportunity without any ambiguity that a burden is cast on the Prosecution to investigate it, **Eyisi vs. State [2000] 4 NSCQR 60** and to disprove same, **Eke vs. The State (supra)**. Failure to investigate the defence of alibi raised in such circumstance will lead to an acquittal, **Yanor vs. The State (1965) ANLR (Reprint) 199**; **Bello vs. Police [1956] SCNLR 113**; **Odu and Anr vs. The State [2001] 5 SCNJ 115, 120**; **[2001] 10 NWLR (Pt. 772) 668**. However, the said defence would be unavailing in a situation, as in this case, where the accused person raised it during the trial, **Hassan vs. State [2001] 6 NWLR (Pt. 709) 305**.

- D In the instant case, the appellant did not raise the said defence in his two statements, Exhibits P1 and P2. He only raised it, for the first time, in court in the course of his defence. Clearly, that can only be a travesty of the said defence. It is, therefore, unavailing.

- E It is for these, and the more detailed, reasons in the leading judgment that I, too, shall dismiss this appeal for being unmeritorious. Appeal dismissed. I abide by the consequential orders in the leading judgment.

- F **Chima Centus Nweze**
Justice, Supreme Court

- G **AMIRU SANUSI, (JSC):** I was obliged with a copy of the judgment just delivered by my learned brother Clara Bata Ogunbiyi JSC. I am in entire agreement with the reason and conclusion she arrived at, that this appeal is devoid of any merit and therefore deserves to be dismissed. I will just advance few comments in support of the judgment.

- H The facts of the case giving rise to appeal and submission by learned
 I counsel for the parties thereto have been ably summarized in the lead judgment

- A** and I therefore need not repeat them here. I will therefore comment on the defence of alibi raised by the appellant in his testimony at the trial court. It is apt to state here that the appellant raised lone issue for the determination of this appeal which had to do with whether the prosecution had proved its case beyond
- B** reasonable doubt in order to obtain conviction on armed robbery count which the appellant faced trial on at the trial High Court.

- It is important to note that during the investigation of the armed robbery case by the Police, the appellant made two statements which were recorded by the
- C** Police and tendered at the trial and admitted in evidence as Exhibits P1 and P2. In none of these two statements did the appellant raise any defence of alibi.

- However, after the conclusion of the prosecution/respondent's case, the appellant opened his defence, wherein he denied committing the offence. The
- D** appellant testified in his own defence only, without calling any other witness. In the course of giving evidence for his defence, the appellant raised alibi defence in that in his testimony he stated that on the date and at the time of the incident (9pm) he was in his house. As I said above, this piece of evidence was not revealed by
- E** the appellant in any of the two statements which he made to the Police at the earliest opportunity when facts about the entire event were fresh in his mind.

- The word “alibi” is a Latin word simply meaning “elsewhere” where it is raised by an accused person/appellant, he means to express on the impression to
- F** the trial court that he was not at scene of the crime at the time material to the commission of the offence he was charged with or is standing trial on. See **Gachi vs. The State (1965) NMLR 334; Nwabueze vs. The State (1988) 4 NWLR (Pt. 86) 16; Adio vs. The State (1986) 3 NWLR (Pt. 31) 714; State vs. Aibangbee (1988) 3 NWLR (Pt. 84) 548.**
- G**

- The law is well settled and is trite too, that for the defence of alibi to avail an accused person, such defence must be raised by him *at the earliest opportunity* so as to give the Police enough time to investigate it and offer
- H** evidence in rebuttal or in support of it. See **Salami vs. The State (1988) 3 NWLR pt. 670; State vs. Pete Eze (1976) SC 125** at 129. Similarly, an accused in order to succeed or benefit from the defence of alibi, it is incumbent upon him to give a detailed particularization of his whereabouts as at the time material to the
- I** commission of the offence he is charged with, which will also include stating the specific place(s) he was, where he was and the people he was with and if possible what transpired at the time and place(s). Such comprehensive information or particulars furnished must also be possible of being investigated unquestionably.
- J** See **Udoebre vs. the State (2001) 6 SCNJ66**. It is only after this particularization

A was supplied to the police and raised timeously too, that the Police has the burden to investigate it. That is to say, it must be raised by the accused person at the earliest opportunity and NOT at the 23rd hour of the day.

Now in this instant case, the appellant did not raise the alibi defence at the earliest opportunity. In other words, at the time he made statement to the Police i.e. Exhibits P1 and P2. Rather, the appellant raised the alibi defence when he was testifying in court and he even did not state that he was at his house at the time material to the commission of the offence (i.e. when the facts about the event were very fresh in his mind). Even then, he did not call any witness to testify that as at that time, he was at his house. I think the defence of alibi raised by the appellant during his testimony is not only belated but also short of cogency or substance. The trial court was therefore right in rejecting such shabby and untenable defence of alibi raised by the appellant. Also the court below was right in affirming the decision of the trial court in that regard. Thus, considering the evidence adduced in the case including the surrounding circumstances of this case, I feel this court has no business in interfering with or disturbing the concurrent findings of the two lower courts, since such findings do not portray any perversion or misconception of law or caused any miscarriage of justice to warrant doing so. Sufficient evidence abound, linking the appellant with the commission of the offence of armed robbery he was convicted and sentenced on, since such offence was proved against the appellant beyond reasonable doubt as required by law.

In the result, for these few comments and the detailed reasons and conclusion marshalled in the lead judgment of my learned brother Clara Ogunbiyi JSC, which I agree with, I also see no merit in this appeal. I accordingly dismiss it. The judgment of the lower court affirming the conviction and sentence made by the trial court is hereby also affirmed by me. Appeal is devoid of merit and is accordingly dismissed.

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Amiru Sanusi
Justice, Supreme Court

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**HON. HASSAN ANTHONY SALEH
AND**

- 1. CHRISTIAN ADABAHABAH**
- 2. PEOPLES DEMOCRATIC PARTY (PDP)**
- 3. INDEPENDENT NATIONAL ELECTORAL
COMMISSION (INEC)**

SC.144/2016

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

FRIDAY, 10TH MARCH, 2017

BEFORE THEIR LORDSHIPS

**MARY UKAEGO PETER-ODILI
CLARA BATA OGUNBIYI
CHIMA CENTUS NWEZE
AMINA ADAMU AUGIE
SIDIDAUDABAGE**

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

APPEAL: Filing of two notices of appeal – Where the respondents were not deceived by which of the two notices to respond, the question of plurality of notices is a misnomer – Failure to withdraw one of the notices is an irregularity not affecting the court's jurisdiction.

APPEAL: Formulation of issues for determination – Need for parties to avoid superfluous overlapping issues.

*CONSTITUTIONAL LAW: Disqualification of a person who has presented a forged certificate to INEC for election – **S 66 (1)(i) of the 1999 Constitution of the Federal Republic of Nigeria 1999 (as amended)** – Scope and Extent thereof.*

COURT: Interpretation of statutes – Duty thereof

COURT: Irregularities as to form rather than substance – Whether affect jurisdiction – Consideration thereof.

COURT: Supreme Court – Essence of rules on notice – Where non service on a party does not amount to denial of adequate opportunity to be heard – Attitude of court thereto.

*ELECTION: Disqualification of a candidate – Person who breached the provisions of **S.66(i) of the 1999 Constitution and S.131(2),(5) and (6) of the Electoral Act 2010** – Effect.*

ELECTION: Disqualification of the winner of an election on ground of forgery of certificate – Implication.

*ELECTION: **S.141 of the Electoral Act 2010 (as amended)** – When applicable.*

ELECTION: Where crime is alleged in electoral proceedings – Whether proof is beyond reasonable doubt – Consideration thereof.

*EVIDENCE: Burden of proof – Where crime is alleged in proceedings – How discharged – **S. 135 of Evidence Act** – Imperatives.*

JUDGMENT AND ORDERS: Person not a party to proceedings – When judgment in the said proceedings can be relied against him – Applicable principles.

PRACTICE AND PROCEDURE: Burden of proving forgery – Where a tribunal had previously found document to be forged – Implication on standard of proof.

PRACTICE AND PROCEDURE: Where a party fails to appeal against a finding adverse to him – Implication.

SERVICE: Whether service of notice of appeal on counsel for the respondents, who did not deny service is good and effective service.

*STATUTES: Interpretation – Distinctions between forgery under the Penal Code and forgery under the **Electoral Act** – **SS 362 and 363 of the Penal Code** – Consideration thereof.*

STATUTES: Interpretation – Principles of interpretation – Approach thereto.

STATUTES: Proof of forgery – Section 31(2) (5) & (6) of Electoral Act and S.66(1)(i) of the 1999 Constitution of Federal Republic of Nigeria, 1999 – Whether a party who alleges certificate forgery need to prove that the alleged forger was charged and convicted.

STATUTES: S.66(1)(i) of Constitution of Federal Republic of Nigeria 1999 – Construction thereof.

WORDS AND PHRASES: “Ever” – Meaning.

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

Issues for Determination

1. **Whether or not there has been a finding of facts by the trial court on the issue of certificate forgery by the 1st respondent.**
2. **Whether or not based on the finding of facts on the issue of certificate forgery the 1st respondent stands disqualified from contesting the House of Representatives election for Ado Okpokwu and Ogbadibo Federal Constituency of Benue State.**

Facts of the Matter

The appellant and the **first** respondent are respective members of the second respondent, the Peoples Democratic Party (PDP). The appellant and first respondent participated in the primary Election in to the House of Representatives. They contested against each other for the seat of Ado, Okpokwu and Ogbadigbo Federal Constituency of Benue State. The first respondent withdrew from the race after he had defeated the appellant.

In the relevant INEC form, he had answered “No” to the question of if he had ever presented any forged certificate to the Electoral Body (i.e the INEC). On this development, the appellant sought that the first respondent be disqualified and in the latter's stead (appellant's) be substituted. The Peoples Democratic Party (PDP) leadership and INDEPENDENT NATIONAL ELECTORIAL COMMISSION (INEC) declined to do so. This prompted the appellant to file a suit via originating summons at the Federal High Court Abuja. The Federal High Court, adjudged the suit in favour of the appellant. The first and second respondents who were the defendants there appealed to the Court of Appeal and succeeded; wherewith; the appellant appealed to this Supreme Court.

Held: *(Unanimously allowing the appeal)*

1. *Service on counsel who did not deny service is good and competent*
We are of the emphatic opinion that since the counsel to the respondents was served and he did not deny such service, there is effective and competent service. The contention that the respondents should have been served personally is misplaced. Service on the counsel, S.I. Ameh, SAN, being the legally and formally acknowledged representative of the respondents, is good, competent and effective enough. Both respondents were duly served via their counsel, we so hold. The real essence of the Supreme Court rules on notice (which is to prevent any party being taken by surprise which in a significant way amounts to denial of adequate opportunity to be heard) is achieved as both the first and second respondent were actually (and more then constructively) served via counsel. And there is no dispute as to this state of affairs. Any assumed irregularity is only as to form rather than substance. Any seeming irregularity does not bear on our jurisdiction and does not amount, by any definition, to denial of notice to the respondents. The case of IHEDIOHA vs. OKOROCHA (2016) 1 NWLR (Pt. 1492), 147 at pages 176 – 179 and the host of other authorities were wrongly referred to as their respective facts and circumstances are fundamentally distinguishable to the present appeal case. (P 180 Paras B–F)
2. *Failure to withdraw one of two notices of appeal is an irregularity which does not affect the court's jurisdiction.*
As to the plurality of the two notices served within time, we tend to think the preliminary objection is misconceived. In fact, the idea of a plurality is a misnomer. The first and second respondents via the instrumentality of their able counsel had no difficulty in deciding which of the two notices to reply on. They directed their energies to responding to the notice of 18/2/2016 (and not the previous one of 8/2/2016) which had nine (9) Grounds and eight (8) issues for determination. The respondents brief unambiguously responded to those Grounds and Issues in the notice of 18/2/2016. It was their articulate study of the 18/2/2016 appellant's notice that gave birth to the respondents own formulation of five (5) issues for determination. The failure of the appellant's counsel to formally withdraw the notice of 8/2/2016 (though improper and reckless) had

amounted to a mere irregularity that does not bear on the court's jurisdiction or the right to adequate notice. (P 180 Paras F–I)

3. *A finding that Grounds 6 and 9 are related to the judgment.*
After scrutinizing and/or evaluating four (4) different but relevant sources of information before us (namely, the brief of argument of counsel to the respondents, the appellant's counsel's reply to the former's brief, the judgment of the Court of Appeal as contained in the record of proceedings and lastly, Section 141 of the Electoral Act, 2010, (as amended), we proceed to hold that, whether the Court of Appeal (or the court below) did or did not have recourse to Section 141 of the Electoral Act, 2010 (as amended) has no effect on the validity and tenability of Ground 9 as its content and substance flow from (and/or relate to) the judgment of the lower court. Simply put, Ground 9 remains a valid Ground together with Ground 6. (P 181 Paras F–I)

4. *Superfluous overlapping and irrelevant issues for determination.*
The seemingly superfluous and overlapping issues formulated by the parties in their briefs of argument. First, any sentence more than 3–4 lines is grammatically inelegant, and putting it straight, wrong. The appellant formulated 8 issues in paragraph 3.0 at pages 7–9 of the appellant's brief of argument. The average number of each issue, formulated as separate sentence, is 8–10 lines. This is not too elegant.
By adopting the issues formulated by the appellants (sic), although this is a sole-appellant appeal; the 3rd respondent also invariably slips into the inelegance of long and inordinate sentences and the surplusage style of brief drafting and writing through overlapping formulation of issues.
The 1st and 2nd respondents formulated 5 issues as listed in paragraph 4.0 of their brief of arguments at pages 13–15, slightly shorter than appellant's, an average of about 6–7 lines per sentence or issue. (P 182 Paras C–F).

5. *Previous judicial pronouncement on certificate forgery*
Per Bage (JSC):
The question that keeps agitating our minds is whether a court of law has made a pronouncement or finding on the facts of certificate forgery, being the main issue in this appeal as it relates to the 1st respondent. Our answer

is, consensually, in the affirmative. There has been a judicial pronouncement on the fact of whether or not the 1st respondent presented a forged certificate to the 3rd respondent for the purpose of an election. The court below, in error, failed to pay attention to this very crucial fact. We wish to quote the trial court on this important issue:

“The court's finding/conclusions are based on paragraphs 8 – 23 of plaintiff's affidavit in support of originating summons sworn to on 26/1/15, with Exhibits A-V, further affidavit No. 2 in support of the originating summons deposed to by Charity Adah Ms, legal practitioners with Exhibits A3 & A4. Exhibit T, the judgment of National/State House of Assembly Election Tribunal for Makurdi, Benue State delivered on 6/9/2011 at pages 57 & 58 are conclusive on this issue. Exhibit A3 is a certified true copy of letter dated 22nd December 2014 emanating from Dr Suleiman S. Buba, Registrar Federal Polytechnic, Mubi, to Mathias O. Emeribe Esq confirming certificate forgery by Mr. Abah Christian Adabah, 3rd defendant in respect of his certificate No. FPM 000293 OBTAINED IN 1985. See KAKIH vs. PDP (2014) 15 NWLR pt 1430 374 SC. Exhibits T & A3 are self-explanatory, positive and devoid of any ambiguity (Emphasis ours).

This is an unassailable and comprehensive finding on facts of forgery. We can't agree less with the position of the trial court, which specifically finds that a tribunal had judicially resolved and concluded, unequivocally, that the 1st respondent forged the certificate in question. The appellant's case at the trial court was predicated, almost exclusively, on the fact that the 1st respondent had presented a forged certificate to INEC (the 3rd respondent”) (P185 Paras A–I).

6. *There is liability where a party has previously presented a forged certificate to INEC.*

The question in paragraph 6 of part E of the 1st respondent's INEC form CF001 is very specific: “Have you ever presented a forged certificate to INEC”. We align with the position of the learned senior counsel to the appellant, that this question relates to all elections, for as long as

candidate had previously presented a forged certificate to INEC. The same scenario plays itself out vis-à-vis the provisions of Section 66(1)(i) of the 1999 Constitution (as amended) which is to the effect that quote:

“No person shall be qualified for election to the Senate or the House of Representatives if:

- (i) he has presented a forged certificate to the Independent National Electoral Commission.”**

The law is very clear to warrant any form of coloured interpretations. The question in INEC form CF001 and Section 66(I)(i) of the 1999 Constitution (as amended) is whether a certificate that turned out to be forged has ever been presented, not whether the forger has been charged, tried or convicted on this. (P 186 Paras A–E)

7. *Distinction between forgery under penal code and forgery under the Electoral Act.*

The court below got into the error of forgery under Sections 362 and 363 of the Penal Code as against forgery under the Electoral Act 2010 (as amended). More importantly, a court or tribunal had found the certificate in issue to be forged.

We have reiterated on several occasions that ours is not only a court of law but public policy. Forgery of certificate for the purpose of election and electoral processes and forgery under criminal law are not the same issue. Forgery under the Electoral Act is a specific law on forgery or presentation of a forged certification for the purpose of election. The best forum for electoral forgery is election tribunal as against general criminal trial. This is what played out, rightly in this appeal. We restate our position that, as held by the trial court,

“...the judgment of National/State House of Assembly Election Tribunal for Makurdi, Benue State delivered on 6/9/2011 at pages 57 & 58 are conclusive on this issue.”

Election tribunal had exercised specific jurisdiction to try the issue. There has also been a judicial reconfirmation by the trial court on the same issue as it relates to forgery of certificate, for electoral purposes, by

the 1st respondent. (P 186 Paras E–I).

8. *Where a party fails to appeal against a finding adverse to him.*

The legal consequence of failure to appeal against any finding, holding or decision of a court is that the parties to the case have accepted it as correct and binding upon them. On this side of the judicial structure, the law is settled that a party is stopped by his failure to appeal against an adverse finding of a fact relevant to the issue.” See ABUBAKAR vs. BEBEJI OIL AND ALLIED PRODUCTS LTD & ORS (2007) 18 NWLR (Pt. 1066) 319 (2007) 2 S.C 48 Per Ogbuagu, J.S.C. (P. 68, para. F).

I am unable to disagree with learned senior counsel on the issue as the 1st respondent is stopped by his failures to appeal against the numerous adverse findings of fact on the issue of certificate forgery which relate directly to his electoral future. See the cases of JOE IGA & ORS. vs CHIEF EZEKIEL AMAKIRI & ORS (1976) 11 SC AT 12-13. See also the position of this court in S.P.D.C. (NIG) LIMITED vs X.M FED LTD (2006) 16 NWLR (Pt 1004) 189 at 203, paras D-F.

(P 187 Paras A–D)

9. *Party needs not to be charged for proof of forgery under the Electoral Act.*

It is our considered view that the court below was wrong to have held that 1st respondent ought to have been charged, tried and convicted. This is because the case of the appellant at the trial court is predicated on the provisions of Section 66(1)(i) of the 1999 Constitution (as amended) and Section 31(2), (5) and (6) of the Electoral Act 2010 (as amended).

(P 187 Paras D–E)

10. *Forged certificate was presented to INEC*

We are of the firm view that a party must not be allowed to profit from his or her fraud. From the totality of the facts of this appeal, forgery of certificate by the 1st respondent to contest Ado, Okpokwu and Ogbadibo Federal Constituency of Benue State keeps resonating. The 1st respondent in the run up to the 2011 election and when it was time for the 2015 General Election he carefully and deliberately omitted to include this fact. The relevant question is whether the 1st respondent ever presented a forged certificate to INEC (3rd respondent) at any (previous or current) elections, and not whether or not it was listed or omitted from the

declaration form completed for a particular election. (*P 188 Paras B–D*)

Per Peter-Odili (JSC):

“Coming down to what this court is faced with here and now, I see that what is relevant is the presentation of a forged certificate and sworn affidavit made by the 1st respondent in 2011. That it was at another time different from the present circumstances does not take away the relevance of the presentation and the application of Section 66 (1) (i) of CFRN and Section 31 (5) and (6) of the Electoral Act, 2010. That is to say that a presentation of a forged certificate to INEC in the past by the 1st respondent can be raised at anytime whenever he seeks to contest for an election and the question is put if he had ever presented a forged certificate to INEC. To go on to answer the question in the negative the matter first arose in an election no longer extant is to beg the question and go outside the spirit and wordings of Section 66 (1) (i) CFRN and Section 31 (5) and (6) of the Electoral Act. It is a question relevant for all time and the answer when asked if such a presentation had been made is, yes. Anything different from that answer is contrary to the constitutional and Electoral Act provisions and the requirements of the law for disqualification are met. See *Araka vs. Egbue* (2003) 17 NWLR (Pt.848) 1 at 21; *Ugba vs. Suswam* (2013) 4 NWLR (Pt.1345) 427 at 474 – 475; *Action Congress vs. INEC* (2007) 12 NWLR (Pt.1048) 222 at 275 – 276.

For further emphasis, what is in issue is that where in an election in the past a candidate as in this instance had presented a forged certificate to INEC the fact that the candidate omitted to make reference to the said forged certificate he presented in 2011, does not prevent a contender or anyone from raising the issue of that candidate's past presentation of the flawed certificate to INEC and the court using it to determine the disqualification of the candidate from contesting the present election of 2015. The reason is that the stipulations of Section 66(1)(i) CFRN have not

contemplated or envisaged that the issue of the presentation is circumscribed to a particular election or period and remains relevant in perpetuity. For clarity I shall quote the question stated in the INEC form CF001 which stipulates as follows:

“Have you ever presented a forged certificate to INEC”?

It is in light of the above and the clear provisions of the Constitution and the Electoral Act that it is not difficult to see that the court below veered off the mark in its interpretation of the Constitutional provisions of Section 66 (1) (i). See *Ojukwu vs. Obasanjo* (2004) 12 NWLR (Pt.886) 169 at 209”. (Pp 206–207 Paras E–E)

11. *Finding by a tribunal that forged certificate was presented to INEC*

The second legal point is that there must have been a judicial pronouncement, by a court or tribunal, that the certificate in question is forged.

In this appeal, an Election Tribunal with specific jurisdiction has found, in the judgment of National/State House of Assembly Election Tribunal for Makurdi, Benue State delivered on 6/9/2011 at pages 57 & 58, that the certificate presented by the 1st respondent is forged. And this, as the trial court rightly found, is conclusive on this issue.

The provisions of the Nigerian Constitution are unambiguous. The constitution expressly provides that:

“66. (1) No person shall be qualified for election to the Senate or the House of Representatives if:

- (i) he has presented a forged certificate to the Independent National Electoral Commission.”**

The intention of the Constitution is that anyone who had presented a forged certificate to INEC should stand automatically disqualified for all future elections if, as in this case, a court or tribunal finds the certificate to have been forged, and it matters not whether or not such facts is further fraudulently or desperately concealed in subsequent elections or declaration forms. (P 188 Paras D–I)

12. *Where a candidate for election stands disqualified*
The 1st respondent ought not to have, and in the opinion of the law, was not qualified to contest election into the Ado, Okpokwu and Ogbadibo Federal Constituency of Benue State based on the combined effects of the provisions of Section 66(1)(i) of the 1999 Constitution (as amended) and Section 31 (2), (5) and (6) of the Electoral Act 2010 (as amended). He stands constitutionally disqualified. This being a pre-election matter, we agree with the trial court that the votes polled by the 1st respondent through nomination by the 2nd respondent are invalid and wasted. The appellant being the runner-up in the PDP Primary election conducted for the said election automatically steps into his shoes as nominee and winner of the election into the Ado, Okpokwu and Ogbadibo Federal Constituency of Benue State. (P 189 Paras A – C)
13. *The application of S. 141 of the Electoral Act*
It is our considered view that the provision of Section 141 of the Electoral Act only applies in cases of post-election cases at the Election Tribunal as against pre-election matters. To hold otherwise would mean allowing ineligible persons to contest and win elections and thus deploy dilatory tactics to reap from his or her fraud to the fullest until the expiration of the tenure procured by fraud. (P 189 Paras D – E)

Per Bage (JSC):

“This court must take the lead, in righting the wrongs in our society, if and when the opportunity presents itself as in this appeal. Allowing criminality and certificate forgery to continue to percolate into the streams, waters and oceans of our national polity would only mean our waters are, and will remain dangerously contaminated. The purification efforts must start now, and be sustained as we seek, as a nation, to now 'change' from our old culture of reckless impunity.

The Nigerian constitution is supreme. It desires that no one who had ever presented forged certificate to INEC should contest election into Nigeria's National Assembly. This is clear and sacrosanct. More compelling as judicial

determination had been taken by no less a technical panel sitting in, at least, a panel of three judges as Election Tribunal with constitutional mandate to determine such issues as they relate to elections and its outcomes, including eligibility. This has also been affirmed by the trial court in this appeal. On these issues, our duty is to apply the constitution and the law in its stark, original form undiluted by 'colored' interpretations". (P 190 Paras A–D).

14. *The winner stands disqualified as not eligible to contest*

In sum, this appeal succeeds. The decision of the court below is hereby set aside. The judgment of the trial court is restored and upheld. The election of the 1st respondent into the Ado, Okpokwu and Ogbadibo Federal Constituency of Benue State is a nullity, as he stands constitutionally disqualified from contesting the said election. The appellant is and hereby declared the candidate of the 2nd respondent and winner of the Okpokwu and Ogbadibo Federal Constituency of Benue State and should be issued certificate of return immediately by the 3rd respondent (INEC).

(P 190 Paras D–F).

15. *Burden of proof in respect of a forged certificate*

Taken in context therefore a consideration of Section 66 (1) (i) of the 1999 CFRN, the burden placed on a person who asserts that another presented a forged certificate to INEC is to prove that the said certificate was forged and the consequent presentation to INEC of the said forged certificate. It is not difficult to agree with learned counsel for the appellant that in proof of the said presentation of the forged certificate to INEC what duty the person asserting the positive needs deal with is not the guilt of the person who made the presentation of the forged but that he made the presentation in the first place and that the proof of the certificate being forged has been made beyond reasonable doubt.

That in simple terms is the intendment of the spirit of Section 66 (1) (i) CFRN and nothing more should be added to it since the words of the provision are simple, clear and unambiguous. (P 205 Paras D–G)

16. *Standard of proof where crime is in issue in any proceedings*

The interpretation of the above Evidence Act provision was showcased in the case of Nwobodo vs. Onoh (1984) 1 SCNLR 1 at 27 where the Supreme Court interpreted Section 137 (1) Evidence Act applicable in that instance which provisions are im pari material with the current one of Section 135 (1) of the Evidence Act, 2011. This court stated thus:

In Nwobodo vs. Onoh (1984) 1 SCNLR 1 at 27 Paras. C – D it was held as follow:

“Specific allegations of crimes in the petition appear to be clear in that commission of forgery, uttering and dereliction of official duty can properly be said to be basis or foundation of the petition. Since the respondents denied the allegations, the commission of crimes by parties. To the petition was directly in issue in consequence of which Section 137 (1) of the Evidence Act came into play.

The section stipulates:

“137 (1): 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”.

See also Wali vs. Bafarawa (2004) 16 NWLR (Pt. 898) 1 at 39 40 paras. C – D. (Pp 205 – 206 Paras I – E)

17. *Judgment of Election Tribunal is relevant*

I am at one with the submissions of learned counsel for the appellant that the court below acted wrongly in law when it held that Exhibit 'T' which is the judgment of the National/State Houses of Assembly Election Tribunal which made a finding that the 1st respondent presented a forged certificate to INEC could not be relied upon because the 1st respondent who presented a forged certificate to INEC was not a party to the election petition where the said judgment emanated from when the 2nd and 3rd respondents herein were parties in the said election petition.

A foray into the background shows that the election petition where Exhibit 'T' emanated from relates to the activities of the 2nd respondent in relation to the appellant and the 1st respondent. After the 1st respondent withdrew his participation in the 2011 General Election as the House of Representatives candidate of the 2nd respondent after the issue of the forged certificate emerged, the 2nd respondent replaced the 1st respondent with the appellant. The finding in Exhibit 'T' is an explanation or reason for that replacement done by 2nd respondent with appellant to the detriment of 1st respondent and the Election Tribunal ruled that there was cogent and verifiable reason for the substitution made by the 2nd respondent. That judgment is relevant for the purpose of the issues thrown up in the election that led to the current appeal as Exhibit 'T', the said judgment is one in rem and not in personam and so binding on 1st respondent for all time. See *Ogboru vs. Ibori* (2005) 13 NWLR (Pt.942) 319 at 418 419; *Osunrinde vs. Ajamogun* (1992) 6 NWLR (Pt.246) 156 at 187.

The 2nd respondent also being privy to that judgment, Exhibit 'T' cannot now claim to be unaffected by it. (*P 208 Paras C-I*)

18. *Principles of interpretation of statutes*

I seek to say at this juncture that on a community reading of Sections 66(1)(i) of the 1999 Constitution taken together with the provisions of subsections (2), (5) and (6) of Section 31 of the Electoral Act 2010 (as amended) *supra*, it is clear that the outcome of issue 2 herein is obvious.

In other words, the said provisions are clear and unambiguous and hence the reason why their interpretation should not be inhibited. See the case of *A – G Ondo State vs. A – G Ekiti State* (2001) 17 NWLR (Pt. 743) 706 at 756 wherein this court held and said:

It is certainly a cardinal principle of interpretation that where in their ordinary meaning the provisions are clear and unambiguous, effect must be given to them without resorting to any aid internal or external. It is the duty of the court to interpret the words of the law maker as used. Those words may be ambiguous, but even if they are the power and duty of the court to travel outside them on a voyage of discovery are strictly limited. (See for example *Major and*

St. Mellon R.D.C. vs. Newport Corporation (1951) 2 All E. L. R. 839, London Transport Executive vs. Betts (1959) A C 231, Attorney General of the Federation & Ors (1981) 10 SC 1 (1981) 12 NS CC. 314.” (P 211 Paras B–G)

19. *Interpretation of S.66(1)(i) and S.31(5) and (6) of the Constitution and Electoral Act respectively*

So, by the constitutional provision, any person, who *has presented* a forged certificate to INEC, is disqualified from contesting election into the National Assembly. By the statutory provisions, any person, who *has reasonable grounds to believe* that a candidate has given false information in the processes filed for an election, may file a Suit against him, and if the court determines that the information is false, it shall issue an order disqualifying him from contesting the election.

Apparently, the constitutional and statutory provisions intersect in this case, where there is a definite finding that the first respondent presented a forged certificate to qualify for the 2011 General Election.

He dropped out of the race for that election, but put himself forward for the 2015 General Election. To this end, he filled out the INEC Form CF 001 that contains the question (Question No.8) – Have you ever presented a forged certificate to INEC? In answer, he said – No. (P 217 Paras C–G)

20. *The meaning of the word “Ever”*

The word “ever” simply means “at any time” – See Webster's Comprehensive Dictionary. Had the first respondent, *at any time*, presented a forged certificate to INEC? That was the question before the court, and the court below blindsided itself when it went into the issue of whether the appellant established that the forged certificate that he used for the 2011 Election was intended for the 2015 Election, and whether he intended to use the false document as a genuine one. (P 217 Paras G–H)

21. *What is proof beyond reasonable doubt*

Even if the allegation of forgery was in issue, the court below fell into serious error when it held that for the allegation to be proved, the first respondent must have been *charged, tried and convicted* by a competent court of law. That is not the correct position of the law.

By Section 135(1) of the Evidence Act, 2011, if the commission of a crime by a party is directly in issue in any civil or criminal proceeding, it must be proved beyond reasonable doubt is not the same as saying proof beyond the shadow of any doubt that the person is guilty – See *Bakare vs. State (1987) 3 SC 1*, wherein Oputa, (JSC), observed:

**“Absolute certainty is impossible in any human adventure including the administration of criminal justice. Proof beyond reasonable doubt means just what it says. It does not admit of plausible and fanciful possibilities but it does admit of a high degree of cogency consistent with an equally, high degree of probability. As Denning, J. (as he then was) observed in *Miller vs. Minister of Pensions (1947) 2 All E. R. 373*: “The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong as to leave only a remote possibility in his favour, which can be dismissed with the sentence ‘of course it is possible but not in the least probable’, the case is proved beyond reasonable doubt”.
(Pp 217–218 Paras I–E)**

22. *The standard of proof where crime is alleged in an Election petition case*
That is the law. It has not changed, and is the same in election cases See *Ikpeazu vs. Otti & Ors (2016) LPELR-40055 (SC)*, wherein this court clearly stated that where in an election petition, the petitioner makes an allegation of crime against a respondent, Section 135(1) of the Evidence Act, 2011, imposes strict burden on the said Petitioner to prove the crime beyond reasonable doubt, if not, his petition will fail.

In view, to insist that the first respondent must be *charged, tried and convicted* before an allegation of forgery is proved is to take an extreme position as regards Section 135(1) of the Evidence Act, which simply talks of proof beyond reasonable doubt; nothing more.

But, as it turns out, the issue for determination in this case boils down to whether the appellant has reasonable grounds to believe that the answer given by the first respondent to the said question is false.

(P 218 Paras E–H)

A Nigerian Cases cited

Abubakar vs. Bebeji Oil and Allied Products Ltd & Ors (2007) 18 NWLR (Pt. 1066) 319 (2007) 2 S.C 48.

Ihedioha vs Okorocha (2016) 1 NWLR (Pt. 1492), 147

B *Joe Iga & Ors. vs Chief Ezekiel Amakiri & Ors* (1976) 11 SC.

Kakih vs. PDP (2014) 15 NWLR pt 1430 374 SC.

S.P.D.C. (Nig) Limited vs. X.MFed Ltd (2006) 16 NWLR (Pt 1004) 189.

C Nigerian Statutes Cited

Constitution of Federal Republic of Nigeria 1999 (as amended) – S. 65(1) and (2)

Electoral Act 2010 (as amended) – S. 141

D *Evidence Act, 2011* – S. 135(1)

Supreme Court Rules 1985 (as amended) Or. 8 Rules 2(1). Or. 2 Rule 3(1)(b)

The 1999 Constitution (as amended) – S. 66(1)(i)

The Electoral Act 2010 (as amended) – S. 31(2), (5) and (6)

E *The Electoral Act, 2010, (as amended)* – S. 141

The Penal Code – S. 362 and 363

Representation**F** Dr. Alex A. Izinyon (SAN) with B.K. Abu, M. Emeribe, E. Ogbojafor and L.O. Fagbemi: For the Appellant.**G** S.I. Ameh (SAN) with Dr. Soni Ajala, Mrs. Comfort Ocheme, R.O. Adakole, J.O. Oche, E.A. Ekoja, A.G. Ameh, D.M. Ikoko, O.D. Sunday, Miss F.U. Emmanuel, Z. Akubo, Miss C.O. Sabo, Ekele Atadoga, Miss R.O. Mohammed, H.I. Iheme, Musa Etubi, Miss Constance O. Afekhai and Mrs. Nadia Oka: For the 1st and 2nd Respondents.**H**

T.M. Inuwa with J. Arabs (Mrs.), W. Kuku (Mrs.), R. Aminu (Mrs.) A.N. Makwe (Mrs.), M. Ibrahim (Mrs.), B.M. Abubakar and C.C. Nnamah (Miss): For the 3rd Respondent.

I

DAUDA BAGE, (JSC) (Delivering the Lead Judgment): This is an appeal from the judgment of the Court of Appeal, Abuja Judicial Division, delivered on the 8th of February, 2016. The Court of Appeal sat over the Judgment of Federal

J High Court, Abuja, in a **Pre-Election** cause. The Federal High Court, Abuja, as

A the trial court, had passed judgment in favour of the appellant (who was the plaintiff there). The respondents (who were the defendants at the trial court) felt aggrieved by the Federal High Court decision. They went on appeal to the Court of Appeal given its status as the penultimate court in the country's judicial hierarchy. The Court of Appeal partially reversed the decision at the court. This, in effect, means the respondents before this court were partially successful at the Court of Appeal (where they were appellants). Their appeal there, was partially (but crucially) granted. The pendulum swung again. Hon Hassan Anthony Saleh, as the respondent at the Court of Appeal, was dissatisfied and aggrieved by the reversal of his trial court fortune by the Court of Appeal. He therefore, proceeded to this court being the apex and ultimate court in the country thereby making him the appellant before us.

D The appellant and the **first** respondent are respective members of the **second** respondent, the Peoples Democratic Party (PDP). The appellant and first respondent participated in the primary Election in to the House of representatives. They contested against each other for the seat of Ado, Okpokwu and Ogbadigbo Federal Constituency of Benue State (hereinafter simply referred to as "the disputed constituency"). The first respondent withdrew from the race after he had defeated the appellant.

E In the relevant INEC form, he had answered "No" to the question of if he had ever presented any forged certificate to the Electoral Body (i.e the INEC). On this development, the appellant sought that the first respondent be disqualified and in the latter's stead (appellant's) be substituted. The Peoples Democratic Party (PDP) leadership and INDEPENDENT NATIONAL ELECTORIAL COMMISSION (INEC) declined to do so. This prompted the Appellant to file a suit via originating summons at the court of first instance. The Federal High Court, adjudged the suit in favour of the appellant. The first and second respondents who were the defendants there appealed to the Court of Appeal and succeeded; wherewith; the appellant (who was the respondent at the penultimate court) appealed to this court.

H The above is considered a fair condensation and/or compact of the case at hand. In accordance with the rules of this court, parties exchanged and served briefs of arguments.

I The appellant's brief filed on the 21st March, 2016, was settled by Dr. Alex A. Izinyon, (SAN) and company. The reply brief which was filed on the 6th of October, 2016 was on behalf of only the first and second respondents. It was filed and settled by S.I. Ameh, (SAN) and company. It needs be repeated that the third respondent (INEC) filed no brief.

J

A The notice of appeal filed before this court sets out Nine (9) Grounds of Appeal with each of the Grounds being supported by a number of particulars elucidating and supporting the respective Grounds. See Exhibit “O” on pages 216 of the Records of Appeal. Three (3) inter-related and integrated forms of Reliefs
B are being requested by the Appellant. See Exhibit “O” the notice of appeal on page 16. For the avoidance of doubt, the reliefs being sought from this court are collapsed in a request for “AN ORDER of this Honourable Court allowing this appeal, set aside the decision of the Court of Appeal and affirm the decision of the
C trial court.” The learned counsel for the appellant proposed eight (8) issues for determination in his brief:

- D** “1. Whether the court below was right in law to have held that the 1st respondent must have been charged, tried and convicted of forgery by a competent court of law for the 1st respondent to be liable for presentation of forged certificate to INEC under Section 66(1)(i) of the 1999
E Constitution (as amended) and making of false declaration on oath under Section 31(2)(5) and (6) of the Electoral Act, 2010 (as amended), (encompassing Grounds 1 and 5 of the notice of appeal).
F 2. Whether the decision of the court below not to rely on the National Diploma Certificate in Accountancy presented by the 1st respondent to INEC in 2011, in determining the
G issue of presentation of forged certificate to INEC before it because the 1st respondent did not include the said National Diploma Certificate in his INEC Form CF001 for 2015 General Election and therefore the 1st
H respondent could not be said to have committed forgery, is not wrong in law in view of the provisions of Section 66(1)(i) of the 1999 Constitution (as amended) and the question in Paragraph 6 of Part E of INEC Form CF001
I for the 2015 General Election (Encompassing Ground 2 of the notice of appeal).
J 3. Whether in view of the nature of the case before it, the court below was right in law when it held that to prove

- A** that 1st respondent lied on oath when he stated that he never presented forged certificate in INEC, it must be shown that the 1st respondent presented the said forged
- B** fraudulently or dishonestly as genuine, and assuming if the court below was right in its said decision, the appellant did not prove beyond reasonable doubt that
- C** the 1st respondent presented a forged certificate with the knowledge that it would be used fraudulently or dishonestly as genuine, (encompassing Ground 3 of the notice of appeal).
- D** 4. Whether the court below was right in law when it held that Exhibit 'T' which is the judgment of the National/State House of Assembly Election Tribunal which made a finding that the 1st respondent presented a
- E** forged certificate to INEC, could not be relied upon because the 1st respondent was not a party in the election petition where the said judgment emanated from, when the 2nd and 3rd respondents' herein were parties in the said
- F** election petition. (Encompassing Ground 4 of the notice of appeal).
- G** 5. Whether the court below was right in law to have held that the 1st respondent's form CF001 has satisfied the constitutional requirements in Section 65(1) and (2) when the appellant's case at the trial court and the issue before the court below was not predicated on the said
- H** Section 65(1) and (2) of the 1999 Constitution (as amended). (Encompassing Ground 6 of the notice of appeal).
- I** 6. Whether the court below was right in law to have held that the 1st and 2nd respondents' paragraphed 5.2 (q) of their counter-affidavit, against appellant's originating summons was unchallenged when the said paragraphs
- J**

- A** **5.2(q) did not raise any fresh issue to warrant the appellant filing a Reply or a further and better affidavit. (Encompassing Ground 7 of the notice of appeal).**
- B** **7. Whether the court below decision that the 1st respondent was duly nominated and sponsored by the 2nd respondent and consequently was qualified to contest in the 2015 General Election was not wrong in law. (Encompassing**
- C** **Ground 8 of the notice of appeal).**
- D** **8. Whether the court below was not wrong in law to have on the basis of Section 141 of the Electoral Act, 2010 (as amended) held that it was wrong for the trial court to have adjudged the appellant the winner of the election and ordered that he be issued a certificate of return when the court below held that the said Section 141 of the**
- E** **Electoral Act was only applicable to and directed at Election Tribunal and Court of Appeal exercising its first instance jurisdiction in the hearing and determination of election petition and not at regular courts.**
- F** **(Encompassing Ground 9 of the notice of appeal).**

On their own part, the first and second respondents' brief proposes and advances five (5) issues for determination of appeal:

- G** **“1. Whether in the absence of proof of any charge, trial and or conviction of the 1st respondent for forgery as well as absence of proof of intent to use a forged document fraudulently or dishonestly as genuine, the 1st respondent could be said to have presented forged certificate to the 3rd respondent. (Grounds 1, 3 and 5 of the notice of appeal).**
- H** **I** **2. Whether the court below could be faulted for rejecting appellant's reliance on National Diploma Certificate in Accountancy which he claimed the 1st respondent**
- J**

A presented to the 3rd respondent in 2011 when no such
B diploma was included in the 1st respondent's INEC Form
 CF001 for the 2015 general election and in view of
 paragraph 5.2(q) of the 1st and 2nd respondents' counter-
 affidavit. (Grounds 2 and 7 of the notice of appeal).

C 3. Whether the court below rightly refused to rely on
 Exhibit T, adduced by the appellant in his bid to establish
 his allegation of forgery against the 1st respondent.
 (Ground 4 of the notice of appeal).

D 4. Whether the court below was wrong in observing that the
 1st respondent's INEC Form CF001 satisfied the
 constitutional requirements in Section 65(1) and (2) of
 the Constitution of the Federal Republic of Nigeria 1999
 (as amended). (Ground 6 of the Notice of Appeal).

E 5. Whether the Court below was right in faulting the trial
 court's endorsement of the appellant as winner of the
 2015 general election and in finding instead that the 1st
 respondent was qualified to contest the general election.
 (Grounds 8 and 9 of the Notice of Appeal).

F See sub-paragraph 4.0, pages 13 and 14 (with legal arguments on the issues
 running from page 7 to 6 of Brief). It is utmostly crucial to add that the
 respondents had filed a notice of preliminary objection and with arguments
G supporting thereto. This court proceeds to determine the preliminary objection.

DETERMINATION OF PRELIMINARY OBJECTION

H There are three (3) dimensions to this objection. Its first and main plank resides
 on the failure to provide an address of service on the first and second respondents
 in the notice of appeal filed on 8/2/2016 and the earlier notice of appeal filed
 8/2/2016. Allied to this point of contention is yet the issue that the first and second
 respondents were not served personally with these notices. The notices rather
I were put in the care (or charge) of their common counsel, S.I. Ameh, (SAN) and
 Company (Address provided). The said service is argued to have run foul of the
 relevant provisions of the rules of this court. The rules were specified in the brief.
 The counsel did not deny service.

J

A The second aspect or dimension of the preliminary objection is the plurality of the notices (two of them) with the attendant ambiguity and difficulty such a state of affair presented as to which of the two notices is to be relied upon.

B With regards to the first and main plank of the respondents' preliminary objection, we are of the emphatic opinion that since the counsel to the respondents was served and he did not deny such service, there is effective and competent service. The contention that the respondents should have been served personally is misplaced. Service on the counsel, S.I. Ameh, SAN, being the
C legally and formally acknowledged representative of the respondents, is good, competent and effective enough. Both respondents were duly served via their counsel, we so hold. The real essence of the Supreme Court rules on notice (which is to prevent any party being taken by surprise which in a significant way
D amounts to denial of adequate opportunity to be heard) is achieved as both the first and second respondent were actually (and more then constructively) Served via counsel. And there is no dispute as to this state of affairs. Any assumed irregularity is only as to form rather than substance. Any seeming irregularity does
E not bear on our jurisdiction and does not amount, by any definition, to denial of notice to the respondents. The case of IHEDIOHA vs. OKOROCHA (2016) 1 NWLR (Pt. 1492), 147 at pages 176-179 and the host of other authorities were wrongly referred to as their respective facts and circumstances are fundamentally
F distinguishable to present appeal case.

As to the plurality of the two notices served within time, we tend to think the preliminary objection is misconceived. In fact, the idea of a plurality is a misnomer. The first and second respondents via the instrumentality of their able
G counsel had no difficulty in deciding which of two notices to reply on. They directed their energies to responding to the Notice of 18/2/2016 (and not the previous one of 8/2/2016) which had nine (9) Grounds and eight (8) issues for determination. The respondents brief unambiguously responded to those
H Grounds and Issues in the notice of 8/2/2016. It was their articulate study of the 8/2/2016 appellant's notice that gave birth to the respondents own formulation of five (5) issues for determination. The failure of the appellant's counsel to formally withdraw the notice of 8/2/2016 (though improper and reckless) had
I amounted to a mere irregularity that does not bear on the court's jurisdiction or the right to adequate notice.

The third aim (or dimension) of the preliminary objection has two legs of it's own, viz/namely, that Grounds 6 and 9 of appeal emanated nor arose from
J the judgment of the court below.

A By the first leg of this third arm (or aspect of preliminary objection, it is meant that since it is trite law that obiter dictum cannot be a basis of a ground of appeal (as correctly held in the judicial decision cited in sub-paragraph 3.2, sub-heading 12, of the respondents' brief of argument), Grounds 6 and 9 should, **B** therefore, be discountenanced and struck out as grounds of appeal.

The second leg of the third aspect and dimension of the preliminary objection is specifically on Ground 9 the objection and contention is to the effect that the ground did not arise from the judgment of the court below (i.e. the Court of Appeal and that since the Ground has no relation to the judgment being appealed against, it (the Ground) should be viewed as incompetent and be struck out. It is the emphatic contention of the Respondents' Counsel that the law is absolutely clear that grounds of appeal do not arise *in nubibus* (from the air) but **C** must arise from or based on the judgment appealed against, failing which they will be incompetent and liable to be struck-out. In support of this proposition, key judicial authorities were cited as for example the cases of **IDIKA & ORS (1988) NWLR (Pt. 18) 563** and **ADEBIYI vs. UMAR (2012) 9 NWLR (Pt. 1305) 279** **D** at 286. **E**

Here is our consideration of the respondents counsel's objection to Grounds 6 and 9 of the Appeal. Though this third plank (or dimension) of the objection has two faces of its own, their combined effect is the same, that is, that **F** the two Grounds should be struck out on the basis that they do not relate to the judgment of the Court of Appeal (either on account of not being part of the ration or even that judgment at all).

After scrutinizing and/or evaluating four (4) different but relevant sources **G** of information before us (namely, the brief of argument of counsel to the respondents, the appellant's counsel's reply to the former's brief, the judgment of the Court of Appeal as contained in the record of proceedings and lastly, Section 141 of the Electoral Act, 2010, (as amended), we proceed to hold that, whether **H** the Court of Appeal (or the Court below) did or did not have recourse to Section 141 of the Electoral Act, 2010 (as amended) has no effect on the validity and tenability of Ground 9 as its content and substance flow from (and/or relate to) the Judgment of the lower court. Simply put, Ground 9 remains a valid Ground **I** together with Ground 6.

On the whole, the preliminary objection raised by counsel to the first and second respondents is without any of its triple legs (together with sub-branches) to stand upon, accordingly, it is hereby struck-out. Effort will now be directed **J** towards the determination of the main appeal.

A DETERMINATION OF THE MAIN APPEAL

The position of this court on the issues raised and arguments canvassed by the respective parties on the preliminary objection, is a painful but necessary therapy of an adage in the South-Western part of this country. By the preliminary

B objection, the parties lured this noble court into leaving 'leprosy to cure ringworm'. Now that the 'ringworm' of the preliminary objection has been addressed, now is the time to deal with the more serious ailment of 'leprosy' which, in this figurative metaphorical expression, is the main issue raised in this

C appeal.
We wish to pause a while to observe the seemingly superfluous and overlapping issues formulated by the parties in their briefs of argument. First, any sentence more than 3-4 lines is grammatically inelegant, and putting it straight,

D wrong. The appellant formulated 8 issues in paragraph 3.0 at pages 7-9 of the appellant's brief of argument. The average number of each issue, formulated as separate sentence, is 8-10 lines. This is not too elegant.

E By adopting the issues formulated by the appellants (sic), although this is a sole-Appellant appeal; the 3rd respondent also invariably slips into the inelegance of long and inordinate sentences and the surplusage style of brief drafting and writing through overlapping formulation of issues.

F The 1st and 2nd respondents formulated 5 issues as listed in paragraph 4.0 of their brief of arguments at pages 13-15, slightly shorter than appellant's, an average of about 6-7 lines per sentence or issue.

ISSUES FOR DETERMINATION

G We are *ad idem* on this side that the several issues in this appeal will, and could, be adequately resolved and answered under two issues. Therefore, for the purpose of this judgment, we have restricted ourselves to two broad issues in effectively determining this appeal, thus:

H

“1. Whether or not there has been a finding of facts by the trial court on the issue of certificate forgery by the 1st respondent.

I

2. Whether or not based on the finding of facts on the issue of certificate forgery the 1st respondent stands disqualified from contesting the House of

J

CONSIDERATION AND RESOLUTION OF RELEVANT ISSUES

B ISSUE 1:

C

J

- A** The learned senior counsel to the appellant argued vehemently that, what the law requires to be proven under **Section 31(5) of the Electoral Act** (as amended) is simply that the information given in the affidavit of the 1st respondent or any document submitted by the 1st respondent to INEC, is false. He contended that the
- B** decision of the court below that a person who alleged that another breached **Section 66(1)(i) of the 1999 Constitution (as amended)** should first establish that such a person was charged, tried and convicted of forgery by a competent court of law, appears to have read extraneous provisions or meaning into an
- C** otherwise clear provision. See pages 9 – 14 of the appellant's brief of argument.

The flip side of the argument on this issue is presented in the brief of arguments of the 1st and 2nd respondents where learned senior counsel submitted that, where there is an allegation that a person has presented a forged certificate to the 3rd respondent, the burden and standard of the proof should be as restated by the court in the case of **KAKIH vs. PDP (2014) NWLR (Pt 1430) 374** at p 423. In **KAKIH**, counsel contended that this court held thus:

- E** By virtue of Section 362 and 363 of the Penal Code, a party who asserts that another person presented a forged certificate must
- F** prove beyond reasonable doubt that the certificate was presented with the knowledge that it would be used fraudulently or dishonestly as genuine. In this case, for the
- G** appellant to succeed in his case of presentation of forged certificate, he ought to have presented evidence that the 4th respondent presented a forged certificate to the 2nd respondent knowing that it would be used fraudulently or dishonestly as genuine...

- H** The learned senior counsel to 1st and 2nd respondents increased the velocity of his arguments by submitting that every forgery requires proof of requisite *mens rea*, i.e. knowledge that the document presented was going to be used fraudulently or dishonestly as genuine, which onus must be discharged by the appellant. He submitted further that the provisions of **Section 31 (5) and (6) of the Electoral Act 2010** (as amended) imposes a procedural obligations on the part of the
- I** appellant and anyone who desires to disqualify a candidate from contesting an election to approach the court through a suit filed either at the Federal High Court, High Court of a State or FCT against. See paragraphs 5.1.1 to 5.1.16 at pages 14-

J

A 19 of the 1st and 2nd respondents' brief of argument.

We have carefully digested the respective submissions of appellant's and respondents' counsel, as the 3rd respondent opted to be neutral and abide by whatever becomes our decision in this appeal. The question that keeps agitating our minds is whether a court of law has made a pronouncement or finding on the facts of certificate forgery, being the main issue in this appeal as it relates to the 1st respondent. Our answer is, consensually, in the affirmative. There has been a judicial pronouncement on the fact of whether or not the 1st respondent presented a forged certificate to the 3rd respondent for the purpose of an election. The court below, in error, failed to pay attention to this very crucial fact. We wish to quote the trial court on this important issue:

D **“The court's finding/conclusions are based on paragraphs 8-23**
 of plaintiff's affidavit in support of originating summons sworn
 to on 26/1/15, with Exhibits A-V, Further Affidavit No. 2 in
 support of the originating summons deposed to by Charity
 E Adah Ms, legal practitioners with Exhibits A3 & A4. Exhibit T,
 the judgment of National/State House of Assembly Election
 Tribunal for Makurdi, Benue State delivered on 6/9/2011 at
 pages 57 & 58 are conclusive on this issue. Exhibit A3 is a
 F certified true copy of letter dated 22nd December 2014
 emanating from Dr Suleiman S. Buba, Registrar Federal
 Polytechnic, Mubi, to Mathias O. Emeribe Esq confirming
 certificate forgery by Mr. Abah Christian Adabah, 3rd defendant
 G in respect of his certificate No. FPM 000293 OBTAINED IN
 1985. See KAKIH vs. PDP (2014) 15 NWLR pt 1430 374 SC.
 Exhibits T & A3 are self-explanatory, positive and devoid of any
 ambiguity (Emphasis ours).

H This is an unassailable and comprehensive finding on facts of forgery. We can't
 agree less with the position of the trial court, which specifically finds that a
 tribunal had judicially resolved and concluded, unequivocally, that the 1st
 I respondent forged the certificate in question. The appellant's case at the trial court
 was predicted, almost exclusively, on the fact that the 1st respondent had
 presented a forged certificate to INEC (the 3rd respondent).

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- A** The question in paragraph 6 of part E of the 1st respondent's INEC form CF001 is very specific: **“Have you ever presented a forged certificate to INEC”**. We align with the position of the learned senior counsel to the appellant, that this question relates to all elections, for as long as candidate had previously
- B** presented a forged certificate to INEC. The same scenario plays itself out vis-à-vis the provisions of **Section 66(1)(i) of the 1999 Constitution** (as amended) which is to the effect that quote:
- C** **“No person shall be qualified for election to the Senate or the House of Representatives if:**
(i) he has presented a forged certificate to the Independent National Electoral Commission.”
- D** The law is very clear to warrant any form of coloured interpretations. The question (as amended) is whether a certificate that turned out to be forged has ever been presented, not whether the forger has been charged, tried or convicted
- E** on this. The court below got into the error of forgery under **Sections 362 and 363 of the Penal Code** as against forgery under the **Electoral Act 2010** (as amended). More importantly, a court or tribunal had found the certificate in issue to be forged.
- F** We have reiterated on several occasions that ours is not only a court of law but public policy. Forgery of certificate for the purpose of election and electoral processes and forgery under criminal law are not the same issue. Forgery under the Electoral Act is a specific law on forgery or presentation of a forged
- G** certification for the purpose of election. The best forum for electoral forgery is election tribunal as against general criminal trial. This is what played out, rightly in this appeal. We restate our position that, as held by the trial court,
- H** **“...the judgment of National/State House of Assembly Election Tribunal for Makurdi, Benue State delivered on 6/9/2011 at pages 57 & 58 are conclusive on this issue.”**
- I** Election tribunal had exercised specific jurisdiction to try the issue. There has also been a judicial reconfirmation by the trial court on the same issue as it relates to forgery of certificate, for electoral purposes, by the 1st respondent. These are not controverted and the 1st respondent did not deem it fit to appeal this finding of
- J** facts that he perceived were adverse to his electoral fortune or political future.

A This position restates the settled position of the law that the legal consequence of failure to appeal against any finding, holding or decision of a court is that the parties to the case have accepted it as correct and binding upon them. On this side of the judicial structure, the law is settled that a party is stopped by his failure to appeal against an adverse finding of a fact relevant to the issue.”
B See **ABUBAKAR vs. BEBEJI OIL AND ALLIED PRODUCTS LTD & ORS (2007) 18 NWLR (Pt. 1066) 319 (2007) 2 S.C 48 Per Ogbunagu, J.S.C. (P. 68, para. F).**

C I am unable to disagree with learned senior counsel on the issue as the 1st respondent is stopped by his failures to appeal against the numerous adverse findings of fact on the issue of certificate forgery which relate directly to his electoral future. See the cases of **JOE IGA & ORS. vs CHIEF EZEKIEL AMAKIRI & ORS (1976) 11 SC at 12-13**. See also the position of this court in **S.P.D.C. (NIG) LIMITED vs. X.M FED LTD (2006) 16 NWLR (Pt 1004) 189** at 203, paras D-F.

E It is our considered view that the court below was wrong to have held that 1st respondent ought to have been charged, tried and convicted. This is because the case of the appellant at the trial court is predicated on the provisions of **Section 66(1)(i) of the 1999 Constitution** (as amended) and **Section 31(2), (5) and (6) of the Electoral Act 2010** (as amended).

F Issue one is resolved in favour of the appellant.

ISSUE 2:

G “Whether or not based on the finding of facts on the issue of certificate forgery the 1st respondent stands disqualified from contesting the House of Representatives election for Ado, Okpokwu and Ogbadibo Federal Constituency of Benue State.”

H The appellant's contention on this issue is that the court below was wrong to have held that the 1st respondent was duly nominated and sponsored by the 2nd respondent and consequently qualified to contest the 2015 General Election. The learned senior counsel contends that the 1st respondent having breached constitutional and statutory provisions stands disqualified from contesting election. See pages 26-30 of the appellant's brief of argument.

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- A** The converse argument of the 1st and 2nd respondents is that the court below was right in relying on **Section 141 of the Electoral Act 2010** (as amended) to fault the trial court's finding that the appellant won the 2015 General Election to Ado, Okpokwu and Ogbadibo Federal Constituency of Benue State. See pages 39-42 of the 1st and 2nd respondents' brief.

- B** We are of the firm view that a party must not be allowed to profit from his or her fraud. From the totality of the facts of this appeal, forgery of certificate by the 1st respondent to contest Ado, Okpokwu and Ogbadibo Federal Constituency of Benue State keeps resonating. The 1st respondent in the run up to the 2011 election and when it was time for the 2015 General Election he carefully and deliberately omitted to include this fact. The relevant question is whether the 1st respondent ever presented a forged certificate to INEC (3rd respondent) at any (previous or current) elections, and not whether or not it was listed or omitted from the declaration form completed for a particular election. The second legal issue is that there must have been a judicial pronouncement, by a Court or Tribunal, that the certificate in question is forged.

- C** In this appeal, an Election Tribunal with specific jurisdiction has found, in the judgment of National/State House of Assembly Election Tribunal for Makurdi, Benue State delivered on 6/9/2011 at pages 57 & 58, that the certificate presented by the 1st respondent is forged. And this, as the trial court rightly found, is conclusive on this issue.

- D** The provisions of the Nigerian Constitution are unambiguous. The **Constitution** expressly provides that:

- E** “66. (1) No person shall be qualified for election to the Senate or the House of Representatives if:
- F** (ii) he has presented a forged certificate to the Independent National Electoral Commission.”

- G** The intention of the constitution is that anyone who had presented a forged certificate to INEC should stand automatically disqualified for all future elections if, as in this case, a court or tribunal finds the certificate to have been forged, and it matters not whether or not such facts is further fraudulently or desperately concealed in subsequent elections or declaration forms. No decent system or polity should condone, or through judicial policy and decisions, encourage the dangerous culture of forging certificates with impunity to seek electoral contest.

H

A The 1st respondent ought not to have, and in the opinion of the law, was not qualified to contest election into the Ado, Okpokwu and Ogbadibo Federal Constituency of Benue State based on the combined effects of the provisions of **Section 66(1)(i) of the 1999 Constitution (as amended)** and **Section 31 (2), (5) and (6) of the Electoral Act 2010 (as amended)**. He stands constitutionally disqualified. This being a pre-election matter, we agree with the trial court that the votes polled by the 1st respondent through nomination by the 2nd respondent are invalid and wasted. The appellant being the runner-up in the PDP Primary election conducted for the said election automatically steps into his shoes as nominee and winner of the election into the Ado, Okpokwu and Ogbadibo Federal Constituency of Benue State.

D It is our considered view that the provision of **Section 141 of the Electoral Act** only applies in cases of post-election cases at the Election Tribunal as against pre-election matters. To hold otherwise would mean allowing ineligible persons to contest and win elections and thus deploy dilatory tactics to reap from his or her fraud to the fullest until the expiration of the tenure procured by fraud.

E Due to the foregoing reasons, issue two is also resolved in favour of the appellant. The judgment of the court below is hereby set aside. The advisory opinion of the learned trial judge is instructive in this regard, and we quote:

F “The culture of impunity exhibited by the 1st and 3rd defendant's continued unabated with 2nd defendant, INEC declaring 3rd defendant not only eligible but the winner of the said general elections 2015 (sic) and returned him unopposed as the honourable member for the said Federal constituency on the platform of 1st Defendant, PDP, as other registered political parties fielded no candidates at the general election 2015.

H The era of political parties presenting candidates holding public offices at Local, State and National public levels with forged certificates which still persist in the polity needs to be addressed urgently by relevant law enforcement agencies and other stakeholders (and we add-including courts) in this nascent democracy (Emphasis ours).”

J This court must take the lead, in righting the wrongs in our society, if and when the opportunity presents itself as in this appeal. Allowing criminality and

A certificate forgery to continue to percolate into the streams, waters and oceans of our national polity would only mean our waters are, and will remain dangerously contaminated. The purification efforts must start now, and be sustained as we seek, as a nation, to now 'change' from our old culture of reckless impunity.

B The Nigerian constitution is supreme. It desires that no one who had ever presented forged certificate to INEC should contest election into Nigeria's National Assembly. This is clear and sacrosanct. More compelling as judicial determination had been taken by no less a technical panel sitting in, at least, a panel of three Judges as Election Tribunal with constitutional mandate to determine such issues as they relate to elections and its outcomes, including eligibility. This has also been affirmed by the trial court in this appeal. On these issues, our duty is to apply the constitution and the law in its start, original form undiluted by 'colorated' interpretations.

C In sum, this appeal succeeds. The decision of the court below is hereby set aside. The judgment of the trial court is restored and upheld. The election of the 1st respondent into the Ado, Okpokwu and Ogbadibo Federal Constituency of Benue State is a nullity, as he stands constitutionally disqualified from contesting the said election. The appellant is and hereby declared the candidate of the 2nd respondent and winner of the Okpokwu and Ogbadibo Federal Constituency of Benue State and should be issued certificate of return immediately by the 3rd respondent (INEC).

D We make no order as to cost.

Sidi Dauda Bage,
Justice, Supreme Court.

G **PETER-ODILI, (JSC):** I agree with the judgment just delivered by my learned brother, Sidi Dauda Bage (JSC) and to underscore my support for the reasonings, I shall make some remarks.

H This is an appeal against the judgment of the Court of Appeal, Abuja Division delivered on 8th February, 2016 wherein the appeal of the 1st and 2nd respondents was partially allowed.

I

FACTS BRIEFLY STATED

J The appellant and the 1st respondent are members of the Peoples Democratic

A Party, the 2nd respondent.

By virtue of being members of the 2nd respondent, the appellant and the 1st respondent participated in the 2nd respondent's House of Representatives Primary Election for Ado, Okpokwu and Ogbadibo Federal Constituency of Benue State

B for the 2011 General Elections where the appellant came second while the 1st respondent came first.

Having won the said Primary Election and become the Peoples Democratic Party House of Representatives candidate for the said Ado, Okpokwu and Ogbadibo Federal Constituency of Benue State for the 2011 General Elections, the 1st respondent proceeded to obtain INEC Form CF001, filed same and sworn before a Commissioner of Oaths at the Registry of the Benue State High Court, Makurdi on the 31st January, 2011 that all the information which he stated in his

D said INEC Form CF001 are true and correct.

In Part B and C of 1st respondent's aforesaid INEC Form CF001 for the 2011 General Election which relate to Educational Qualifications, the 1st respondent stated unequivocally in his hand writing that he attended the Federal Polytechnic Mubi 1982 – 1983 and 1983 – 1985 and that during the aforesaid periods of his stay at the Federal Polytechnic Mubi, he obtained or was awarded Accounting Certificate, 1983 and Ordinary National Diploma in Accountancy 1985. See page 374 of Vol. 1 of the record.

F Undone yet, the 1st respondent proceeded to present his said INEC Form CF001 for 2011 General Elections and some documents which included the said Accounting Certificate and Ordinary National Diploma Certificate in Accountancy which he claimed was awarded to him by the Federal Polytechnic Mubi in 1983 and 1985 respectively to INEC. See pages 371– 384 of Vol. 1 of the record which showed that 1st respondent's Form CF001 for 2011 General Election and the aforesaid accompanying documents were duly received by INEC showing that they are in INEC possession.

H Curious about the 1st respondent's claim that he obtained the aforesaid certificates from the Federal Polytechnic Mubi, inquiries were carried out at the Federal Polytechnic Mubi to test the authenticity of the said Certificates which the 1st respondent claimed were issued to him by the Federal Polytechnic, Mubi.

I In its response, the Federal Polytechnic Mubi through its Registrar Suleiman S. Buba and one Yunusa J. Umar SEO (Exams and Records) on behalf of the said Registrar of the Federal Polytechnic Mubi, via two letters Exhibits 'O' and 'P' at pages 57 and 58 of Vol. 1 of the record, stated unequivocally that

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- A** although the 1st respondent was issued a certificate in Accountancy in 1983, the 1st respondent never enrolled for a National Diploma Programme in Accountancy at the Federal Polytechnic Mubi and that the said National Diploma Certificate in Accountancy which the 1st respondent claimed was awarded to him by the
- B** Federal Polytechnic Mubi was forged.

- As a result of the aforesaid discovery that the 1st respondent was never issued the aforesaid National Diploma Certificate in Accountancy which he specifically stated in his own hand writing in his INEC Form CF001 for 2011
- C** General Elections that same was awarded him by the Federal Polytechnic, Mubi, sworn on oath in support of his aforesaid claim before a Commissioner for Oaths at the Registry of Benue State High Court, Makurdi and proceeded further to present the said National Diploma Certificate to INEC, Abuja with suit
- D** No.FHC/ABJ/CS/195/2011 against the 1st, 2nd, and 3rd respondents herein, claiming in the said suit that the 1st respondent be disqualified from contesting in the 2011 General Election.

- Upon the service of the said suit on the 1st respondent, he did not file any
- E** defence but instead withdrew his candidature as the 2nd respondent's House of Representatives candidate for Ado, Okpokwu and Ogbadigbo Federal Constituency of Benue State for the 2011 General Elections and he was consequently replaced by the 2nd respondent with the appellant.

- Consequently, as the candidate of the 2nd respondent in the House of Representatives Election for Ado, Okpokwu and Ogbadigbo Federal Constituency of Benue State during the 2011 General Elections, the appellant emerged the winner in the said election and was elected as a Member House of
- F** Representatives representing the aforesaid Federal Constituency.
- G**

- After the said election of the appellant, the appellant was dragged before an Election Tribunal by the candidate of the then Action Congress of Nigeria in
- H** **Petition No. NSHA/EPT/BN/07/2011 BETWEEN ONEJEH DANIEL DONALD & ANOR vs. HASSAN ANTHONY SALEH & ORS.**

- In its judgment in the said election petition, the Election Tribunal held that the reason why the 2nd respondent replaced the 1st respondent with the appellant was because the 1st respondent submitted forged certificate to INEC and there was therefore a cogent and verifiable reason for the substitution of the 1st
- I** respondent herein. Furthermore, it was held by the said Election Tribunal that the 2nd respondent was aware that the 1st respondent presented a forged certificate to INEC. See pages 198 and 199 of Vol.1 of the record.

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A By virtue of a letter dated 15th November, 2014, the appellant through his solicitor wrote the Federal Polytechnic Mubi requesting for a confirmation of its earlier position that it never issued the 1st respondent the said National Diploma Certificate in Accountancy and that the said Certificate was a forgery. See page **B** 59 of Vol.1 of the record.

In its response to the appellant's aforesaid request, the Federal Polytechnic Mubi, through its Registrar Dr. Suleiman S. Buba again stated emphatically that the 1st respondent's said National Diploma Certificate in Accountancy is forged **C** and not genuine. See pages 60 – 61 of Vol. 1 of the record and pages 765 – 769 of Vol. of the record.

The issue of the 1st respondent presenting a forged certificate to INEC was in the public domain in the 1st respondent's Federal Constituency and an issue of **D** public discourse in his said Federal Constituency as shown in the candidate of the opposition party making it an issue in the aforesaid Election petition **No. NSHA/EPT/BN/REP/07/2016 BETWEEN ONJEH DANIEL DONALD & ANOR. vs. HASSAN ANTHONY SALEH & 4 ORS.** This circumstance **E** should have made the 1st respondent to challenge the strong denial by the Federal Polytechnic, Mubi that it awarded him the said National Diploma Certificate presented the said certificate to INEC.

In November, 2014 when the 2nd respondent had started selling nomination **F** forms, the 1st respondent purchased the said nomination forms and indicated interest that he would be contesting in the 2nd respondent's House of Representatives Primary Election fixed for 6th December, 2014.

On becoming aware of the aforesaid steps taken by the 1st respondent, the **G** appellant through his counsel wrote a petition to the 2nd respondent's Chairman House of Representatives Screening Committee, the National Chairman of the 2nd respondent, the National Legal Adviser of the 2nd respondent, the National Publicity Secretary of the 2nd respondent and the Inspector General of Police **H** intimating them via the said petition that the 1st respondent presented forged certificate to INEC in 2011 and made false declaration on oath in his INEC Form CF001 which he duly swore before a Commissioner for Oaths and consequently **I** should be disqualified from participating in the said Primary election. See pages 39 – 48 of Vol. 1 of the record.

The appellant's said petition was ignored by the said National Leaders of the 2nd respondent who proceeded to allow the 1st respondent to participate in the said **J** House of Representatives Primary Election on 6th December, 2014 where he was

A declared winner and the appellant came second.

Dissatisfied with the 1st respondent's participation in the 2nd respondent's said primary election, the appellant on 12th December, 2014 filed Suit No. FHC/ABJ/989/14 at the Federal High Court, Abuja against the 1st – 3rd respondents herein. While the appellant was waiting to be given a date to argue his motion ex-parte for leave to serve the 1st respondent with appellant's processes outside jurisdiction in the said suit, the 1st respondent without being served the said court processes filed a preliminary objection and written address challenging the competence of the suit. See pages 631– 642 and 650 – 652 of Vol. 2 of the record.

In filling his INEC Form CF001 for 2015 General Elections having been declared the winner of the 2nd respondent's House of Representatives Primary Election for Ado Okpokwu and Ogbadigbo Federal Constituency, when asked if he had ever presented a forged certificate to INEC in paragraph 6 of Part E of the said INEC Form CF001 for 2015 General Elections, the 1st respondent answered with an emphatic NO! See specifically pages 388 – 389 of Vol.1 of the record.

Furthermore, the 1st respondent in his INEC Form CF001 for 2015 General Election relating to Educational Institutions attended with dates and Educational Qualifications with dates omitted everything relating to the Federal Polytechnic, Mubi.

See page 387 of Vol.1 of the record.

Upon becoming aware of the 1st respondent's declaration in Form CF001 for 2015 General Elections deposited to before the Commissioner For Oaths at the High Court, FCT Registry, Abuja on 18/12/2014, the appellant discontinued the earlier Suit No. FHC/ABJ/CS/989/2-14 on 26th January, 2015.

After discontinuing the aforesaid suit earlier filed by the appellant, on the same 26th January, 2015, the appellant filed a fresh suit incorporating the aforesaid issue of false declaration on oath on the issue of presentation of forged certificate. See pages 3 – 291 of vol. 1 of the record.

After the filling of the said suit, the Honourable Chief Judge of the Federal High Court assigned the suit to the Court presided over by Hon. Justice A.F.A. Ademola. The suit was consequently fixed by the trial court for 2nd February, 2015 for the hearing of appellant's motion ex-parte for an order, among others, for leave to serve the 1st respondent outside jurisdiction the court processes in the said suit.

While appellant's counsel was in court on the said 2nd February, 2015, to

A argue appellant's said motion ex-parte, he was informed by a court official that the case file of the suit which was assigned to that court had been retrieved from the court and presently at the Federal High Court Registry, Abuja.

Appellant's counsel was surprised as the 1st respondent had not been served the court process in the said suit and appellant's counsel was never served and was not aware of the said letter of transfer written by the 1st respondent's counsel.

C Aggrieved, appellant's senior counsel wrote the Hon. Chief Judge of the Federal High Court for the reversal of the decision to transfer the suit on cogent grounds. See pages 644 – 647 of vol.2 of the record. Upon being aware of the true state of events, the Hon. Chief Judge of the Federal High Court reversed his decision transferring the appellant's suit to the Federal High Court, Makurdi.

D On 3rd February, 2015, appellant's senior counsel argued his said Motion Ex-parte praying among others, for an order for leave to serve the 1st respondent the court process outside the jurisdiction of court and same, among other orders were granted on the said 3rd February, 2015.

E Upon service of the court process on the respondents, the 1st and 2nd respondents refused to immediately file any counter-affidavit in support of appellant's originating summons but however filed a notice of preliminary objection challenging the jurisdiction of the trial court to entertain appellant's suit, filed a notice of appeal against the decision of the trial court abridging the time for the 1st respondent to appear and file his defence to the matter and filed an application for stay of proceedings of the trial court. See pages 406 – 456 of vol.1 of the record.

G On 20th May, 2015, the trial court delivered judgment in the appellant's suit holding that the 1st respondent presented forged certificate to INEC and made false declaration on oath. The trial court consequently granted the reliefs claimed by the appellant in his said suit. See pages 1057 – 1074 of vol. 2 of the record.

H On the 8th February, 2016, the court below delivered its judgment partially allowing the 1st and 2nd respondents' appeal on the grounds among others that to prove that a person presented a forged certificate, there must be evidence of charge, trial and conviction of the person who is said to have presented the said forged certificate for forgery of the said certificate and the presentation of the forged certificate must not relate to past elections but must relate to the election which a person who is said to present the said forged certificate is presently participating.

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A Aggrieved with the said judgment of the court below, the appellant has approached the Supreme Court on appeal.

B At the hearing of the appeal on 14/12/2016, learned counsel for the appellant, Dr. Alex Izinyon (SAN), adopted his appellants brief of argument filed on 21/3/2016. Also adopted is a Reply Brief filed on 6/10/16 and deemed filed on 14/12/16.

C 1. Whether the court below was right in law to have held that the 1st respondent must have been charged, tried and convicted of forgery by a competent court of law for the 1st respondent to be liable for presentation of forged certificate to INEC under Section 66(1) (i) of the 1999 Constitution (as amended) making of false declaration on oath under Section 31(2) (5) and (6) of the Electoral Act, 2010 (as amended), (Encompassing Grounds 1 and 5 of the Notice of Appeal).

D 2. Whether the decision of the court below not to rely on the National Diploma Certificate in Accountancy presented by the 1st respondent to INEC in 2011, in determining the issue of presentation of forged certificate to INEC before it because the 1st respondent did not include the said National Diploma Certificate in his INEC Form CF001 for 2015 General Election and therefore the 1st respondent could not be said to have committed forgery, is not wrong in law in view of the provisions of Section 66(1) (i) of the 1999 Constitution (as amended) and the question in paragraph 6 of Part E of INEC Form CF001 for the 2015 General Election. (Encompassing Ground 2 of the Notice of Appeal).

E 3. Whether in view of the nature of the case before it, the court below was right in law when it held that to prove that 1st respondent lied on oath when he stated that he never presented a forged certificate to INEC, it must be shown that the 1st respondent presented the said forged certificate with the knowledge that it would be used fraudulently or dishonestly as genuine, and assuming if the court below was right in its said decision, the appellant did not prove beyond reasonable doubt that the 1st respondent presented a forged certificate with the knowledge that it would be used fraudulently or dishonestly as genuine. (Encompassing Ground 3 of the notice of appeal).

F 4. Whether the court below was right in law when it held that Exhibit 'T' which is the judgment of the National/State Houses of Assembly Election Tribunal which made a finding that the 1st respondent presented a forged

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- A** certificate to INEC, could not be relied upon because the 1st respondent was not a party in the election petition where the said judgment emanated from, when the 2nd and 3rd respondents' herein were parties in the said election petition. (Encompassing Ground 4 of the Notice of Appeal).
- B** 5. Whether the court below was right in law to have held that the 1st respondent's form CF001 has satisfied the constitutional requirements in Section 65(1) and (2) when the appellant's case at the trial court and the issue before the court below was not predicated on the said Section 65 (1) and (2) of the 1999 Constitution (as amended). Encompassing Ground 6 of the notice of appeal).
- C** 6. Whether the court below was right in law to have held that the 1st and 2nd respondents' paragraphs 5.2(q) of their counter-affidavit, against appellant's originating summons was unchallenged when the said paragraph 5.2(q) did not raise any fresh issue to warrant the appellant filing a reply or a further and better affidavit. (Encompassing Ground 7 of the notice of appeal).
- D** 7. Whether the court below decision that the 1st respondent was duly nominated and sponsored by the 2nd respondent and consequently was qualified to contest in the 2015 General Election was not wrong in law. (Encompassing Ground 8 of the Notice of Appeal).
- E** 8. Whether the court below was not wrong in law to have on the basis of Section 141 of the Electoral Act, 2010 (as amended) held that it was wrong for the trial court to have adjudged the appellant the winner of the election and ordered that he be issued a certificate of return when the court below had held that the said Section 141 of the Electoral Act was only applicable to and directed at Election Tribunal and Court of Appeal exercising its first instance jurisdiction in the hearing and determination of election petition and not at regular courts. (Encompassing Ground 9 of the notice of appeal).
- F**
- G**
- H**

Learned counsel for the 1st and 2nd respondents adopted their brief of argument filed on 20/6/2016 and deemed filed 21/6/16. In it was raised and argued a preliminary objection.

I But in the event, the objection failed, learned counsel distilled five issues for determination which are thus:

1. Whether in the absence of proof of any charge, trial and or conviction of

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- A** the 1st respondent for forgery as well as absence of proof of intent to use a forged document fraudulently or dishonestly as genuine, the 1st respondent could be said to have presented forged certificate to the 3rd respondent. (Grounds 1, 3 and 5 of the notice of appeal).
- B** 2. Whether the court below could be faulted for rejecting appellant's reliance on National Diploma Certificate in Accountancy which he claimed the 1st respondent presented to the 3rd respondent in 2011 when no such diploma was included in the 1st respondent's INEC Form CF001 for the 2015
- C** general election and in view of paragraph 5.2(q) of the 1st and 2nd respondents' counter-affidavit. (Grounds 2 and 7 of the notice of appeal).
3. Whether the court below rightly refused to rely in Exhibit 'T', adduced by the appellant in his bid to establish his allegation of forgery against the 1st
- D** respondent. (Grounds 4 of the Notice of Appeal).
4. Whether the court below was wrong in observing that the 1st respondent's INEC Form CF001 satisfied the constitutional requirements in Section 65 (1) and (2) of the Constitution of the Federal Republic of Nigeria 1999 (as
- E** amended). (Grounds 6 of the notice of appeal).
5. Whether the court below was right in faulting the trial court's endorsement of the appellant as winner of the 2015 general election and in finding instead that the 1st respondent was the duly nominated and sponsored
- F** candidate of the 2nd respondent and qualified to contest the general election. (Grounds 8 and 9 of the notice of appeal).

G Mr. T. M. Inuwa of counsel for the 3rd respondent preferred to remain neutral as the umpire.

The preliminary objection raised by the 1st and 2nd respondents have to be dealt with first before venturing further as the competence of the appeal and jurisdiction or lack thereof depend on it.

H

NOTICE OF PRELIMINARY OBJECTION

I **TAKE NOTICE** that the 1st and 2nd respondents shall raise objection as to the competence of the appellant's notice of appeal filed by the appellant on 18th February 2016 on grounds that:

The appellant's notice of appeal is incompetent and ought to be struck out.

J **GROUND UPON WHICH THE OBJECTION IS PREDICATED**

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1. **The notice of appeal filed on 18th February 2016 does not contain the addresses for service of the 1st and 2nd respondents.**

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2. **The appellant's notice of appeal was not served on the 1st and 2nd respondents personally.**

3. **Grounds 6 and 9 challenge statements or observation of the court below. They are a challenge against mere obiter dicta of the court below.**

C

4. **The notice of appeal filed on the 1st of February 2016 being the second notice of appeal is an abuse of court processes in view of the earlier notice of appeal filed on the 8th of February, 2016.**

D

5. **Ground 9 does not arise from the Judgment of the Court below.**

E Learned counsel for the 1st and 2nd respondents/objectors contended that the notice of appeal upon which the appellant's brief of argument appears to be based which was filed on 18/2/2016 and even the earlier one of 8th February 2016 did not contain the address of service of the objectors and not served on them personally.

F He referred to the **Notices of Appeal, Order 8 Rule 2 (1) of the Supreme Court Rules (Amended in 1999); National Bank of Nigeria Ltd vs. Guthrie Nig. Ltd (1993) 3 NWLR (Pt. 281) 643** etc. That the appellant's Notice of Appeal are incompetent.

G Also submitted for the objectors is that it is inappropriate for an appellant to maintain two notices of appeal to prosecute his appeal as in this case and so the second notice translates to an abuse of court process and the notice of appeal should be struck out. He cited **Dingyadi & Anor vs. INEC (2010) 18 NWLR (Pt.1224) 1 at 73 76, 122 123, 130.**

H Learned counsel for the objectors contended that Grounds 6 and 9 of the notice of appeal are based on Obiter Dicta which cannot be a ground or basis of a ground of appeal. He cited **Boothia vs. Fareast (2001) 3 MJSC 32 at 45; Achakpa vs. Nduka (2001) 9 MJSC 137 at 167.**

I That also ground 9 of the notice of appeal has no relation to the judgment of the court below and does not arise from the said judgment and so is liable to being struck out. He cited **Idika & Ors vs. Erisi & Ors (1988) 2 NWLR (Pt. 78) 563; Adebisi vs. Umar (2012) 9 NWLR (Pt.1305) 279 at 286; Olonade & Anor**

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A vs. Soweimo (2014) LPELR 22914 (SC); Atoyebi vs. Governor of Oyo State (1994) 5 NWLR (Pt.344) 296 at 305.

In response, learned counsel for the appellant stated that the appellant endorsed on his notice of appeal an address of service for the 1st and 2nd respondents which is the same as the one indicated in the 1st and 2nd respondents' notice of appeal at the court below.

That the 1st and 2nd respondents/objectors counter affidavit on appellant's application for injunction did not challenge the competence of the notice of appeal which means objectors had waived their rights in the circumstance. He referred to **NBC PLC vs. Ubani (2014) 4 NWLR (Pt.1398) 421 at 449.**

That the objectors have not suffered any miscarriage of justice nor their right to fair hearing breached in any form whatsoever. He stated that the objectors are relying on technical justice instead of substantial justice which is no longer the norm. He relied on **Uwazuruike vs. A. G. Federation (2013) 10 NWLR (Pt.1361) 105, Omoju vs. FRN (2000) 7 NWLR (Pt.1085) 38 57; Ukiri vs. Geco Prakla (Nig.) Ltd (2010) 16 NWLR (Pt. 1220) 544 at 558 etc.**

It was contended for the appellant that it was not true that Ground 9 of the notice of appeal attacked obiter dicta and not based on issue arising from the judgment of the court below.

Also that the submission on an abuse of court process relating to more than one notice of appeal is misconceived.

This preliminary objection is certainly misconceived and not borne out of the record and the earlier it is dispatched to make room for meat of the matter the better. Firstly the grouse of the 1st and 2nd respondents that the appellant had not endorsed on the notice of appeal and address of service for the 1st and 2nd respondents cannot be sustained as it is not the correct position and **Order 8 Rule 2 (1), Order 2 Rule 3 (1) (b) of the Supreme Court Rules (as amended)** is not infringed.

Also not sustained in this objection is that matter of some of the grounds not stemming from the judgment of the court below or that they were matters of obiter dicta. Indeed, by this objection, the objectors want the precious time of court utilised on mere technicalities as to whether they are insufficient to vitiate the process in limine. That clearly is not within the current trends where substantial justice has taken the pride of place and very little time given to matters pertaining to technical justice in our judicial administration. It is for that reason that what the objectors seek at this point in time and in this preliminary objection

J

- A cannot be granted therein as it is a luxury we cannot indulge in. see **Egbo vs. Agbara (1997) 1 NWLR (Pt.481) 293** at 321; **Uwazuruike vs. A.G. Federation (2013) 10 NWLR (Pt.1361) 105**; **Omoju vs. F R N (2000) 7 NWLR (Pt.1085) 38** at 57; **Ukiri vs. Geco – Prakla (Nig.) Ltd** relied upon.
- B Therefore this preliminary objection is dismissed or lacking in merit.

MAIN APPEAL

- C I shall utilize the issues as crafted by the respondents 1st and 2nd for ease of reference.

ISSUES 1, 2 & 3:

- D 1. Whether in the absence of proof of any charge, trial and or conviction of the 1st respondent for forgery as well as absence of proof of intent to use a forged document fraudulently or dishonestly as genuine, the 1st respondent could be said to have presented a forged certificate to the 3rd respondent.
- E
- F 2. Whether the court below could be faulted for rejecting appellant's reliance on National Diploma Certificate in Accountancy which he claimed the 1st respondent presented to the 3rd respondent in 2011 when no such diploma was included in the 1st respondent's INEC Form CF001 for the 2015 general election and in view of paragraph 5.2(q) of the 1st and 2nd respondents' counter-affidavit.
- G
- H 3. Whether the court below rightly refused to reply on Exhibit 'T', adduced by the appellant in his bid to establish his allegation of forgery against the 1st respondent.
- I Learned counsel for the appellant contended that the provisions of Section 66 (1) (i) of the **1999 Constitution** (as amended) and **Section 31 (2), (5) and (6) of the Electoral Act, 2010** (as amended) are clear and unambiguous and consequently should be given their ordinary meaning. He cited **A.G. Ondo State vs. A.G. Ekiti**
- J

A State (2001) 17 NWLR (Pt.743) 706 at 756; Section 135 (1) of the Evidence Act, 2011.

B That the decision of the court below not to rely on the National Diploma Certificate in Accountancy presented by 1st respondent to INEC in 2011 in determining issue of presentation of forged certificate and false declaration on oath before it on the ground that since the 1st respondent did not include the said National Diploma Certificate in Accountancy in his INEC form CF001 for the 2015 General Election, he could not be said to have committed forgery, is not a reflection of the law and the circumstances surrounding the appellant's case.

C That where a candidate in an election had in a past election presented a forged certificate to INEC, the fact that in the present election he omitted to make reference to the said forged certificate he presented in the said past election, does not prevent another person from raising the issue of the candidate's past presentation of forged certificate to INEC and the court using it to determine if he is disqualified from contesting the present election. He stated that affirming the decision of the court below on this issue, will undoubtedly lead to the destruction of the objective for which **Section 66 (1) (i)** was enacted to attain. He cited **Ojukwu vs. Obasanjo (2004) 12 NWLR (Pt. 886) 169 at 209; UTB (Nig.) Ltd vs. Ukpabia (2000) 8 NWLR (Pt. 670) 580; Adewole vs. Adesanoye (1998) 3 NWLR (Pt. 541) 175 at 198.**

F Learned counsel for the appellant contended that considering the appellant's case at the two courts below, the Court of Appeal was wrong in law to have held that the 1st respondent had lied on oath and that it must be proved beyond reasonable doubt that he presented a forged certificate to INEC with the knowledge that the said forged certificate would be used fraudulently or dishonestly as genuine.

G That by writing in his own hands that he was awarded a National Diploma Certificate in Accountancy and proceeded deliberately to swear an oath that all answers, facts and particulars he gave in his said Form CF001 are true and correct after which he proceeded to present the said National Diploma Certificate in Accountancy to INEC and the Federal Polytechnic Mubi firm denial that it awarded the 1st respondent a National Diploma Certificate in Accountancy show beyond a reasonable doubt, that the 1st respondent presented the said certificate with the knowledge that it would be used fraudulently or dishonestly as genuine.

I In response, learned counsel for the respondents 1st and 2nd submitted that the court below was right to hold that for the allegation of forgery to be sustained, the 1st respondent must have been charged, tried and convicted by a competent

A court of law and it was not enough that he obtained a National Diploma Certificate which was found to be false. That allegation of commission of forgery and perjury are serious criminal offences and where as in this case the allegation of commission of crime is made in a proceedings, the standard of proof is not less severe. That is settled law that such allegation as in criminal cases must be proved beyond reasonable doubt. He cited **Akalezi vs. The State (1993) 2 NWLR (Pt.273) 1** at 13; **Nwosu vs. The State (1998) 8 NWLR (Pt.562) 433** at 444; **Kakih vs. PDP (2014) NWLR (Pt. 1430) 374** at 423 etc.

For the 1st and 2nd respondents, it was submitted that the words of **Section 31 (5) and (6)** have shown the procedure to be followed by a party who claims that another be disqualified from contesting election on ground of forgery or perjury in documents submitted to INEC to approach the courts for a declaration that the information supplied or submitted to INEC is false failing which such a disqualification cannot be obtained. He cited **FRN vs. Osahon (2006) 5 NWLR (Pt.973) 361** at 436; **Balonwu vs. A.G. Anambra State (2009) 18 NWLR (Pt.1172) 13** at 43; **Okereke vs. Yar'Adua (2007) 12 NWLR (Pt.1100) 95** at 127 etc.

Learned counsel for the 1st and 2nd respondents contended that the presentation of the forged certificate must be related to the present election for which the presenter is vying. That the only constitutionally permitted way to prove guilt or commission of an offence is by trial and conviction by a court of law. That an election tribunal is not a competent court to declare or pronounce on any document as forged as it is the function of the regular courts. He cited **Okotie Eboh vs. Manager & Ors Vol. 3 EA.c.**

That the affidavit evidence of 1st and 2nd respondents debunked the claims of the appellant in paragraphs 8 – 23 of the depositions of the appellant in support of the originating summons and the further affidavit also strongly disputed the authenticity or genuineness of Exhibits O, P, R, A3 and A4 by which the appellant sought to establish perjury and forgery against the respondent, as well as the authority of the alleged maker of Exhibit R to make or issue. That the averments of the 1st and 2nd respondents in counter affidavit and further counter affidavit were not controverted by the appellant and so should be deemed established. He cited **Agbaje vs. Ibru foods (1972) 7 NSCC 338; Registered Trustees A.A.C. vs. Fatunde (2009) 8 NWLR (Pt.1144) 513.**

The long and short of what is in contention in the issues 1, 2 and 3 and really at the base of this appeal is on the part of the appellant that it is presentation

- A of the forged 2012 that is relevant and there is no time frame to the application of **Section 66(1) (i)** of the **1999 Constitution** (as amended) when that issue of whether or not such a presentation took place. That what is in issue is not whether the ingredients of the offence of forgery have been established beyond reasonable doubt. On the other hand, the stance of the respondents 1st and 2nd is that in the absence of proof of any charge, trial and conviction of the 1st respondent for forgery as well as absence of proof of intent to use a forged document fraudulently or dishonestly as genuine, the 1st respondent could not be said to have presented a forged certificate to the 3rd respondent.

- C I daresay a thin lie does exist between the two divergent positions, and the court below in resolving what side had the day accepted the view point of the 1st and 2nd respondents hence the recourse to this court to proffer what really along the lines of the relevant constitutional provisions and the Electoral Act stipulations is the correct stance. **Section 66 (1) (i)** of the **1999 Constitution of the Federal Republic of Nigeria** prescribes thus:

- E **Section 66 (1) (i):**

- F “No person shall be qualified for election to the Senate or the House of Representatives if
(i) He has presented a forged certificate to the Independent National Electoral Commission”.

- G Then the **Electoral Act**, 2010 (as amended) as **Section 31 (2), (5) and (6)** provides as follows:

- H **Section 31 (2), (5) and (6) of the Electoral Act, 2010 (as amended):**
“(2) The list or information submitted by each candidate shall be accompanied by an affidavit sworn to by the candidate at the High Court of a state indicating that he has fulfilled all the constitutional requirement for election into that office.
I (5) A person who has reasonable grounds to believe that any information given by a candidate in the affidavit or any document submitted by that candidate is false may file a
J suit at the High Court of a state or Federal High Court

A **against such person seeking a declaration that the information contained in the affidavit is false.**

B **(6) If the court determines that any of the information contained in the affidavit or any document submitted by that candidate is false, the court shall issue an order disqualifying the candidate from contesting the election”.**

C Taken in context therefore a consideration of **Section 66 (1) (i)** of the **1999 CFRN**, the burden placed on a person who asserts that another presented a forged certificate to INEC is to proof that the said certificate was forged and the consequent presentation to INEC of the said forged certificate. It is not difficult to agree with learned counsel for the appellant that in proof of the said presentation of the forged certificate to INEC what duty the person asserting the positive needs deal with is not the guilt of the person who made the presentation of the forged but that he made the presentation in the first place and that the proof of the certificate being forged has been made beyond reasonable doubt.

D That in simple terms is the intendment of the spirit of **Section 66 (1) (i) CFRN** and nothing more should be added to it since the words of the provision are simple, clear and unambiguous. Then to be said is that what is required is in line with the provisions of **Section 135 (1)** of the **Evidence Act, 2011** which provides thus:

E **“If the commission of a crime by a party to any proceedings is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt”.**

F The interpretation of the above Evidence Act provision was showcased in the case of **Nwobodo vs. Onoh (1984) 1 SCNLR 1** at 27 where the Supreme Court interpreted Section 137 (1) Evidence Act applicable in that instance which provisions are im pari material with the current one of **Section 135 (1)** of the **Evidence Act, 2011**. This court stated thus:

G In **Nwobodo vs. Onoh (1984) 1 SCNLR 1 at 27 Paras. C – D** it was held as follow:

H **“Specific allegations of crimes in the petition appear to be clear**

**A in that the commission of forgery, uttering and dereliction of
official duty can properly be said to be basis or foundation of
the petition. Since the respondents denied the allegations, the
B commission of crimes by parties to the petition was directly in
issue and consequently, Section 137 (1) of the Evidence Act
came into play.**

The section stipulates:

**C “137 (1): 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”.**

**D See also Wali vs. Bafarawa (2004) 16 NWLR (Pt. 989) 1 at 39 – 40 paras. C –
D.**

**E Coming down to what this court is faced with here and now, I see that what
is relevant is the presentation of a forged certificate and sworn affidavit made by
the 1st respondent in 2011. That it was at another time different from the present
circumstances does not take away the relevance of the presentation and the
application of Section 66 (1) (i) of CFRN and Section 31 (5) and (6) of the
F Electoral Act, 2010. That is to say that a presentation of a forged certificate to
INEC in the past by the 1st respondent can be raised at anytime whenever he seeks
to contest for an election and the question is put if he had ever presented a forged
certificate to INEC. To go on to answer the question in the negative the matter
G first arose in an election no longer extant is to beg the question and go outside the
spirit and wordings of Section 66 (1) (i) CFRN and Section 31 (5) and (6) of the
Electoral Act. It is a question relevant for all time and the answer when asked if
such a presentation had been made is, yes. Anything different from that answer is
H contrary to the constitutional and Electoral Act provisions and the requirements
of the law for disqualification are met. See Araka vs. Egbue (2003) 17 NWLR
(Pt.848) 1 at 21; Ugba vs. Suswam (2013) 4 NWLR (Pt.1345) 427 at 474 – 475;
Action Congress vs. INEC (2007) 12 NWLR (Pt.1048) 222 at 275 – 276.**

**I For further emphasis, what is in issue is that where in an election in the
past a candidate as in this instance had presented a forged certificate to INEC the
fact that the candidate omitted to make reference to the said forged certificate he
presented in 2011, does not prevent a contender or anyone from raising the issue**

J

- A of that candidate's past presentation of the flawed certificate to INEC and the court using it to determine the disqualification of the candidate from contesting the present election of 2015. The reason is that the stipulations of **Section 66(1)(i) CFRN** have not contemplated or envisaged that the issue of the presentation is
- B circumscribed to a particular election or period and remains relevant in perpetuity. For clarity I shall quote the question stated in the INEC form CF001 which stipulates as follows:

C **“Have you ever presented a forged certificate to INEC”?**

- It is in light of the above and the clear provisions of the Constitution and the Electoral Act that it is not difficult to see that the court below veered off the mark
- D in its interpretation of the Constitutional provisions of **Section 66 (1) (i)**. See **Ojukwu vs. Obasanjo (2004) 12 NWLR (Pt.886) 169** at 209.

It is clear that the issues 1 2 and 3 are to be resolved in favour of the appellant and I do so here and now.

E

ISSUE NO.4

- Whether the court below was wrong in observing that the 1st respondent's INEC Form CF001 satisfied the constitutional requirements in Section 65 (1) and (2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).**
- F

- Learned counsel for the appellant said the case of the appellant at both courts
- G below is not that the 1st respondent did not meet the requirements stipulated in **Section 65 (1) and (2) of the 1999 Constitution** (as amended) but that the case is that 1st respondent presented forged certificate to INEC and made a false declaration on oath in his INEC form by stating that he had never presented a
- H forged certificate to INEC. That the court must confine itself to the issue raised before it and not otherwise. He cited **Kraus Thompson Org. Ltd vs. UNICAL (2004) 9 NWLR (Pt.879) 631** at 651, **Ebba vs. Ogodo (2000) FWLR (Pt.27) 2094.9**.

- I That there was no basis to file Reply to the averments in the counter-affidavit since no new issues were raised and so it cannot be said that the deposition in the counter affidavit were unchallenged. He referred to **Unity Bank Plc vs. Bouari (2008) 7 NWLR (Pt.1086) 372** at 406 – 407.

J

A In response, learned counsel for the respondent stated that the matter of
the disqualification of the 1st respondent contrary to **Section 65 (1) and (2) of the**
Constitution was an issue before the court and so the court below was right to
rule on it. He cited **Ardo vs. Nyako (2014) All FWLR (Pt.744) 130** at 152 –
B 153; **A. G. Leventis Nig. PLC vs. Akpu (2007) 17 NWLR (Pt.1063) 416** etc.

I am at one with the submissions of learned counsel for the appellant that
the court below acted wrongly in law when it held that Exhibit 'T' which is the
judgment of the National/State Houses of Assembly Election Tribunal which
C made a finding that the 1st respondent presented a forged certificate to INEC
could not be relied upon because the 1st respondent who presented a forged
certificate to INEC was not a party to the election petition where the said
judgment emanated from when the 2nd and 3rd respondents herein were parties in
D the said election petition.

A foray into the background shows that the election petition where
Exhibit 'T' emanated from relates to the activities of the 2nd respondent in relation
to the appellant and the 1st respondent. After the 1st respondent withdrew his
E participation in the 2011 General Election as the House of Representatives
candidate of the 2nd respondent after the issue of the forged certificate emerged,
the 2nd respondent replaced the 1st respondent with the appellant. The finding in
Exhibit 'T' is an explanation or reason for that replacement done by 2nd respondent
F with appellant to the detriment of 1st respondent and the Election Tribunal ruled
that there was cogent and verifiable reason for the substitution made by the 2nd
respondent. That judgment is relevant for the purpose of the issues thrown up in
the election that led to the current appeal as Exhibit 'T', the said judgment is one in
G rem and not in personam and so binding on 1st respondent for all time. See
Ogboru vs. Ibori (2005) 13 NWLR (Pt.942) 319 at 418 – 419; **Osunrinde vs.**
Ajamogun (1992) 6 NWLR (Pt.246) 156 at 187.

H The 2nd respondent also being privy to that judgment, Exhibit 'T' cannot
now claim to be unaffected by it.

I In the light of the foregoing and the better and fuller reasoning in the lead
judgment of my lord, Sidi Dauda Bage (JSC), I see great merit in this appeal
which I also allow. I set aside the judgment of the Court of Appeal while I restore
the judgment of the trial High Court. Appeal allowed as I abide by the
consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

J

A

BATA OGUNBIYI, (JSC): I have had the privilege of reading in draft the lead judgment of my learned brother **Dauda Bage, (JSC)**. I agree that the appeal succeeds and should be allowed.

B

The genesis and the facts of this appeal are all stated comprehensively in the lead judgment. My learned brother has also done justice to this appeal by taking the bull by the horn in upturning the judgment of the lower court and restoring that of the High Court.

C

My brother has dealt adequately also with the two issues formulated in this appeal and I hereby adopt his judgment as mine. For purpose of emphasis, however, I wish to put in a word or two of mine.

D

I agree with my brother that the appeal can conveniently be determined on two issues, as against the eight issues formulated by the appellant which is a proliferation of multiple issues. My contribution in this appeal will zero on the 2nd issue which is reproduced hereunder:

E

2. Whether or not based on the finding of fact on the issue of certificate forgery the 1st respondent stands disqualified from contesting the House of Representatives election for Ado Okpokwu and Ogbadibo Federal Constituency of Benue State.

F

The appellant's case at the trial court was predicated on presentation of forged certificate and making of false declaration on oath in breach of **Section 66(1)(i)** of the **1999 Constitution** (as amended) and also **Section 31(2), (5) and (6)** of the **Electoral Act, 2010** (as amended). The reproduction of **Section 66(1)(i)** states as follows:

G

H

“No person shall be qualified for election to the Senate or the House of Representatives if

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1. HON. JUSTICE TITUS ADEWUYI OYEYEMI (RTD)
 2. CHIEF REMIALABI
 3. BARRISTER EZEKIEL OGUNJUYIGBE
 4. HON. ADEBISI GBOLAGADE
 5. ALHAJI RASAK ADEGBILE
 6. SURVEYOR AKINBOYE OGUNOLA
(CHAIRMAN AND MEMBERS OF OSUN STATE
INDEPENDENT ELECTORAL COMMISSION)
- AND
1. HON. TIMOTHY OWOEYE
(FOR AND ON BEHALF OF OTHER MEMBERS
OF THE ACTION CONGRESS IN THE
OSUN STATE HOUSE OF ASSEMBLY)
 2. OSUN STATE HOUSE OF ASSEMBLY

SC.102/2013

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

FRIDAY, 3RD MARCH 2017

BEFORE THEIR LORDSHIPS

WALTER S. NKANU ONNOGHEN	AG. CHIEF JUSTICE OF NIGERIA
MARY UKAEGO PETER-ODILI	JUSTICE, SUPREME COURT
KUMAI BAYANG AKA' AHS	JUSTICE, SUPREME COURT
EJEMBI EKO	JUSTICE, SUPREME COURT
SIDI DAUDA BAGE	JUSTICE, SUPREME COURT

ACTION: Abuse of courts' process – When occurs

ACTION: Parties – Failure to join necessary parties – Effect.

ACTION: Parties – Necessary parties – Considerations thereof.

APPEAL: Withdrawal of appeal – Filing of Notice of Withdrawal – Effect.

APPEAL: Appeal not entered at the Court of Appeal – Notice of withdrawal of appeal filed at the registry of the trial court – Propriety.

APPEAL: Appellate processes – Whether can be activated by any of the parties to the appeal.

APPEAL: Brief writing – The respondents' reply briefs identical in all respects and copied verbatim propriety.

APPEAL: Notice of withdrawal – Complaints about improper withdrawal of notice of appeal – Where ought to be decided.

APPEAL: Withdrawal of Appeal – Filing of notice of withdrawal – Effect.

CONSTITUTIONAL LAW: Right to fair hearing – S.36(1) of the Constitution of Nigeria 1999 (as amended) – Rule of fair hearing – Whether a technical doctrine.

CONSTITUTIONAL LAW: Right to fair hearing – Non-joinder of parties – Court makes orders against non-joined persons – Breach of principle of fair hearing.

COURT: Absence of necessary parties – Duty on court.

COURT: Abuse of process – Duty of court to prevent.

COURT: Adjudicatory role – Need to avoid technicalities.

COURT: Court awarded relief not specifically pleaded or claimed – Whether such relief is valid.

COURT: Court's orders – Order directed against a person not a party in the suit – Effect.

COURT: Decision of court – Perverse decision – Considerations thereof.

COURT: Judicial sanctity – Need to be preserved.

COURT: Supreme Court – Duty of Supreme Court.

EVIDENCE: Presumption of regularity – Section 168 of the Evidence Act – Import.

JUDGMENT AND ORDERS: An order of court directed against a non-party – Whether valid.

JUDGMENT AND ORDERS: Order of court – When based on submission of counsel – Propriety

JUDGMENT AND ORDERS: An order of court not specifically claimed is perverse.

JUDGMENT AND ORDERS: Consequential orders – Purpose

JUDGMENT AND ORDERS: Judgment debtor who submits to judgment – Whether can still appeal on the same judgment.

JUDGMENT AND ORDERS: Order of court made against a person not joined nor heard in the proceedings – Effect.

PRACTICE AND PROCEDURE: Court – Award of relief – Relief not specifically claimed – Relief only claimed by counsel during final address – Propriety of.

PRACTICE AND PROCEDURE: Abuse of process – Why it should be discouraged.

PRACTICE AND PROCEDURE: Filing of process and service of process – Different connotations.

PRACTICE AND PROCEDURE: Order of court – A party not joined affected by order of court – Implication.

PRACTICE AND PROCEDURE: Pleadings – Reliefs not claimed – Court awarding such reliefs – Implication.

SERVICE: Address of service not endorsed on notice of withdrawal of appeal – Whether notice is competent.

SERVICE: Service of process – Significance.

WORDS AND PHRASES: “Abuse of court process” – Meaning.

WORDS AND PHRASES: “Consequential order” – Meaning.

Issues for Determination

- “1 Whether the learned justices of the Court of Appeal were correct in upholding the decision of the trial court that the notice of withdrawal filed by the appellants against the judgment of the High Court in Suit No. HOS/M.41/2009 was not served on the claimant/respondent.**
- 2 Whether the learned justices of the Court of Appeal were right in upholding the decision of the learned trial judge that the appellants have no interest in the matter before the trial court and that the proceedings did not breach the appellants' right to fair hearing.**

Facts of the Matter

This is an appeal against the judgment of the Court of Appeal Akure Judicial Division sitting in Akure delivered on 29th November, 2012 in appeal No. CA/AK/31M/2011. The appellants had in the appeal before the Court of Appeal, appealed against the judgment of the Osun State High Court, Oshogbo Judicial Division sitting in Oshogbo in Suit No. HOS/M70/2010 delivered by Hon. Justice S.O. Falola on 3rd December, 2010. The claimant/respondent in this appeal instituted the action at the High Court against the defendant/respondent to this appeal by way of originating summons claiming five declaratory reliefs. The originating summons, and the reliefs claimed are as follows:

- 1. A declaration that the screening of chairman and members of OSSIEC during the pendency of appeal in suit No. HOS/M41/2009 is improper, incompetent, null and void and of no effect.**

2. **A declaration that the screening of the Chairman of OSSIEC during the pendency of appeal in suit No. HOS/M41/2009 is an abuse of court process.**
3. **A declaration that, taking into consideration the combine effects of Order 11 Rule 1, 2, 4 and 5 of the Court of Appeal Rules 2007, the notice of withdrawal of appeal dated the 27th day of March, 2010 can not automatically terminated the appeal filed by the appellant in this appeal. (Sic)**
4. **A declaration that the filing of an application for stay of execution of judgment delivered on 25th day of February, 2010 by the defendant against whom the judgment is given has put the judgment in abeyance until the ruling on the application for stay of judgment is delivered.**
5. **A declaration that an appeal properly filed at the High Court Registry is for onward transmission to the Court of Appeal and can not be terminated before the same High Court by merely filing a notice of withdrawal of appeal.”**

At the close of trial the trial judge delivered judgment against the defendants, whose appeal to the Court of Appeal was dismissed. This has necessitated this further appeal to the Supreme Court.

Held: *(Unanimously allowing the appeal)*

1. *A respondent may adopt or rest his position on the brief of another respondent instead of plagianism or copying verbatim.*

Let me pause to register our observation on the duplicitous briefs of the two respondents, which are similar in content and context, appearing verbatim and serialization as in the example at pages 5-9 of the arguments on issue one. This is a point to note in advocacy and brief writing. The 2nd respondent, knowing it has nothing different to canvass in its brief would at best have adopted or rested its position on that of the claimant/respondent as against seeming and obvious plagiarism. We reckon with the date of filing as against purposive dates the documents

were signed. The 1st respondent's brief is dated 24th June, 2013 while the date of the 2nd respondent's brief is 13th May 2014 and filed on 5th May 2014, almost a year after the 1st respondent's brief which it copied almost verbatim. It paints a picture of a needless, afterthought recourse of a less diligent legal officer. (*P 247 paras G–I*)

2. *The duty of the Supreme Court.*

Our duty as an apex court is to do substantial justice-stark justice, based on fairness which, to all intents and purposes, seeks to not only ensure fairness in dispensing justice, but which is manifestly seen and duly acknowledged by all and sundry as justice both in content and context.

We are not judicial technicians in the workshop of technical justice. The jurisprudence or logic of our reasoning is, and as humanly possible, would be devoid of technicalities. The need to do substantial justice and avoid delving into the era of technicalities is well settled. The principle has been rehashed in a long line of authorities, [NATIONAL REVENUE MOBILIZATION ALLOCATION AND FISCAL COMMISSION (N.R.M.A.F.C) vs. JOHNSON (2007) 49 W.R.N. Pages 169-170] where Peter Odili JCA (as he then was) opined as follows:

“...The courts have deliberately shifted away from narrow technical approach to justice which characterized some earlier decisions to now pursue the course of substantial justice. MAKERI SMELTING CO. LTD. vs ACCESS BANK OF (NIG.) PLC (2002) 7 NWLR (PT.766) 447 at 476-477]. (*P 248 paras B–F*)

3. *The courts no longer decide cases on mere technicalities.*

The attitude of the courts has since changed against deciding cases on mere technicalities.

The attitude of the courts now is that cases should always be decided, wherever possible on merit. Blunders must take place from time to time, and it is unjust to hold that because a blunder has been committed, the party blundering is to incur the penalty of not having the dispute between him and his adversary determined upon the merits. [AJAKAIYI vs. IDEHAI (1994) 8 NWLR (PT.364) 504, ARTRA IND. LTD. vs. NBCI (1997) 1 NWLR (PT.483) 574, DAKAT vs. DASHE (1997)

12 NWLR (PT.531) 46, BENSON vs. NIGERIA AGIP CO. LTD (1982) 5 S.C.1]. (P 248 paras G–J)

4. *A notice of withdrawal was filed before the fresh invitation and clearance of appellants.*
A number of points have been made that would inform our final decision on this issue. Save for disputing and denying service and non-service, the parties are ad idem that a notice of withdrawal was indeed filed dated 29th March, 2010 before the fresh invitation and clearance of appellants for conformation on March 30 2010 and fresh swearing-in by the then Governor on 1st April, 2010. (P 249 paras A–B)

5. *The cause of action of the respondents*
The cause of action of the respondents, as originally canvassed in Suit No. M.41/2009 (HON. OWOEYE vs OSUN STATE HOUSE OF ASSEMBLY) by way of originating summon was, and remained, the procedural irregularities in the initial screening of the appellants on 24th March, 2009 despite failure to present (enough) copies of their credentials contrary to the provisions of section 106 and 200 (1)(a) of the 1999 Constitution. (P 249 paras B–C)

6. *An appeal could be terminated by filing a Notice to Withdraw or discontinue.*
To effectuate this, a notice of withdrawal was filed in the registry to terminate the appeal, but the respondents insisted on being sued on the supposed, misconceived notion that a party who voluntarily opted to sheath his sword could not do so. The law is settled that an appeal could be withdrawn by filing a notice of intention to discontinue or withdraw. [DALFAM (NIG.) LTD vs. OKAKU INTERNATIONAL LTD (2001) 15 NWLR (Pt.735) 203 at 250, LENAS FIBREGLASS LTD vs. FURTODO (1997) 8 NWLR (PT. 504) 220 AT 231, ERONINI vs. IHEUKO, (1989) 2 NWLR (PT.101) 46 AT 63; (1989) 20 N.S.C.C. 503 AT 520, UNIVERSITY OF LAGOS vs AIGORO (1985) 1 SC 265 at 271 and UNIVERSITY OF LAGOS vs OLANIYAN (1985) 1 S.C.295]. (P 249 paras E–G).

7. *Filing and service of a process have different legal essence.*
Filing and service of a process have different legal essence. By filing, a party crystallizes a legal process for the attainment of specific objective in judicial proceedings. Service is intended as notice to the other party and does not vitiate a judicial process duly initiated except that the attainment of the objective might be put in abeyance without proper or valid service. [AJIBOLA vs SOGEKE (2001) 23 W.R.N. 68 at 88, SAIDU vs MAHMOOD (1998) 2 NWLR (Pt. 536) 130 at 138 and NATIONAL EMPLOYERS MUTUAL GENERAL INSURANCE ASSOCIATION LTD. vs. LADUN MARTINS (1969) 1 A.N.L.R. 469 at 473]
(P 249 paras G–I)
8. *The objective of notice of termination.*
The objective of notice of termination in the instant appeal is to voluntarily put an end to a judicial process or terminate the objective for seeking judicial remedies. A party should not be crucified for conceding defeat or bowing out of a fight, where, anticipatorily, he is set to be the loser. (P 250 para A)
9. *Any party can sustain the process of appeal.*
The claimant/respondent in this case opted to continue to fight a shadow in this case. Had the claimant/respondent herein being interested in defendant/respondent's appeal against the judgment in HOS/M41/2009 he could have followed through the process of appeal by compiling the record of appeal and transmitting same to the Court of Appeal within the time permissible in the Court of Appeal Rules and enable the Court of Appeal to assume jurisdiction rather than filing a new suit to ventilate his grievances against the procedural infraction. After all, the duty to compile record is not restricted to the person appealing but also to the respondent in an appeal. Were this step taken by the claimant/respondent in this case needless litigation would have been avoided and the issue of withdrawal of appeal would have been settled once and for all by the Court of Appeal timeously. (P 250 paras A–D)
10. *A party who brings a new action after the defendant has met his demands in the previous action may have a different intention.*
Seeking to stop further confirmation of the appellants despite

rectification of initial procedural irregularities or gaps would appear to mean that the respondents had a mission or objective different from their initial cause of action in Suit No. HOS/M41/2009, which was to ensure compliance with the conditions precedent to confirmation of the appellants. The claimant/respondent desired that the defendants/respondents should comply with the judgment of the court in Suit No. HOS/M41/2009 by remedying procedural irregularities.

It would appear inconsistent on the part of the claimant/respondent to insist that the defendants/respondents cannot voluntarily withdraw their appeal after swallowing their pride to do what the respondent had insisted must be done before their confirmation could be said to be valid. (P 250 paras D – G)

11. *Abuse of judicial process should be discouraged to avoid overburdening of the judiciary.*

Against the background of this case, it is rather amazing that claimants/respondents and defendant/respondent who were adversaries in HOS/M41/2009 in their briefs before this court maintained the same position and insisted in a rather contradictory manner, that the appellants could still not be confirmed and/or sworn-in as did on 30th March and 1st April by the House of Assembly and the then Governor of Osun State respectively. This is the misconceived basis for which another action (Suit HOS/M.70/2010) was instituted. This patently is a reckless abuse of judicial process that should be discouraged to avoid needless overburdening of the already burdened judiciary. The courts have opined severally and unambiguously on what constitutes an abuse of process (authorities or abuse of court processes) (P 250 paras G – J).

12. *The Supreme Court cannot encourage litigants to take Judicial sanctity for granted.*

The respondents, particularly the claimant/respondent, would want us to join him on the misguided frolic of assumption that the later suit, M.70/2010 became inevitable as the appellants had blundered by withdrawing the appeal against the earlier suit without ensuring service. Clearly, we cannot sit on this side of the hall and encourage litigants to take judicial sanctity for granted. The existence of a suit on appeal, and the fact that the claimant/respondent had earlier objected to the non-

service of notice of withdrawal on him shows that issues had been joined. The logic of judicial sanctity dictates that the earlier suit and its appeal ought to be rested and decided one way or the other including whether or not the appeal was validly withdrawn. By instituting another action which embodies the issues as in the earlier action on appeal makes the later manifestly an unpardonable abuse of court process.

(P 251 paras A–D)

13. *The meaning of abuse of court's process*

This court has succinctly enunciated in NTUKS VS NPA (2007) 13 NWLR (Pt.105) at pages 392 on the meaning of abuse of Court process and held that:

“Abuse of court process generally means that a party in litigation takes a most irregular, unusual and precipitate action in the judicial process for the sake of action qua litigation, merely to waste valuable litigation time. It is an action that is one or more too many, an action that could be avoided by the party without doing any harm to the matter in dispute. The process of the court is used merely to overreach the adversary to the direct annoyance of the court. The court process is initiated with malice or in some premeditated or organized vendetta, aimed at frustrating either the quick disposal of the matter or the abatement of the matter for no good cause. The court process could also be said to be abused where there is no iota of law supporting it. In other words, the court process is premised or founded on frivolity or recklessness.” *(P 251 paras D–H)*

Per Tobi, J.S.C.

14. *The court has a duty to put an end to a suit that constitutes an abuse*

In CHIEF VICTOR UMEH & ANOR vs PROFESSOR MAURICE IWU & ORS (2008) Vol. 41 WRN 1 at 18 lines 5-10 (SC) this court enunciated on what abuse of process connotes and attitude of courts to suit filed in abuse of process thus:

“It is settled law that generally, abuse of process contemplates multiplicity of suits between the same parties in regard to the same subject matter and on the same issue. See OGOEJEOFO vs OGOEJEOFO (2006) 3 NWLR (Pt.996) 205 and OKAFOR vs ATTORNEY-GENERAL OF ANAMBRA STATE (2001) 7 WRN 77; (2001) FWLR (Pt.58) 1127; (1991) 6 NWLR (Pt.200) 659; (1991) 9-10 SCNJ 107.

The bottom line of these authorities in regard to abuse of process is that, to institute an action during the pendency of another suit claiming the same relief is an abuse of court process and the only course open to the Court is to put an end to the suit.

Per Chukwuma Eneh and Onnoghen, JSC.”

The act of filing another suit by the respondent in Suit No. M.70/2010 is reprehensible. If strongly aggrieved, a conscionable litigant in an assumed ongoing appeal arising from a similar Suit (HOS/M41/2009) would have, through counsel, pursued the appeal as earlier stated and make the issue of non-service a distinctive ground and seek relief(s) to set aside the proceedings of 30th March and 1st April by the House of Assembly and the then Governor of Osun State respectively. Not doing so makes the new suit unnecessary and unconscionable. Put differently, filing another suit while the validity or otherwise of the withdrawal of the appeal was pending amounted to cherry-picking. The respondents, by so doing, have constituted themselves into judicial nuisances by assuming that withdrawal of the appeal filed against Suit No. HOS/M.41/2009 was invalid and that the best way to vent their misgivings was to file yet another action, Suit No. HOS/M.70/2010. (Pp 251–252 para I–H)

15. *Where appeal has not been entered at the Court of Appeal, a Notice of withdrawal can be effectively filed at the lower court.*

Since appeal had not been entered at the Court of Appeal at the time of filing the notice of withdrawal, the filing of same at the lower court clearly and effectively puts an end to the appeal. The decisions in EZOMO vs ATTORNEY-GENERAL BENDEL (1986) 4 NWLR (Pt.36) and GOVERNING COUNCIL OF ITF vs CHIJOKE (1998) 3 NWLR (Pt.540) 170 are applicable and are hereby applied. (P 252 Paras H–J)

16. *Failure to join the appellants in the suits of respondents breached their right to fair hearing*

The right of the appellants to enjoy this constitutionally guaranteed right is primary, and cannot be ignored by any court in assuming jurisdiction to make judicial orders or other forms of adjudicatory determinations without joining them as parties. Doing so will vitiate the entire proceedings as in the instant appeal.

The right to fair hearing is well established and entrenched in our constitutional jurisprudence and indeed enjoys universal appeal and application in view of its constitutional and fundamental importance. Indeed Section 36(4) CFRN 2011 (as amended) clearly embodies two traditional maxims to wit: *audi alterem par tem* (the other party must be heard) as held in the locus *classicus* of R vs THE UNIVERSITY OF CAMBRIDGE (1723) S.128 and *nemo judex in causa sua* (a person shall not be a judge in his own case. [GARBA & ORS. vs. THE UNIVERSITY OF MAIDUGURI (1986) 2 S.C. 128.

They were necessary parties in the two suites who ought to be joined before any order affecting their interest could be made. [Green vs. Green (1987) 3 NWLR (Pt.61) 480; O. K. Contact Point vs. Progress Bank (1999) 5 NWLR (Pt.604) 631]. When proper parties are not before the court, such that those who may be affected by the orders of the court are not before it, the proper course a court must follow is to direct that all persons interested or likely to be affected by the results are brought before it. [Mozie vs. Mbamalu (2006) 15 NWLR (Pt.1003) 466].

The suit of the claimant/respondent was not just to challenge the internal proceedings of the defendant/respondent but the effect of it (as it ultimately turned out) was to deprive the appellants of their established right as members of OSSIEC. (Pp 254; 270 paras A–D; G–I)

17. *Appellant have sufficient interest to have been joined as parties.*

It is abundantly clear that Suit No. HOS/70/2010 was a protest suit of the respondent against seeming improper withdrawal by the appellants of the appeal against the earlier Suit No. HOS/M.41/2009. As at 30th March, 2010 the appellants had been re-screened and reconfirmed. They were also sworn-in by the then Governor of Osun State on 1st April, 2010. Assuming the latter acts of fresh confirmation and swearing-in were wrong and improper, putatively, their right and interests as chairman,

members and secretary of OSSIEC is in issue and at stake. Therefore, logic or common reasoning would ordinary dictate, or ought to have dictated that, beyond woolly misconception or political desperation; no reasonable reliefs could be sought or granted without joining them as parties. (P 254 paras D–F)

18. Appellants were not given fair hearing.

Section 36(1) of the 1999 Constitution (as amended) stipulates that where the right or obligation of a person is in question and is to be determined by a court or tribunal he is entitled to be heard for it is an immutable principle of natural justice that no one is to be condemned unheard. A court is duty-bound to adjudicate between the parties on the basis of the claim formulated by them. The question of granting a relief not specifically claimed is not an issue which depends on the discretionary power of a trial court. The court must hear the views of the parties before making an order different from the one claimed. [Ekpenyong vs. Nyong (1975) 2 SC 71; Ajayi vs. Texaco Nig. Ltd (1978) 9-10 SC 1; A-G Anambra State vs. Okafor (1992) 2 NWLR (Pt.224) 396; Makanjuola vs. Balogun (1989) 3 NWLR (Pt.108) 192; Olurotimi vs. Ige (1993) 8 NWLR (Pt.311) 25; Abbas vs. Solomon (2001) 15 NWLR (Pt.735) 144; Korede vs. Adedokun (2001) 15 NWLR (Pt.736) 483; Akinterinwa vs. Oladunjoye (2000) 6 NWLR (Pt.659) 92; Osuji vs. Ekeocha (2009) 16 NWLR (Pt.1166) 81] (Pp 270–271 paras I–D)

19. It is wrong not to join a party who is expected to comply with the court's order.
Refusal to join them as interested parties while expecting them to comply with the judgment to cease functioning in such capacities is, to say the least, overly presumptive and judicially wrong.

It is our considered opinion, following a line of settled principles of law and decided authorities, that appellants are persons interested in the suit and ought to have been joined as necessary parties by the trial court because all the reliefs being sought are directed at the right and interest of the appellants. [GREEN vs GREEN (SUPRA)] (P 254 paras F–H)

20. An order made against a person that is not made a party to the suit is a nullity.
The effect of order(s) made against person not joined as a party is that such order is a nullity and of no effect. In our view, counsel to the

appellants was right to have submitted at pages 12 and 13 of his brief of arguments, that where persons who ought to be joined to the suit had orders made against them by the trial judge, such proceedings ought to be a nullity, being a denial of the appellants' right to fair hearing. [OVUNWO & ANOR vs WOKO & ORS (2011) 7 SCM 207 at 231-232 and NURTW 7 ANOR vs RTEAN & ANOR (2012) 3 SCM 171 at 178-179].

Dissolution of the OSSIEC and order directing the appellants to vacate office raise a presumption that OSSIEC had prior been constituted and that the appellant are or were occupying the offices sought to be vacated. (P 256 paras A–D)

21. *There is a presumption of regularity in favour of the appellants.*
As held above, it certainly cannot be the case that having been screened and sworn-in, adverse orders would be made against the appellants without being heard. Assuming without conceding that the appointment and/or confirmation of the appellants is voidable, it remains valid until otherwise set aside by the Osun State House of Assembly or a court of law. This is particularly so as there is a legal presumption of regularity in favour of the appellants pursuant to Section 168 of the Evidence Act. It states:

“168. Presumptions of regularity and of deeds to complete title.

(1) When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for the validity were complied with.

(2) When it is shown that any person acted in a public capacity, it is presumed that he had been duly appointed and were entitled so to act.

(3) XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

(4) XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

(P 256 paras D–H)

22. *A court cannot properly make an order based on oral submission of counsel and without evidence.*

Per BAGE (JSC):

“It is also painfully discovered that the claimant/respondent did not specifically ask for an order dissolving OSSIEC or for the appellants to vacate offices in OSSIEC. The request was made in the final address by way of reply on points of law on page 29 of the record as follows:

“We submit with respect that the mere filing of notice of appeal cannot be used to terminate this appeal. Consequently, we hereby apply for the consequential order nullifying the appointment of the chairman and members of OSSIEC and thereby dissolving OSSIEC as presently constituted. Being null and void.”

This far reaching relief, in our opinion was wrongly granted by the trial court and improperly upheld by the Court of Appeal as it did at pages 359-360 of the record, to the effect that:

“The simple answer to the agitation of the appellants in this issue is that the court did not need the prompting of counsel to enter a consequential order which the immediately preceding issues, the order, now being complained against, was consequential or incidental to the declaration of the validity of the procedure adopted by the defendant/ respondent. It was, thus a proper order to give effect to its declaration that:

“The House of Assembly is a creation of law and should be reminded constantly on (sic) the need to follow the law. As I said earlier, the issues in dispute were still live questions in court any step taken by the House of Assembly at least before that date is illegal, null and void.”.

The law is settled that, no matter the length and logic, submissions of counsel cannot substitute for pleadings or hard evidence. CALABAR CENTRAL CO-OPERATIVE THRIFT AND CREDIT SOCIETY LIMITED & 2 ORS vs BASSEY EKPONG EKPO (2008) 25 WRN 1; (2008) 1-2 SC.229; (2008) 6 NWLR (Pt.1083) 362. According to Ogundare, JSC:

“Arguments of counsel, however brilliant is no substitute for the pleadings and evidence in proof of same and therefore go to no issue”.

In consequence, therefore, (and without making unsolicited consequential orders), the effect of the order of dissolution and vacation of office is far reaching, and, in our considered view, should have been specifically pleaded. Not doing so means: (1) order dissolving OSSIEC and (2) order directing the appellants to vacate their offices, are both not appurtenant to the main order. Both are hereby nullified not having been specifically sought by the claimant/respondent”.

(Pp 256–257; 258 paras H–I; B–D)

23. *Reliefs are not sought in the counsel's address or summation.*

At the risk of repetition, the 1st respondent did not, in the originating summons, seek any orders for dissolution of OSSIEC and immediate vacation from their offices in the OSSIEC by the Appellants who were the incumbent chairman, members and secretary of OSSIEC. The request for those orders, without the amendment of the originating summons, came in only at the stage of reply on points of law when the defence no longer had the right of reply. Reliefs are not sought in the counsel's address or summation. They must be pleaded and served for the defence to respond to it. An address of courses in not, and cannot be, substitute for pleading. [AYANWOLE vs. ODUSAMI (2011) 11 – 12 SCM (Pt.2) 39; GMB vs. DOSUNMU (2010) 6 SCM 88 at 103-104].

In any case, it is only against the parties in the suit that such reliefs can be directed in the pleadings. (P 275 paras E–H)

24. *Orders made against the appellants ought to have been specifically claimed.*

The right vested in the appellants cannot be taken away or determined in the suits filed by the claimant/respondent against the defendants/respondents after it became vested on the appellants. They must be made parties to the suit or be given opportunity to be heard. The orders made by the learned trial judge and held by the justices of the Court of Appeal were specific reliefs and they encompassed more issues than the matter of procedure of conducting screening. As such they ought to have been

specifically claimed with the proper and necessary parties joined in the action before they could be granted. The only reason which could make a person a party to an action is that he should be bound by the result of the action. [Babayeju vs. Ashamu (1998) 9 NWLR (Pt.567) 546] (P 271 paras F–H)

25. *Appellants are to be treated as retiring appointees*

In the final analysis, we pause to anticipate what in essence, will be or is the real (sweet) fruit of the labour of the Appellants in travelling the long, tortuous and expensive journeys of pursuing judicial remedies from trial Court to the Supreme Court. Assuming the appellants had remained in office, their tenure would have ended by now, regrettably.

However, as a court of law, justice and policy, it is our considered view that the appellants would appear to have lost most, despite gaining all in judicial victory. The justice of this appeal would, in our thinking, be better served by treating the appellants as retiring appointees for the purpose of enabling them to be paid their salaries and severance package(s) applicable to the current occupants of those offices as at the date of this judgment. (P 258 paras D–F)

26. *Appellants were denied fair hearing.*

From the reliefs granted the respondents supra, it is very clear that the interests of the appellants were directly affected by that judgment though they were not made parties in the action. The judgment therefore clearly infringed their right of fair hearing constitutionally guaranteed by the Constitution of the Federal Republic of Nigeria, 1999, as amended, (hereinafter referred to as the 1999 Constitution as amended). See section 36(1) etc thereof. The lower court was therefore in error in holding that appellants, were not necessary parties even when the trial court held thus:

“In effect, the Osun State Independent Electoral Commission is hereby dissolved, having been constituted illegally! The chairman, members and secretary of the Commission shall vacate office forthwith.”

Funny enough, appellants are the people the trial court's above order is directed at in absentia!! Is it not good common sense that you cannot cut a

man's hair in his absence? In the circumstance, it is clear that the above decision, in so far as it affected, adversely, the right of appellant's without being heard is a nullity and that the lower court was in grave error when it affirmed same. (P 260 paras B–F).

27. *The rule of fair hearing is not a technical doctrine.*

It was held in *Kotoye vs. CBN* (1989) 1 NWLR (Pt.98) 419 that the rule of fair hearing is not a technical doctrine but a rule of substance and the question is not whether injustice has been done because of lack of hearing but whether a party entitled to be heard before a decision had in fact been given an opportunity of hearing. Thus once an appellate court comes to a conclusion that a party was entitled to be heard before a decision was reached but was not given the opportunity of a hearing the decision is liable to be set aside.

The learned trial judge played Father Christmas in ordering the dissolution of OSSIEC and making the appellants to vacate their offices as chairman and members of OSSIEC without the claimant/respondent asking for that specific relief. The decision of the Court of Appeal which affirmed the dissolution of OSSIEC and asking the chairman and members to vacate their offices without affording them any hearing is perverse and must be set aside. (P 271 paras D–E; I–J)

28. *Meaning of a consequential order.*

A consequential order is an appurtenant to the main or principal relief or order sought.

In *EAGLE SUPER PACK (NIG.) LTD. vs. A.C.B.* (2006) 19 NWLR (Pt.1013) 20, it was held that where the claim was for refund in Naira currency, an order made for refund in U.S. Dollars could not be a consequential order.

A consequential order is one made to give effect to the judgment which it follows. It does not come from the blues as the two made gratuitously, and capriciously too, by the trial court. The incidence of consequential order is not an occasion or pretext for the trial court to enter into the arena to deliver punches on one of the parties in the contest before it to the obvious disadvantage of the other. The drawing up of consequential order should not make the judge violate the injunction on

him to remain independent and impartial in terms of Section 36(1) of the 1999 Constitution. Neither should he shred the plague before him reminding him that, in his business, the rule *I nemo judex in causa sua*.

In the instant matter both pillars of fair hearing – *audi alteram partem* (give the other party an opportunity) to be heard) and *nemo judex in causa sua* (judge should be impartial and not be a judge in his own cause) were all violated by the trial court. The court below, therefore, was wrong to have affirmed the judgment, as it did.

(Pp 275–276 paras D–E; H–B)

29. *A judgment debtor can submit to a judgment he is appealing.*
Nothing in law prohibits a judgment debtor from submitting to the judgment against him, which he is appealing against. In principle, I agree with the court below, where in its judgment at page 345 of the Records, it stated that:

“it is reprehensible conduct for any party to – appeal, pending in court, to attempt to take the law into his hands without any specific order of court and to do any act which would pre-empt the result of the action”.

The peculiar facts of this case, however, do not justify the application of this sound rule of law and prudence. A party who submits to the judgment against him and has taken steps to comply with the judgment, which he had earlier filed notice of appeal against, is in my view law abiding who should be encouraged and commended, rather than vilified.

(P 276 paras C–G)

30. *Notice filed without address for service is defective*
The first defect in the notice to withdraw is that there was no address on the said notice of the respondent in that appeal. This defect is fundamental.

Order 2 Rule 3 of the Court of Appeal rules, 2007, provides, without ambiguity:

“3. Where under these rules, *any notice* or other process is required to have an address for service endorsed on it, *it*

shall not be deemed to have been properly filed unless such address has been endorsed on it”.

The instant notice of withdrawal of the subsisting appeal had no address endorsed on it for service on the respondent in the appeal. The notice is therefore impotent, as submitted by the 1st respondent.

Order 11 Rules 1, 2, 4 and 5 of the 2007 Rules of the Court of Appeal have the following active components/requirements necessary to effectuate a valid notice to withdraw appeal, viz:

- “(1) The notice must be filed before the appeal is called on for hearing. [Not relevant for this appeal].**
- (2) The notice shall be filed with the registrar of the Court of Appeal [“Registrar” defined by Order Rule 5 is the Registrar of the Court of Appeal, and not the registrar of the High Court or the court from where the appeal emanates].**
- (3) The notice shall/must be served on all parties, particularly the respondent in the appeal”.**

The service of the notice of withdrawal on the respondent in the appeal, being imperative, the address for service on the respondent of the notice of withdrawal of appeal shall/must be on the notice, failing which the notice of withdrawal of appeal is incompetent and a non-starter by dint of Order 2 Rule 3 of the Court of Appeal Rules.

The court below, on this issue of the notice of withdrawal being incompetent, was right in holding that:

“it is only where a notice of withdrawal had been filed and served on the respondent that the appeal in question is deemed, automatically, dismissed”.

(Pp 276–277 paras H–H)

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A-G Anambra State vs. Okafor (1992) 2 NWLR (Pt. 224) 396

Ajakiye vs. Idehia (1994) 8 NWLR (PT.364) 504
Ajayi vs. Texaco Nig. Ltd (1978) 9-10 SC 1
AJIBOLA vs. SOGEKE (2001) 23 W.R.N. 68
Akinterinwa vs. Oladunjoye (2000) 6 NWLR (Pt.659) 92
Anyanwoko vs. Okoye & Ors (2010) 1 SCM21
Artra Ind. Ltd. vs. NBCI (1997) 1 NWLR (PT.483) 574
Ayanwale vs. Odusami (2011) 11 – 12 (Pt.1) SCM39
Babayehu vs. Ashamu (1998) 9 NWLR (Pt.567) 546.
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Dakat vs Dashe (1997) 12 NWLR (PT.531) 46;
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Ekenyong vs. Nyong (1975) 2 SC 71;
Eronini vs. Ihenko (1989) 2 NWLR (PT.101) 56; (1989) 20 N.S.C.C. 503;
Ezomo vs. Attorney-General Bendel State (1986) 4 NWLR (Pt.36);
Fiscal Commission (N.R.M.A.F.C) vs. Johnson (2007) 49 W.R.N. pages 169-170;
Garba & Ors. vs. The University of Maiduguri (1986) 2 S.C. 128;
GMB vs. Dosunmu (2010) 6 SCM88;
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Lenas Fibreglass Ltd vs. Furtodo (1997) 8 NWLR (PT. 504) 220;
Makanjuola vs. Balogun (1989) 3 NWLR (Pt.108) 192
Olurotimi vs. Ige (1993) 8 NWLR (Pt.311) 25;
Makeri Smelting Co. Ltd. vs. Access Bank (Nig.) PLC (2002) 7 NWLR (PT.766) 447;
Momoh vs. Umoru (2011) 6 SCM99 at 126;
Mozie vs. Mbamalu (2006) 15 NWLR (Pt.1003) 466;
Mutual General Insurance Association Ltd. vs. Ladun Martins (1969) 1 A.N.L.R. 469;
Ntuks vs. NPA (2007) 13 NWLR (Pt.1051) at page 392;
NURTW & Anor vs. RTEAN & Ors (2012) 3 SCM171;
O. K. Contact Point vs. Progress Bank (1999) 5 NWLR (Pt.604) 631;
Ogoejeofa vs. Ogoejeofa (2006) 3 NWLR (Pt.996) 205;

- A** *Okafor vs. Attorney-General of Anambra State* (2001) 7 WRN 77; (2001) FWLR (Pt.58); 1127; (1991) 6 NWLR (Pt.200) 659; (1991) 9-10 SCNJ 107;
Olufeagba vs. Abdul-Raheem (2009) 18 NWLR (Pt.1173) 384;
Onyejekwe vs. Enweonwu (2010) 4 NWLR (Pt.1185) 447;
- B** *Osuji vs. Ekeocha* (2009) 16 NWLR (Pt.1166) 81;
Ovunwo & Anor vs. Woke & Ors (2011) 7 SCM 207;
Rossek vs. ACB (1993) 10 SCNJ 20;
Saidu vs. Mahmood (1998) 2 NWLR (Pt. 536) 130;
- C** *Tanko vs. UBA* (2010) 11 SCM 199 at 212;
Togun vs. Oputa (2001) 16 NWLR (Pt. 940) at page 585;
University of Lagos vs. Aigoro (1985) 1 SC 265;
University Of Lagos vs. Olaniyan (1985) 1 S.C.295; and
- D** *Victino Fixed Odds Ltd vs. Ojo & Ors* (2010) 4 SCM 122

Foreign case cited in this Judgment

R vs The University of Cambridge (1723) S.128;

E

Nigerian Statute cited in this Judgment

Constitution of the Federal Republic of Nigeria 1999 (as amended)
Court of Appeal Rules, 2007.

F

Representations:

S.K. Olowosolagba (Esq.) - *for the Appellants.*

A.A. Folabi with T.Adegboyega, K. Alimi- *for 1st and 2nd Respondents.*

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BAGE (JSC) (Delivering the Lead Judgment): This is an appeal against the judgment of the Court of Appeal Akure Judicial Division, sitting in Akure delivered on 29th November, 2012 in appeal No. CA/AK/31M/2011. The

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appellants had in the appeal before the Court of Appeal, appealed against the judgment of the Osun State High Court, Oshogbo Judicial Division sitting in Oshogbo in Suit No. HOS/M70/2010 delivered by Hon. Justice S.O. Falola on 3rd December, 2010. The claimant/respondent in this appeal instituted the action at

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the High Court against the defendant/respondent to this appeal by way of originating summons claiming five declaratory reliefs. The originating summons, and the reliefs claimed are as follows:

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A ORIGINATING SUMMONS

“LET THE DEFENDANT within forty two days after the service of this summons on him inclusive of the day of such service cause an appearance to be entered for him to this summons which is issued upon the application of the claimant of Osun State House of Assembly quarters, Osogbo for the determination of the following questions:

- B 1. Whether the screening of the chairman and members of**
- C OSSIEC during the pendency of appeal in Suit No. HOS/M41/2009 is not improper, incompetent, null and of no effect.**
- D 2. Whether the screening of the chairman and members of**
- E OSSIEC during the pendency of appeal in Suit No. HOS/M41/2009 is not an abuse of court.**
- F 3. Whether taking into consideration the combined Order 11 Rules 1, 2, 4, and 5 of the Court of Appeal Rules, 2007, the notice of withdrawal dated the 27th day of March, 2010 automatically terminated the appeal filed by the appellant in this case. (Sic).**
- G 4. Whether the filing of a stay of execution of a Judgment by a party against whom the judgment is given has not put the judgment in abeyance until the ruling on the application is delivered.**
- H 5. Whether an appeal properly filed at the High Court registry is for onward transmission to the Court of Appeal and could be properly terminated at the same High Court Registry by mere filing a notice of withdrawal of Appeal.**

I

WHERE OF the plaintiff claims as follows:

- J 1. A declaration that the screening of chairman and members of OSSIEC during the pendency of appeal in suit No. HOS/M41/2009 is improper, incompetent, null**

A and void and of no effect.

B

2. A declaration that the screening of the chairman of OSSIEC during the pendency of appeal in suit No. HOS/M41/2009 is an abuse of court process.

C 3. A declaration that, taking into consideration the combine effects of Order 11 Rule 1, 2, 4 and 5 of the Court of Appeal Rules 2007, the notice of withdrawal of appeal dated the 27th day of March, 2010 can not automatically terminated the appeal filed by the Appellant in this appeal. (Sic)

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4. A declaration that the filing of an application for stay of execution of judgment delivered on 25th day of February, 2010 by the defendant against whom the judgment is given has put the judgment in abeyance until the ruling on the application for stay of judgment is delivered.

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**F 5. A declaration that an appeal properly filed at the High
 Court Registry is for onward transmission to the Court
 of Appeal and can not be terminated before the same
 High Court by merely filing a notice of withdrawal of
G appeal.”**

G

SUMMARY OF FACTS

H In the early part of March 2009, the Executive Governor of Osun State appointed the **first** to the **sixth** appellants as chairman, secretary and members respectively of the Osun State Independent Electoral Commission (OSSIEC). The list was transmitted to the Osun State House of Assembly (OSHA), who are the defendants/respondents, for confirmation.

I On 24/3/2009, the appellants appeared before the Osun State House of
Assembly (the defendants/respondents) for screening for the constitutional
purpose of confirmation of their appointments. The appellants supplied their
respective curriculum vitae within a relatively short notice. Only two of the
J appellants submitted their credentials together with the Curriculum Vitae for

A screening and confirmation to Osun State House of Assembly. The claimant/respondent maintained that without the submission of credentials by all the appellants, the allied issue of **Screening** and **Confirmation** should not hold. That position was over-ruled by the majority and by majority votes of its members, the OSHA (the defendants/respondents) confirmed the appointments of the appellants. The Governor proceeded to swear in the appellants on April 3rd, 2009, as chairman, secretary and members of OSSIEC respectively.

The claimant/respondent and some members of Action Congress in OSHA were dissatisfied with the procedure followed in confirming the appellants. The claimant/respondent thereafter commenced an action by way of originating summons before the Osogbo High Court in Suit No. HOS/M41/2009 **HON. TIMOTHY & ORS vs. OSUN STATE HOUSE OF ASSEMBLY**. The claimants sought for five declaratory reliefs. The defendant/respondent filed a defence. The trial Court Osogbo State High Court sitting at Osogbo delivered its judgment on 25/2/2010, granting the reliefs as claimed. In other words, judgment was in favour of claimant/respondent.

E Unfavoured and aggrieved by the Osun High Court judgment (under the Superintendence of Hon. Justice S.O. Falola), the defendant/respondent, the OSHA, appealed to the Court of Appeal, Akure Division. The defendant/respondent also applied for Order of stay of execution of the High Court's judgment which was later abandoned. The application of stay of execution was sought before the High Court itself. In a rather dramatic twist of events, the defendant/respondent followed its **Application for stay of execution** with a notice of **withdrawal** of the appeal and subsequently issued forth fresh invitations to the already "Sworn-in" members of OSSIEC for fresh screening and confirmation exercise. On 30/3/2010, the defendant/respondent, by majority vote, confirmed the appointment of the appellants. The Governor of the State swore them for the second time on 1/4/2010. There was, as it were, a clear re-think by the defendant/respondent as to the legality or propriety of its earlier actions.

The claimant/1st respondent sought to contest the new position and action of the defendant/respondent by instituting **another** suit of the High Court, Osogbo **SUIT NO. HOS/M.70/2010 HON. JUSTICE TIMOTHY OWOEYE vs. OSUN STATE HOUSE OF ASSEMBLY**.

In the new suit he contested the legal validity of the **Notice of Withdrawal** of the appeal against the Judgment of the Osun High Court, Osogbo, **SUIT NO. HOS M.41/2009**. He averred that the said notice was

- A** technically incapable of terminating the appeal because it was incompetent for want of service. He contended that both the appeal and application for stay of execution were still valid and subsisting. Accordingly (and consequently), he argued that the new screening and re-confirmation were **irregular** and
- B** constituted an abuse of court process.

- The Osun State High Court, Osogbo, agreed with the claimant/respondent and accordingly **invalidated** the said **Notice of withdrawal** and **granted all reliefs claimed** by the claimant/respondent. The Osun High Court
- C** made a further order dissolving the OSSIEC and directed the appellants in the case before us to vacate their respective offices.

- It is noteworthy at this juncture that the appellants are not parties at the trial court. It was after trial court's judgment that they sought leave of the lower
- D** court to lodge an appeal against the said judgment as interested parties before it. The appellants proceeded on appeal to the Court of Appeal, Akure, Judicial Division. They presented **Six Grounds of Appeal** and formulated six issues therefore for the determination of the appeal.

- E** The Court of Appeal resolved all six issues presented before it against the appellants. It dismissed their appeal in its judgment of 29/11/2012.

- The appellants were dissatisfied with the Court of Appeal's decision and accordingly filed a notice of appeal before this court containing three (3)
- F** Grounds of Appeal. Each of these Grounds is supported by a number of details (or particulars) to explain the respective arguments. Three (3) forms of reliefs are being sought before this court by the appellants. The appellants' brief of argument raises four (4) issues for determination by this court. Arguments and
- G** submission are equally articulated respecting the issues.

ISSUES FOR DETERMINATION

- H** "The appellants humbly submit the following issues for determination of this appeal.

- I** (1) **Whether the learned justices of the Court of Appeal were right in upholding the decision of the learned trial judge on the ground that the notice of withdrawal of appeal filed by the defendant/respondent against the judgment of the High Court in suit No. HOS/M.41/2009 HON. TIMOTHY OWOEYE vs. OSUN STATE HOUSE OF**
- J** **ASSEMBLY was not served on the claimant/**

A respondent.

(Relate to Ground 1 of the Grounds of Appeal)

**B (2) Whether the learned justices of the Court of Appeal were
C right in their decision that the appellants have no interest
 in the matter of the suit before trial court and that the
 proceeding is not a breach of the appellants right to fair
 hearing.**

(Relate to Ground 2 of the Grounds of Appeal)

**D (3) Whether the learned justices of the Court of Appeal were
 right in upholding the decision of the trial court
 dissolving OSSIEC on the basis that the screening and
E confirmation exercise cannot be done when the
 defendant/respondent's appeal against the Judgment in
 suit No. HOS/M.41/2009 is still pending.**

(Relate to Ground 3 of the Grounds of Appeal)

**F (4) Whether the order dissolving OSSIEC and ordering the
 appellants to vacate office made by the learned trial
 judge and upheld by the Court of Appeal can
G appropriately be qualified as a consequential order in
 view of the circumstances of this case.**

(Relate to Ground 4 of the Grounds of Appeal)

H In his brief of argument and oral presentation before this court, learned counsel to the 1st and 2nd respondents aligned with and adopted the issue for determination as formulated by the appellants.

I After a careful perusal of the four (4) issues proposed by the learned counsel for the appellant, which the 1st and 2nd respondents adopted *mutatis mutandis*, in the opinion of this court, only two main issues arise for the just determination of this appeal. The said issues capture all the grounds of the
J appeal. The two (2) issues are as follows:

A “1) Whether the learned justices of the Court of Appeal were correct in upholding the decision of the trial court that the notice of withdrawal filed by the appellants against the judgment of the High Court in Suit No. HOS/M.41/2009 was not served on the claimant/respondent.

B 2) Whether the learned justices of the Court of Appeal were right in upholding the decision of the learned trial judge that the appellants have no interest in the matter before the trial court and that the proceedings did not breach the appellants' right to fair hearing.

D

ISSUE 1

E Whether or not the learned Justices of the Court of Appeal were correct in upholding the decision of the trial court that the notice of withdrawal filed by the appellants against the judgment of the High Court in Suit No. HOS/M.41/2009 was not served on the claimant/respondent.”

F The gravamen of the submission of learned counsel to the claimant/respondent and the 2nd respondent respectively placed before us at pages 5-9 of the two respondents briefs on issue 1 is that, the notice of withdrawal of the appeal filed by the appellants under Order 11 Rule 1 dated 29th March, 2010 was not a valid withdrawal due to non-service.

G Let me pause to register our observation on the duplicitous briefs of the two respondents, which are similar in content and context, appearing verbatim and serialization as in the example of pages 5-9 of the arguments on issue one.

H This is a point to note in advocacy and brief writing. The 2nd respondent, knowing it has nothing different to canvass in its brief would at best have adopted or rested its position on that of the claimant/respondent as against seeming and obvious plagiarism. We reckon with the date of filing as against purposive dates the documents were signed. The 1st respondent's brief is dated 24th June, 2013 while the date of the 2nd respondent's brief is 13th May 2014 and filed on 5th May 2014, almost a year after the 1st respondent's brief which it copied almost verbatim. It paints a picture of a needless, afterthought recourse of a less diligent legal officer.

J That said, the flip side of the argument on issue 1 is laid-out at pages 6-9 of

A the appellants' brief of arguments. In essence, counsel contend that the issue of non-service of the notice of withdrawal could have been made an issue at the Court of Appeal.

B Those are the divergences of the positions of the appellants and respondents as far as issue 1 is concerned. Our duty as an apex court is to do substantial justice-stark justice, based on fairness which, to all intent and purposes, seeks to not only ensure fairness in dispensing justice, but which is manifestly seen and duly acknowledged by all and sundry as justice both in content and context.

C We are not judicial technicians in the workshop of technical justice. The jurisprudence or logic of our reasoning is, and as humanly possible, would be devoid of technicalities. The need to do substantial justice and avoid delving into the error of technicalities is well settled. The principle has been rehashed in a long line of authorities, for example: **NATIONAL REVENUE MOBILIZATION ALLOCATION AND FISCAL COMMISSION (N.R.M.A.F.C) vs. JOHNSON (2007) 49 W.R.N. Pages 169-170** where Per **Odili JCA (as he then was)** opined as follows:

F **“....The courts have deliberately shifted away from narrow technical approach to justice which characterized some earlier decisions to now pursue the course of substantial justice. See MAKERI SMELTING CO. LTD. vs ACCESS BANK (NIG.) PLC (2002) 7 NWLR (PT.766) 447 at 476-477.**

G **The attitude of the court has since changed against deciding cases on mere technicalities. The attitude of the courts now is that cases should always be decided, wherever possible on merit. Blunders must take place from time to time, and it is unjust to hold that because a blunder has been committed, the party blundering is to incur the penalty of not having the dispute between him and his adversary determined upon the merits.”**

I **See also AJAKIYE vs IDEHIA (1994) 8 NWLR (PT.364) 504, ARTRA IND. LTD. vs NBCI (1997) 1 NWLR (PT.483) 574, DAKAT vs DASHE (1997) 12 NWLR (PT.531) 46, BENSON vs NIGERIA AGIP CO. LTD (1982) 5 S.C.1.**

J A number of points have been made that would inform our final decision

A on this issue. Save for disputing and denying service and non-service, the parties are ad idem that a notice of withdrawal was indeed filed dated 29th March, 2010 before the fresh invitation and clearance of appellants for conformation on March 30 2010 and fresh swearing-in by the then Governor on 1st April, 2010.

B The cause of action of the respondents, as originally canvassed in Suit No. M.41/2009 (**HON. OWOEYE vs OSUN STATE HOUSE OF ASSEMBLY**) by way of originating summon was, and remained, the procedural irregularities in the initial screening of the appellants on 24th March, 2009 despite failure to present (enough) copies of their credentials contrary to the provisions of section 106 and 200 (1)(a) of the 1999 Constitution.

C It does not appear to us that the basis of the tussle has shifted or lost its original natural colours. What remains certain is that, upon the judgment of 25th February, 2009 nullifying the initial confirmation, an appeal was filed alongside a motion for stay of execution. But about a year later, the appellants had a rethink and opted to regularize the process of screening and confirmation, being the basis of the dispute.

E To effectuate this, a notice of withdrawal was filed in the registry to terminate the appeal, but the respondents insisted on being sued on the supposed, misconceived notion that a party who voluntarily opted to sheath his sword could not do so. The law is settled that an appeal could be withdrawn by filing a notice of intention to discontinue or withdraw. See the cases of **DALFAM (NIG.) LTD vs. OKAKU INTERNATIONAL LTD (2001) 15 NWLR (Pt.735) 203** at 250, **LENAS FIBREGLASS LTD vs. FURTODO (1997) 8 NWLR (PT. 504) 220** AT 231, **ERONINI VS IHENKO, (1989) 2 NWLR (Pt.101) 46** at 63; **(1989) 20 N.S.C.C. 503 at 520, UNIVERSITY OF LAGOS vs. AIGORO (1985) 1 SC 265 at 271** and **UNIVERSITY OF LAGOS vs. OLANIYAN (1985) 1 S.C.295.**

F Filing and service of a process have different legal essence. By filing, a party crystallizes a legal process for the attainment of specific objective in judicial proceedings. Service is intended as notice to the other party and does not vitiate a judicial process duly initiated except that the attainment of the objective might be put in abeyance without proper or valid service. See the cases of **AJIBOLA vs. SOGEKE (2001) 23 W.R.N. 68 at 88, SAIDU vs. MAHMOOD (1998) 2 NWLR (Pt. 536) 130 at 138** and **NATIONAL EMPLOYERS MUTUAL GENERAL INSURANCE ASSOCIATION LTD. vs. LADUN MARTINS (1969) 1 A.N.L.R. 469 at 473.**

I The objective of notice of termination in the instant appeal is to voluntarily put an end to a judicial process or terminate the objective for seeking judicial

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- A** remedies. A party should not be crucified for conceding defeat or bowing out of a fight, where, anticipatorily, he is set to be the loser. The claimant/respondent in this case opted to continue to fight a shadow in this case. Had the claimant/respondent herein being interested in defendant/respondent's appeal
- B** against the judgment in HOS/M41/2009 he could have followed through the process of appeal by compiling the record of appeal and transmitting same to the Court of Appeal within the time permissible with the Court of Appeal Rule and enable the Court of Appeal to assume jurisdiction rather than filing a new suit to
- C** ventilate his grievances against the procedural infraction. After all, the duty to compile record is not restricted to the person appealing but also to the respondent in an appeal. Were this step taken by the claimant/respondent in this case needless litigation would have been avoided and the issue of withdrawal of
- D** appeal would have settled once and for all by the Court of Appeal timeously.

- Seeking to stop further confirmation of the appellants despite rectification of initial procedural irregularities or gaps would appear to mean that the respondents had a mission or objective different from their initial cause of action
- E** in Suit No. HOS/M41/2009, which was to ensure compliance with the conditions precedent to confirmation of the appellants. The claimant/respondent desired that the defendant/respondent should comply with the Judgment of the court in Suit No. HOS/M41/2009 by remedying procedural irregularities. It would
- F** appear inconsistent on the part of the claimant/respondent to insist that the defendant/respondent cannot voluntarily withdraw their appeal after swallowing its pride to do what the respondent had insisted must be done before their confirmation could be said to be valid.

- G** Against the background of this case, it is rather amazing that claimant/respondent and defendant/respondent who were adversaries in HOS/M41/2009 in their briefs before this court maintained the same position and insisted in a rather contradictory manner, that the appellants could still not be
- H** confirmed and/or sworn-in as did on 30th March and 1st April by the House of Assembly and the then Governor of Osun State respectively. This is the misconceived basis for which another action (Suit HOS/M.70/2010) was instituted. This patently is a reckless abuse of judicial process that should be
- I** discouraged to avoid needless overburdening of the already burdened judiciary. The courts have opined severally and unambiguously on what constitutes an abuse of process (authorities or abuse of court processes).

- The respondents have admitted, and abundance of documentary evidence
- J** in the record of appeal and briefs of arguments also indicate the existence of Suit

A no. HOS/M41/2009 is uncontroverted. But the respondents, particularly the claimant/respondent, would want us to join him on the misguided frolic of assumption that the later suit, M.70/2010 became inevitable as the appellants had blundered by withdrawing the appeal against the earlier suit without ensuring service. Clearly, we cannot sit on this side of the hall and encourage litigants to take judicial sanctity for granted. The existence of a suit on appeal, and the fact that the claimant/respondent had earlier objected to the non-service of notice of withdrawal on him shows that issues had been joined. The logic of judicial sanctity dictates that the earlier suit and its appeal ought to be rested and decided one way or the other including whether or not the appeal was validly withdrawn. By instituting another action which embodies the issues as in the earlier action on appeal makes the later manifestly an unpardonable abuse of court process.

D This court has succinctly enunciated in **NTUKS vs. NPA (2007) 13 NWLR (Pt.1051)** at pages 392 on the meaning of abuse of court process and held that:

E **“Abuse of court process generally means that a party in litigation takes a most irregular, unusual and precipitates action in the judicial process for the sake of action qua litigation, merely to waste valuable litigation time. It is an**

F **action which could be avoided by the party without doing any harm to the matter in dispute. The process of the court is used merely to overreach the adversary to the direct annoyance of the court. The court process is initiated with malice or in some**

G **premeditated or organized vendetta, aimed at frustrating either the quick disposal the matter or the abatement of the matter for no good cause. The court process could also be said to be abused where there is no iota of law supporting it. In other**

H **words, the court process is premised or founded on frivolity or recklessness.”**

Per Tobi, J.S.C.

I **Furthermore, in CHIEF VICTOR UMEH & ANOR vs. PROFESSOR MAURICE IWU & ORS (2008) Vol. 41 WRN 1 at 18 lines 5-10 (SC) this court enunciated on what abuse of process connotes and attitude of courts to suit filed in**

J **abuse of process thus:**

A

“It is settled law that generally, abuse of process contemplates multiplicity of suits between the same parties in regard to the same subject matter and on the same issue. See OGOEJEOFO vs OGOEJEOFO (2006) 3 NWLR (Pt.996) 205 and OKAFOR vs ATTORNEY-GENERAL OF ANAMBRA STATE (2001) 7 WRN 77; (2001) FWLR (Pt.58) 1127; (1991 6 NWLR (Pt.200) 659; (1991) 9-10 SCNJ 107. The bottom line of these authorities in regard to abuse of process is that, to institute an action during the pendency of another suit claiming the same relief is an abuse of court process and the only course open to the court is to put an end to the suit

D

Per Chukwuma Eneh and Onnoghen, JSC.”

The act of filing another suit by the respondent is suit No. M.70/2010 is reprehensible. If strongly aggrieved, a conscionable litigant in an assumed ongoing appeal arising from a similar Suit (HOS/M41/2009) would have, through counsel, pursued the appeal as earlier stated and make the issue of non-service a distinctive ground and seek relief(s) to set aside the proceedings of 30th March and 1st April by the House of Assembly and the then Governor of Osun State respectively. Not doing so makes the new suit unnecessary and unconscionable. Put differently, filing another suit while the validity or otherwise of the withdrawal of the appeal was pending amounted to cherry-picking. The respondents, by so doing, have constituted themselves into judicial nuisances by assuming that withdrawal of the appeal filed against Suit No. HOS/M.41/2009 was invalid and that the best way to vent their misgivings was to file yet another action, Suit No. HOS/M.70/2010.

In view of the foregoing, Issue 1 is resolved in favour of the appellants. Since appeal had not been entered at the Court of Appeal at the time of filing the notice of withdrawal, the filing of same at the lower court clearly and effectively puts an end to the appeal. The decisions in **EZOMO vs. ATTORNEY-GENERAL BENDEL STATE (1986) 4 NWLR (Pt.36) 448** and **GOVERNING COUNCIL OF ITF vs. CHIJOKE (1998) 3 NWLR (Pt.540) 170** are applicable and are hereby applied. Issue 1 resolved in favour of the appellants.

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A ISSUE 2:

B “Whether or not the learned justices of the Court of Appeal were right in upholding the decision of the learned trial judge that the appellants have no interest in the matter before the trial court and that the proceedings did not breach the appellant's right to fair hearing.”

C The 1st respondent argued issue 2 at pages 9-11 of his brief. The 2nd respondent also made similar repetitious submissions on the same pages (9-11) of its brief in a way and manner similar to 1st respondent.

D Relying on **TOOGU vs. OPUTA (2001) 16 NWLR (Pt.940)** at page 585, the 1st and 2nd respondents respectively at page 10, paragraph 4.08 and page 10, paragraph 4.06 of their briefs that, I quote:

E “.. It is only when section 198 CFRN is duly complied with by the House of Assembly, that right to the appellant under Section 199 of the Constitution become established right of the appellant as chairman and members of OSSIEC.”

F The appellant's brief of argument encapsulates issue 2 on pages 10-13. The appellants contended that the Court of Appeal was wrong. Learned counsel to the appellants in his brief of argument submitted that:

G “It is our humble submission that from the facts of this suit at the time the claimant/respondent filed his action, the right of the appellants as chairman, members and secretary of OSSIEC had already accrued. The due process for their appointment and confirmation under section 198 and 199 of the Constitution have been complied with.

H

I Contrary to the decision of the Court of Appeal, we submit that the appointment of the appellants as at the time claimant/respondent filed this suit to challenge the screening exercise conducted by the defendant/respondent on March 30th, 2010 was no longer inchoate. It has become substantive.”

J The right of the appellants to enjoy this constitutionally guaranteed right is primary, and cannot be ignored by any court in assuming jurisdiction to make

A judicial orders or other forms of adjudicatory determinations without joining them as parties. Doing so will vitiate the entire proceedings as in the instant appeal.

The right to fair hearing is well established and entrenched in our constitutional jurisprudence and indeed enjoys universal appeal and application in view of its constitutional and fundamental importance. Indeed **Section 36(4) CFRN 2011 (as amended)** clearly embodies two traditional maxims to wit: *audi alteram partem* (the other party must be heard) as held in the locus *classicus* of **R vs. THE UNIVERSITY OF CAMBRIDGE (1723) S.128** and *nemo judex in causa sua* (a person shall not be a judge in his own case. See also **GARBA & ORS. vs. THE UNIVERSITY OF MAIDUGURI (1986) 2 S.C. 128**.

It is abundantly clear that Suit No. HOS/70/2010 was a protest suit of the respondent against seeming improper withdrawal by the appellants of the appeal against the earlier Suit No. HOS/M.41/2009. As at 30th March, 2010 the appellants had been re-screened and reconfirmed. They were also sworn-in by the then Governor of Osun State on 1st April, 2010. Assuming the latter acts of fresh confirmation and swearing-in were wrong and improper, putatively, their right and interests as chairman, members and secretary of OSSIEC is in issue and at stake. Therefore, logic or common reasoning would ordinary dictate, or ought to have dictated that, beyond woolly misconception or political desperation; no reasonable reliefs could be sought or granted without joining them as parties. Refusal to join them as interested parties while expecting them to comply with the judgment to cease functioning in such capacities is, to say the least, overly presumptive and judicially wrong.

Beyond cavil, it is our considered opinion, following a line of settled principles of law and decided authorities, that appellants are persons interested in the suit and ought to have been joined as necessary parties by the trial court because all the reliefs being sought are directed at the right and interest of the appellants. See **GREEN vs. GREEN (SUPRA)**.

In view of the foregoing, we are unable to subscribe to the reasoning of the Court of Appeal as contained in the last two paragraphs of their judgment at page 43 (365 of the record). This is because question one and relief one of the originating summons leave no one in doubt that the essence is to get at the appellants as far as the exercise of their functions and duties as chairman, members and secretary of OSSIEC are concerned. I quote question one and relief one of the 1st respondent's originating summons dated 29th June, 2010 in Suit No. HOS/M.70/2010:

A

“Whether the screening of chairman and members of OSSIEC during the pendency of appeal in suit No. HOS/M.41/2009 is not improper, incompetent and null and void.

B

A declaration that the screening of chairman and members of OSSIEC during the pendency of appeal in suit No. HOS/M.41/2009 is improper, incompetent and null and void.

C

There should be no shying away from the reality or realization of the fact that the appellants are the chairman and members of OSSIEC envisaged in question one and relief one, and by logical inference, the entirety of Suit No. HOS/M/70/2010, as they were the target in Suit No. HOS/M.41/2009 in which they were likewise excluded.

D

Without dissipating precious time and energy, being luxury 'goods' that are hardly ever available at this end of the Nigerian Judicial hierarchy, we also resolve issue 2 in favour of the appellants for the foregoing reasons.

E

We had noted earlier in this judgment that counsel to the appellants and 1st and 2nd respondents formulated two extra issues as issues 3 and 4 thus:

F ISSUE 3

“Whether or not the learned justices of the Court of Appeal were right in upholding the decisions of the trial court dissolving the Osun State Independent Electoral Commission (OSSIEC) on the basis of screening and confirmation exercises carried out while the defendant/respondent' appeal against the judgment is pending.”

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H ISSUE 4

“Whether the order dissolving OSSIEC and ordering the appellants to vacate office made by the learned trial judge and upheld by the Court of Appeal can appropriately be qualified (sic) as a consequential order in view of the circumstances of this case.”

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To all intent and purposes, issues 3 and 4 would necessarily be subsumed in issues 1 and 2 already dealt with above. The effect of order(s) made against persons not

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- A joined as a party is that such order is a nullity and of no effect. In our view, counsel to the appellants was right to have submitted at pages 12 and 13 of his brief of arguments, that where person who ought to be joined to the suit had orders made against them by the trial judge, such proceedings ought to be a nullity, being a denial of the appellant's right to fair hearing. See the case of **OVUNWO & ANOR vs. WOKO & ORS (2011) 7 SCM 207 at 231-232** and **NURTW 7 ANOR vs. RTEAN & ANOR (2012) 3 SCM 171 at 178-179**.

- Issue 3 and 4 are resolved against the appellants. Dissolution of the OSSIEC and order directing the appellants to vacate office raise a presumption that OSSIEC had prior been constituted and that the appellant are or were occupying the offices sought be vacated. As held above, it certainly cannot be the case that having been screened and sworn-in, adverse orders would be made against the appellants without being heard. Assuming without conceding that the appointment and/or confirmation of the appellants is voidable, it remains valid until otherwise set aside by the Osun State House of Assembly or a court of law. This is particularly so as there is a legal presumption of regularity in favour of the appellants pursuant to **Section 168** of the **Evidence Act**. It states:

“168. Presumptions of regularity and of deeds to complete title.

- (5) **When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for the validity were complied with.**
- (6) **When it is shown that any person acted in a public capacity, it is presumed that he had been duly appointed and were entitled so to act.**
- (7) **XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX**
- (8) **XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX**

- It is also painfully discovered that the claimant/respondent did not specifically ask for an order dissolving OSSIEC or for the appellants to vacate offices in OSSIEC. The request was made in the final address by way of reply on points of law on page 29 of the record as follows:

“We submit with respect that the mere filing of notice of appeal cannot be used to terminate this appeal. Consequently, we

A hereby apply for the consequential order nullifying the appointment of the chairman and members of OSSIEC and thereby dissolving OSSIEC as presently constituted. Being null and void.”

B This far reaching relief, in our opinion was wrongly granted by the trial Court and improperly upheld by the Court of Appeal as it did at pages 359-360 of the record, to the effect that:

C “The simple answer to the agitation of the appellants in this issue is that the court did not need the prompting of counsel to enter a consequential order which the immediately preceding
D issues, the order, now being complained against, was consequential or incidental to the declaration of the validity of the procedure adopted by the defendant/respondent. It was, thus a proper order to give effect to its declaration that:

E The House of Assembly is creation of law and should be reminded constantly on (sic) the need to follow the law. As I said earlier, the issues in dispute were still live
F questions in court any step taken by the House of Assembly at least before that date is illegal, null and void.”

G The law is settled that, no matter the length and logic, submissions of counsel cannot substitute for pleadings or hard evidence. On this position we refer to the case of CALABAR CENTRAL CO-OPERATIVE THRIFT AND CREDIT SOCIETY LIMITED & 2 ORS vs. BASSEY EKPONG EKPO (2008) 25

H WRN 1; (2008) 1-2 SC.229; (2008) 6 NWLR (Pt.1083) 362. According to Ogundare, JSC.

I “Arguments of counsel, however brilliant is no substitute for the pleadings and evidence in proof of same and therefore go to no issue.

J The issue of validity or otherwise of notice of withdrawal of the appeal in HOS/M41/2009 on March 29, 2010 and the effect of fresh screening and

A swearing-in resonate at every stage and level of this appeal. We have dealt with the arguments on issues 3 and 4 as canvassed in the briefs of parties without agreeing with them on the need to formulate more than two issues in this appeal (that is issues 1 and 2 only).

B In consequence, therefore, (and without making unsolicited consequential orders), the effect of the order of dissolution and vacation of office is far reaching, and, in our considered view, should have been specifically pleaded. Not doing so means: (1) order dissolving OSSIEC and (2) order directing the appellants to vacate their offices, are both not appurtenant to the main order. Both are hereby nullified not having been specifically sought by the claimant/respondent.

D In the final analysis, we paused to anticipate what in essence, will be or is the real (sweet) fruit of the labour of the appellants in travelling the long, tortuous and expensive journeys of pursuing judicial remedies from trial court to the Supreme Court. Assuming the appellants had remained in office, their tenure would have ended by now, regrettably.

E However, as a court of law, justice and policy, it is our considered view that the Appellants would appear to have lost most, despite gaining all in judicial victory. The justice of this appeal would, in our thinking, be better served by treating the appellants as retiring appointees for the purpose of enabling them to be paid their salaries and severance package(s) applicable to the current occupants of those offices as at the date of this judgment.

G Having resolved all the issues in favour of the appellants, this appeal succeeds in whole. The judgment of the trial court and Court of Appeal are hereby set aside. No order is made as to cost. No order is made reinstating appellants to their offices either as chairman, secretary and members of the Osun State Independent Electoral Commission (OSSIEC). As stated immediately above, the justice of this appeal demands that appellants be, and are hereby treated as retiring appointees for the benefit of payment of the full salaries and allowances up to the time they would have left their offices by expiration of their tenure, and severance packages as provided by law, applicable to the current occupants of those offices as at the date of this Judgment.

I We so order.

Sidi Dauda Bage,

Justice, Supreme Court

NKANU ONNOGHEN, (AG. CJN): I have had the benefit of reading in draft the lead judgment of my learned brother BAGE, JSC just delivered. I agree with

A his reasoning and conclusion that the appeal has merit and should be allowed.

The facts relevant for the determination of the issues in contention have been stated in the lead judgment of my learned brother and I consequently do not intend to repeat them herein except as may be needed for the point(s) being made.

B It is not in dispute that appellants were not made parties to either the earlier suit No. HOS/M.41/2009 nor the later suit No. HOS/M.70/2010 the decision on which resulted in the instant further appeal. Appellants became aware of the suits after judgments had been delivered. They consequently applied and were
C granted leave to appeal as interested parties against the decision on suit No. HOS/M.70/2010 which appeal was dismissed by the lower court.

Also not in dispute is the fact that suit No. HOS/M.70/2010 is not an appeal against the decision in suit No. HOS/M.41/2009 though its complaints are

D essentially against the proceedings in the said suit No. HOS/M.41/2009.

The above notwithstanding, the trial Judge held at pages 165-166 of the record as follows:

- E** **“1. The screening of the chairman and member of OSSIEC during the pendency of suit NHOS/M4/2010 is improper, incompetent, null and void and of no effect.**
- 34. The screening of the chairman and members of OSSIEC**
F **during the pendency of appeal in suit No. HOS/M41/2009 is an abuse of court process.**
- 35. Taking into consideration the combine effect of Order 11**
G **Rule 1, 2, 4 and 5 of the Court of Appeal Rules 2007 the Notice of Withdrawal dated and filed 27 March 2010 cannot authentically terminate the appeal filed by the appellant.**
- 36. The filing of the Motion for Stay of Execution of the**
H **judgment delivered 25/2/2010 by the defendant has put the judgment into abeyance.**
- 37. An appeal properly filed at High Court Registry is for**
I **onward transmission to the Court of Appeal cannot be terminated before the same High Court by mere filing a notice of withdrawal of appeal.**

J **In effect, the Osun State Independent Electoral Commission is hereby dissolved, having been constituted illegally. The**

A chairman, members and secretary of the Commission shall vacate office forthwith.”

B From the reliefs granted the respondents supra, it is very clear that the interests of the appellants were directly affected by that judgment though they were not made parties in the action. The judgment therefore clearly infringed their right of fair hearing constitutionally guaranteed by the **Constitution of the Federal Republic of Nigeria, 1999**, as amended, (hereinafter referred to as the **1999 Constitution** as amended). See **section 36(1)** etc thereof. The lower court was therefore in error in holding that appellants, were not necessary parties even when the trial court held thus:

D “In effect, the Osun State Independent Electoral Commission is hereby dissolved, having been constituted illegally! The chairman, members and secretary of the Commission shall vacate office forthwith.”

E Funny enough, appellants are the people the trial court's above order is directed at in absentia!! Is it not good common sense that you cannot cut a man's hair in his absence? In the circumstance, it is clear that the above decision, in so far as it affected, adversely, the right of appellant's without being heard is a nullity and that the lower court was in grave error when it affirmed same.

F Secondly there is the issue of abuse of process following the institution of suit No. HOS/M.70/2010, the reliefs of which questioned the proceedings in suit No. HOS/M.41/2009 when it was not by way of an appeal. It is settled law that abuse of process contemplates multiplicity of suit between the same parties in regard to the same subject matter and on the same issue. It is therefore very clear that for the respondents to institute suit No. HOS/M.70/2010 during the pendency of an alleged unwithdrawn appeal in the suit No. HOS/M.41/2009 claiming the same reliefs is an abuse of court process which has never been encouraged by the courts.

H It is for the above reasons and the more detailed reasons assigned in the lead judgment of my learned brother, BAGE, JSC that I too find merit in the appeal and consequently allow same. I abide by the consequential orders made in the said lead judgment including the order as to costs.

Appeal allowed.

J Walter Samuel Nkanu Onnoghen,

A***Ag. Chief Justice of Nigeria***

PETER-ODILI, (JSC): I am in complete agreement with the judgment and reasoning just delivered by my learned brother, Sidi Dauda Bage JSC and to place
B on record that support, I shall make some remarks.

This is an appeal against the judgment of the Court of Appeal, Akure Division sitting in Akure on the 29th November, 2012 in which the judgment of Osun State High Court, Oshogbo per S. O. Folala J. on 3rd December, 2010 was
C upheld in which all the declaratory reliefs sought by the Claimant/1st respondent were granted.

The appellants further aggrieved have come before the Supreme Court upon four grounds of appeal.

D On the 24th March, 2009, the appellants failed to bring their credentials and the defendant/respondent confirmed the appointment of the appellants.

The appellants were sworn into office by the Governor of Osun State on 3rd April, 2009.

E Dissatisfied with the procedure employed by the defendant/respondent in confirming the appointment of the appellants, the claimant/respondent approached the court by way of originating summons in Suit No. HOS/M.41/2009 HON. TIMOTHY OWOEYE V OSUN STATE HOUSE OF
F ASSEMBLY.

The claimant/respondent in the said suit claimed three reliefs, which reliefs were granted altogether in the judgment delivered on the 25th February, 2010. The court declared the confirmation of the appellant null, void and of no
G effect and as such dissolved the appellants.

The defendant/respondent promptly appealed against the judgment in HOS/M.41/2009 delivered on the 25th February, 2010 and applied for a stay of execution.

H The application for stay of execution of the judgment in HOS/M.41/2009 was pending before the court when the defendant/respondent to show intention to withdraw the appeal merely filed a notice of withdrawal dated 29th March, 2010. The notice of withdrawal filed at the registry of the lower court disclosed no
I address for service and indeed was never served on the claimant/respondent in violation of Order 11 Rule 1 of Court of Appeal Rules, 2007.

The pendency of the application for stay of execution of judgment in HOS/M.41/2009 and non service of the notice withdrawal of appeal was deposed
J

A to in the claimant/respondent's affidavit in support and reply to counter-affidavit. The deposition was never rebutted.

Fresh invitation was made by the defendant/respondent to the appellants and on the 30th March, 2010, the appointment of the appellants was reconfirmed and the appellants were re-sworn on the 1st April, 2010 into office by the then Governor of Osun State.

Consequently, the claimant/respondent, in Suit No. HOS/M.70/2010 TIMOTHY OWOEYE vs OSUN STATE HOUSE OF ASSEMBLY approached the court to challenge the notice of withdrawal of appeal which was not served on the claimant/respondent purporting to terminate the appeal in HOS/M.41/2009; the effect of Order 11 Rules 1, 2, 4 and 5 of the Court of Appeal Rules 2007.

The claimant/respondent contended in suit No. HOS/M.70/2010 that the notice of withdrawal of appeal filed by the defendant/respondent withdrawing the appeal filed against the judgment in HOS/M.41/2009 could not terminate the appeal for being incompetent due to lack of service; and that application for stay of judgment delivered in Suit No. HOS/M.41/2009 was still pending before the court. The claimant/respondent contended further that since the appeal was still pending, the re-screening exercise conducted for the appellants by the defendant/respondent on the 30th March, 2010 was irregular and an abuse of court process. We refer to the paragraphs 1-15 of the affidavit in support of originating summons at pages 4-9 of the records and the reply to counter affidavit of the claimant/respondent at pages 26-27 together with the counsel's address and the attached exhibits.

The defendant/respondent however contended that the notice of withdrawal of appeal in Suit No. HOS/M.41/2009 at the registry of the lower court has effectively terminated the said appeal. This position is contained in the counter affidavit paragraphs 6-12 filed by the defendant/respondent at page 10-11 and the argument pressed by counsel in the written address on behalf of the defendant/respondent at page 17-25 of the records.

The learned trial judge granted all the reliefs sought by the claimant/respondent and further granted a consequential relief by ordering the dissolution of the OSSIEC and that the appellants should vacate office forthwith.

Hence the appeal by the appellants to the Court of Appeal or lower court on six grounds of appeal. The appeal was dismissed hence the records of this court.

On the 7th day of December, 2016 date of hearing, learned counsel for the appellants, S. K. Olowolagba Esq. adopted the brief of the appellants settled by

A M. O. Okediya Esq. and filed on 6/5/15 in which were distilled four issues for determination of the appeal, viz:

- B 1) Whether the learned justices of the Court of Appeal were right in upholding the decision of the learned trial judge on the ground that the notice of withdrawal of appeal filed by the defendant/respondent against the judgment of the High Court in Suit HOS/M.41/2009
- C HON. TIMOTHY OWOEYE vs. OSUN STATE HOUSE OF ASSEMBLY was not served on the claimant/respondent. (Relate to Ground 1 of the Grounds of Appeal).
- D 2) Whether the learned justices of the Court of Appeal were right in their decision that the appellants have no interest in the matter of the suit before the trial court and that the proceedings is not a breach of the appellants' right to fair hearing. (Relate to Ground 2 of the grounds of appeal).
- E
- F 3) Whether the learned justices of the Court of Appeal were right in upholding the decision of the trial court dissolving OSSIEC on the basis that the screening and confirmation exercise cannot be done when the defendant/respondent's appeal against the judgment in
- G suit HOS/M.41/2009 is still pending. (Relate to Ground 3 of the Grounds of Appeal).
- H 4) Whether the order dissolving OSSIEC and ordering the Appellants to vacate office made by the learned trial judge and upheld by the Court of Appeal can appropriately be qualified as a consequential order in
- I view of the circumstances of this case. (Relate to Ground 4 of the Grounds of Appeal).

J Adewale Afolabi Esq. of counsel for the respondents adopted the separately settled and filed briefs, one by T. S. Adegboyega for the 1st respondent filed on

A 24/6/2013 and that for the 2nd respondent filed on 15/5/2014 and deemed filed on the 14/11/16. Learned counsel for the respondents adopted the issues as formulated by the appellants.

B ISSUE ONE

C Whether the learned justice of the Court of Appeal were right in upholding the decision of the learned trial judge on the ground that the notice of withdrawal of appeal filed by the defendant/respondent against the judgment of the High Court in suit HOS/M.41/2009 – HON. TIMOTHY OWOEYE vs. OSUN STATE HOUSE OF ASSEMBLY was not served on the claimant/respondent. (Ground 1).

D

Learned counsel for the appellant contended that the basis of respondent's case before the trial court and the reliefs sought therein were simply that the notice of withdrawal of appeal is for transmission to the Court of Appeal and it would not terminate the appeal at the trial high court and that the notice of withdrawal having not been transmitted to the Court of Appeal, the appeal was therefore still pending. That the service or non-service of the notice of withdrawal of appeal filed in suit HOS/M.41/2009 was not made an issue in any of the grounds of appeal and issues formulated for determination in the appeal before the Court of Appeal. That the decision of the Court of Appeal on that ground was clearly in error being outside the case before them, nor arose at the court of trial. He cited **Momoh vs. Umoru (2011) 6 SCM 99 at 126; Ayanwale vs. Odusami (2011) 11 – 12 (Pt.1) SCM 39 at 48 and 52 etc.**

G Responding, learned counsel for the respondents submitted that contrary to the position of the appellants that the matter of whether the notice of withdrawal dated 27th March, 2010 is competent to automatically terminate the appeal was an issue raised, argued and settled by the trial court and affirmed by the court of appeal. That the supporting affidavit to the questions raised and the counter affidavit were borne out of the record. He cited page 162 of the record and the case of **Onyejekwe vs. Enweonwu (2010) 4 NWLR (Pt.1185) 447 at 486 etc.**

H That the issue was properly considered by the Court of Appeal which court ruled against the appellants on it.

J

A The stance of the appellants on this Issue One is that the matter of the non-service of the notice of withdrawal of the appeal in suit HOS/M.41/2009 was not determined or raised in the trial High Court. This is the respondent dispute referring to the certified true copy of the notice of withdrawal of appeal attached as Exhibit “AA” and the appellants' brief in which the issue was raised, argued and the trial court made a determination thereof. That the issue had been raised thus:

C **“Whether taking into consideration the combined effects of Order 11 Rules, 1, 2, 4 and 5 of the Court of Appeal Rules 2007, the notice of withdrawal dated the 27th day of March, 2010 automatically terminated the appeal filed by the appellant in this case”.**

D That the affidavit evidence showed that the issue having been raised and admitted thereby giving room for its due consideration by the trial court which ruled thus:

E **“I have checked the original copy in the case file and discovered that not only was there no address of service on the defendant (SIC), there is no proof of service on him. By implication, there is no consensus to withdraw the appeal. The conduct of the defendant is obviously in confrontation with Order 11 Rules 1, 2, and 4 Court of Appeal Rules.”**

The Court of Appeal on its part per Nweze JCA (as he then was) held:

G **“.....It is only where a notice of withdrawal has been filed and served on the respondents that the appeal in question is deemed, automatically dismissed.”**

H It falls to reason therefore that the matter of whether or not the notice of withdrawal was considered does not arise as the records bear that out clearly. The result is that a valid subsisting decision of the trial court, affirmed by the court below that there was not service of the notice of withdrawal of the appeal and so in effect stamped the fact of the appeal being alive and well, it should have been raised in the earlier suit by way of an appeal.

ISSUE NO.2

J **Whether the learned justice of the Court of Appeal were right in**

- A** **their decision that the appellant have no interest in the matter of the suit before the trial court and that the proceeding is not a breach of the appellants' right to fair hearing.**
- B** For the appellants, learned counsel submitted that contrary to the decision of the Court of Appeal, the appointment of the appellants as at the time the respondent as claimant filed this suit to challenge the screening exercise conducted by the 2nd respondent on the 30th March, 2010 was no longer inchoate as it had become substantive and so the interest of the appellants had accrued. Therefore shutting them out of the suit breached their right to fair hearing. He cited **Green vs. Green (1987) NSCC 115; Section 36 (1) of the 1999 Constitution** (as amended); **Ovunwo & Anor vs. Woko & Ors (2011) 7 SCM 207 at 231– 232**
- C** etc.
- D** Countering the stance of the appellants, learned counsel for the respondents stated that it is only when **Section 198** of the **Constitution of the Federation** is duly complied with by the 2nd respondent that any right to the
- E** appellants under **Section 199** of the **Constitution** would become established right of the appellants as claimant and members of the Osun State Independent Electoral Commission. He referred to **Togun vs. Oputa (No 1) (2001) 16 NWLR (Pt.740) 577; Olufeagba vs. Abdul-Raheem (2009) 18 NWLR (Pt.1173) 384 at 646** etc.
- F** The court below was of the mind that the appellants' right to be joined had not crystallized and so their right to fair hearing had not accrued since what was at stake whether or not the House of Assembly had complied with **Section 198** of
- G** the **Constitution** in carrying out its processes which would later lead to the appellants becoming chairman and members of the OSSIEC.
- That position put across by the respondents and accepted by the court below is not to be taken so simply. This is because from the facts available at the
- H** inception of the suit the right of the appellants as chairman, members and secretary of OSSIEC had already accrued as the process of their appointment and confirmation under **Section 198** and 199 of the Constitution had been complied with. Therefore, as at the time the respondents as claimants had initiated their
- I** suit on 30th March, 2010 there process were no longer inchoate but compete and substantive. That brought their interest to the fore and so could not have the matters relating thereto adjudicatory discussed in their absence without being made parties. For a fact the suit was not just to challenge the internal proceedings
- J** of the respondent House of Assembly but the connecting interests of the now

A appellants and so the appellants had to be heard in it. See **Green vs. Green (1987) NSCC 115; Section 36 (1) of the 1999 Constitution** (as amended).

The resultant effect is that the appellants being necessary interested parties who ought to be heard and were not joined in suit, the orders made against them by the trial judge and the entirety of the proceedings, thereby would come to naught as they had been denied of their right to fair hearing. The situation makes the stance of the Court of Appeal not to be agreed upon at this level. See **Ovunwo & Anor vs. Woke & Ors (2011) 7 SCM 207 at 231 -232; NURTW & Anor vs. RTEAN & Ors (2012) 3 SCM 171 at 178-1179; Tanko vs. UBA (2010) 11 SCM 199 at 212.**

In fact this matter of the breach, fundamental as it shows the unassailable reason for which the decision of the Court of Appeal alongside the trial judge's cannot be sustained as a clear miscarriage of justice has occurred. The necessary party being absent before court and its hearing and determination, the proceedings done are evidently in breach of the appellants right to fair hearing and therefore a nullity. See **Anyanwoko vs. Okoye & Ors (2010) 1 SCM 21 at 38 Victino Fixed Odds Ltd vs. Ojo & Ors (2010) 4 SCM 122 at 135.**

From the foregoing and the fuller reasoning in the lead judgment, there is no point in my humble view in getting into the other issues raised as I have no difficulty in finding for the appellants whose appeal is meritorious. I also allow the appeal as I set aside the decision of the court below in its affirmation of the judgment and orders of the trial High Court.

I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

G

BAYANG AKA' AHS, (JSC): I read before now the judgment just delivered by my learned brother, Bage JSC. I am in complete agreement with him that the appeal has merit and should be allowed.

The claimant/respondent in this appeal and some members of the Action Congress (AC) in the Osun State House of Assembly were dissatisfied with the procedure followed by the House of Assembly in the screening and appointment of the chairman and member of the Osun State Independent Electoral Commission (OSSIEC) and took out an original summons before the Osun State High Court Oshogbo in suit No. HOS/M41/2009. Judgment was delivered against the Osun State House of Assembly. Aggrieved by the decision the said House of Assembly filed their notice of appeal and followed it up with a motion

D **“1. A declaration that the screening of the chairman and members of OSSIEC during the pendency of appeal in suit No. HOS/M41/2009 is improper, incomplete, null and void and of no effect.**

E

F **2. A declaration that the screening of the chairman of OSSIEC during the pendency of appeal in Sui No. HOS/M41/2009 is an abuse of court process.**

G

H **3. A declaration that, taking into consideration the combined effects of Order 11 Rules 1, 2, 4 and 5 of the Court of Appeal Rules, 2007, the notice of withdrawal of appeal dated the 27th day of March, 2010 cannot automatically terminate the appeal filed by the appellant in this appeal.**

I

J **4. A declaration that the filing of an application for stay of execution of judgment delivered on 25th day of February, 2010 by the defendant against whom the judgment is given has put the judgment in abeyance until the ruling on the application for stay of execution is delivered.**

5. A declaration that an appeal properly filed at the High Court Registry is for onward transmission to the Court of Appeal and cannot be terminated before the same

A High Court by merely filing a notice of withdrawal of appeal.”

B Judgment in the suit was delivered on 3rd December, 2010 and the Osun State House of Assembly appealed and on 29th November, 2012 the court of appeal sitting in Akure affirmed the decision in appeal No. CA/AK/31M/2011.

C The court below per Nweze JCA (as he then was) in affirming the judgment of the learned trial judge held that the non-joinder of the appellants could not have affected the proper determination of the question framed for the decision of the lower court in the originating summons while Kekere-Ekun JCA (as she then was) who presided over the appeal held that in the exercise of its wide powers under **section 6(6)(b) of the 1999 Constitution** (as amended) the court **D** has inherent powers to grant consequential reliefs that would give effect to its decision and since the procedure adopted by the State House of Assembly was declared illegal, null and void, the court rightly granted the consequential order to give effect to its judgment.

E In suit No. HOS/M.41/2009, the learned trial judge in resolving the issues raised in the originating summons declared as follows:

F “1. That the purposed confirmation of the appointment of the chairman and members of the Osun State Independent Electoral Commission by Osun State House of Assembly is null, void and of no effect. It is therefore set aside.

G 2. That the procedure adopted by the Osun State House of Assembly in the confirmation of the appointment of chairman and members of the Osun State Independent Electoral Commission without the photostat copies of the credentials five out of the seven and indeed without the original credential (sic) of any of the nominees placed before the House is irregular, unconstitutional null and void, and of no effect.

I 3. It is hereby ordered that the Osun State Electoral Commission as presently constituted be dissolved in that the Defendant (House of Assembly) did not follow the

J

A provision of the 1999 Constitution and normal procedure required for the confirmation of the appointment of chairman and members of the Osun State Independent Electoral Commission.

B I like to clarify that while the appointment of the chairman and members of the Osun State Independent Electoral Commission made by the Governor and forwarded to the House of Assembly (which has not been challenged) remains valid, only the purported confirmation undertaken by the house of the Assembly is set aside.”

D The learned trial judge's clarification was that it was the screening and confirmation of the appellants that he set aside and not their appointment. The clarification was therefore not obiter. I therefore do not agree that the order made dissolving OSSIEC was a consequential relief which was meant to give effect to the declarations made on the screening of the chairman and members of the Osun State Independent Electoral Commission.

E At the time Suit No. HOS/M.41/2009 was instituted, the Governor of Osun State had already sworn-in the appellants as chairman and members of OSSIEC after their appointment was confirmed by the Osun State House of Assembly. Again when Suit No. HOS/M.70/2010 was instituted the appellants had been re-sworn as chairman and members of OSSIEC. They were necessary parties in the two suites who ought to be joined before any order affecting their interest could be made. See: **Green vs. Green (1987) 3 NWLR (Pt.61) 480; O. K. Contact Point vs. Progress Bank (1999) 5 NWLR (Pt.604) 631**. When proper parties are not before the court, such that those who may be affected by the orders of the court are not before it, the proper course a court must follow is to direct that all persons interested or likely to be affected by the results are brought before it. See: **Mozie vs. Mbamalu (2006) 15 NWLR (Pt.1003) 466**. The suit of the claimant/respondent was not just to challenge the internal proceedings of the defendant/respondent but the effect of it (as it ultimately turned out) was to deprive the appellants of their established right as members of OSSIEC. **Section 36(1) of the 1999 Constitution** (as amended) stipulates that where the right or obligation of a person is in question and is to be determined by a court or tribunal he is entitled to be heard for it is an immutable principle of natural justice that no one is to be condemned unheard. A court is duty-bound to adjudicate between the

- A parties on the basis of the claim formulated by them. The question of granting a relief not specifically claimed is not an issue which depends on the discretionary power of a trial court. The court must hear the views of the parties before making an order different from the one claimed. See: **Ekpenyong vs. Nyong (1975) 2 SC 71**; **Ajayi vs. Texaco Nig. Ltd (1978) 9-10 SC 1**; **A-G Anambra State vs. Okafor (1992) 2 NWLR (Pt.224) 396**; **Makanjuola vs. Balogun (1989) 3 NWLR (Pt.108) 192**; **Olurotimi vs. Ige (1993) 8 NWLR (Pt.311) 25**; **Abbas vs. Solomon (2001) 15 NWLR (Pt.735) 144**; **Korede vs. Adedokun (2001) 15 NWLR (Pt.736) 483**; **Akinterinwa vs. Oladunjoye (2000) 6 NWLR (Pt.659) 92**; **Osuji vs. Ekeocha (2009) 16 NWLR (Pt.1166) 81**.

- It was held in **Kotoye vs. CBN (1989) 1 NWLR (Pt.98) 419** that the rule of fair hearing is not a technical doctrine but a rule of substance and the question is not whether injustice has been done because of lack of hearing but whether a party entitled to be heard a decision had in fact been given an opportunity of hearing. Thus once an appellate court comes to a conclusion that a party was entitled to be heard before a decision was reached but was not given the opportunity of a hearing the decision is liable to be set aside.

- The right vested in the appellants cannot be taken away or determined in the suits filed by the claimant/respondent against the defendant/respondent after it became vested on the appellants. They must be made parties to the suit or be given opportunity to be heard. The orders made by the learned trial judge and held by the justices of the Court of Appeal were specific reliefs and they encompassed more issues than the matter of procedure of conducting screening. As such they ought to have been specifically claimed with the proper and necessary parties joined in the action before they could be granted. The only reason which could make a person a party to an action is that he should be bound by the result of the action. See: **Babayeju vs. Ashamu (1998) 9 NWLR (Pt.567) 546**.

- H The learned trial judge played Father Christmas in ordering the dissolution of OSSIEC and making the appellants to vacate their offices as chairman and members of OSSIEC without the claimant/respondent asking for that specific relief. The decision of the Court of Appeal which affirmed the dissolution of OSSIEC and asking the chairman and members to vacate their offices without affording them any hearing is perverse and must be set aside.

I It is for this reason and the more detailed reasons contained in the judgment of my learned brother, Bage JSC that I too allowed the appeal.

- J The appointment of the appellants as chairman and members of OSSIEC

- A** was a tenure appointment lasting five years and they were entitled to their salaries and allowances as stipulated by law. Since their tenure was truncated by the trial court in 2010 and the tenure has elapsed, they are entitled to be paid their salaries and allowances for the unexpired period of the tenure as well as enjoy any
- B** severance benefits. In the result I allow the appeal and endorse the order made in the lead judgment regarding the payment of salaries and allowances for the unexpired term of their tenure and the payment of severance allowance as stipulated by law.

C

K. B. Akaahs
Justice, Supreme Court.

- EJEMBI EKO, (JSC):** On 29th November, 2012 the Court of Appeal, sitting at
- D** Akure (hereinafter referred to as “the lower court”) in the appeal No. CA/AK/31M/2011 affirmed the decision of Osun State High Court, Oshogbo delivered on 3rd December, 2010 in the suit No. HOS/M70/2010. The parties in the suit No. HOS/M70/2010 were the 1st respondent herein, as the claimant (suing
- E** for and on behalf of other members of the Action Congress in the Osun State House of Assembly), and the Osun State House of Assembly, the 2nd respondent herein, as the sole defendant.

- The suit was on the originating summons. The 1st respondent, as the
- F** claimant, had sought the following reliefs:

- G** “1. A declaration that the screening of the chairman and members of OSSIEC during the pendency of appeal in the suit No. HOS/M41/2009 is improper, incompetent, null and void and of no effect.
- H** 2. A declaration that the screening of the chairman of OSSIEC during the pendency of appeal in suit No. HOS/M41/2009 is an abuse of court process.
- I** 3. A declaration that, the taking into consideration the combined effects of Order 11, Rules 1, 2, 4 and 5 of the Court of Appeal Rules, 2007, the notice of withdrawal of appeal dated the 27th day of March, 2010 cannot automatically terminate the appeal filed by the appellant in this appeal (sic).

J

- A 4. A declaration that the filing of an application for stay of execution of judgment delivered on 25th day of February, 2010 by the defendant against whom the judgment is given has put the judgment in abeyance until the ruling on the application for stay of execution is delivered.**
- B**
- 5. A declaration that an appeal properly filed at the High Court Registry is for onward transmission to the Court of Appeal and cannot be terminated before the same High Court by merely filing a notice of withdrawal of appeal.”**
- C**

D The persons referred to as the chairman and members of OSSIEC, in the reliefs 1 and 2 above reproduced, are the appellants herein. They were not made parties in the suit No. HOS/M70/2010 and judgment in the suit was delivered without them, even though they were the targets of the declaratory reliefs 1 and 2 in the said suit. OSSIEC is the acronym for Osun State Independent Electoral Commission, established pursuant to **Section 197** of, and **paragraph 3, Part 2 of the Third Scheduled** to the **1999 Constitution**. The appointments of the Chairman and Members by the Governor of the State are subject to the screening and approval or resolution of the State House of Assembly.

F The Governor of Osun State had earlier made the appointments of the Chairman and Members of OSSIEC, and submitted their names to the Osun State House of Assembly for screening and approval. The House of Assembly did the screening and resolved to approve their appointments. The 1st respondent herein **G** was not satisfied with the manner the screening and resolution were done. He complained that the curricular vitae of all the nominees were not available previously to the House of Assembly to enable it to do any proper screening. He took out the suit No. HOS/M41/2009 against the Osun State House of Assembly. **H** Judgment in the suit No. HOS/M41/2009 was delivered against the Osun State House of Assembly (herein the 2nd respondent). Aggrieved, the said House of Assembly filed their notice of appeal and followed it with a motion for stay of execution of the said judgment. It later had a re-think, and decided to submit to the judgment and then do the needful. Consequently, it filed a notice to withdraw the appeal. **I** The notice of withdrawal of appeal was filed at the registry of the High Court. The notice had no address for service of the respondent in the appeal.

J The Osun State House of Assembly (OSHA), believing that the notice of withdrawal of appeal was filed pursuant to Order 11 of the Court of Appeal Rules,

A 2007 and the appeal, in their thinking, duly terminated, proceeded to screen *de novo* the appellants herein. This screening culminated in the resolution of the OSHA on 30th March, 2010, confirming or approving the appointments of the appellants, respectively, as chairman and members of OSSIEC. The governor of

B Osun State promptly on 1st April, 2010 swore the appellants into their offices in OSSIEC to perform their functions. The 1st respondent undaunted and not satisfied with these screening and resolution went back to the Osun State High Court and took out the present suit, No. HOS/M70/2010 on 29th June, 2010 about

C 3 months after the appellants had assumed duties and were discharging their functions. The appellants, who were necessary parties, in view of Reliefs 1 and 2 (earlier reproduced) which adversely affected them, were not joined as parties to defend the suit.

D The suit No. HOS/M70/2010 was improperly constituted by reason of the non-joinder of necessary parties. The trial court granted all the reliefs, including reliefs 1 and 2, sought. It proceeded gratuitously to make orders dissolving the OSSIEC and directing the chairman, members and secretary of Commission to

E forthwith vacate their respective offices. These mandatory orders directed against the appellants specifically were not sought by the 1st respondent, as the claimant, at the trial court. It was in consequence of this quixotic manner of adjudication that the appellants sought leave to appeal, and they were granted

F leave to appeal, as interested parties.

The contention that the failure to join the appellants, in view of the declarations in Reliefs 1 and 2 together with the two mandatory orders reeled out against the appellants in favour of the 1st respondent in the manner of the

G benevolence of Santa Claus, was dismissed by the court below as “thus not well taken”. The court below, in my firm view was clearly in error here.

The granting of the two declarations in reliefs 1 and 2 and re-in forcing them with the orders *ex gratia* dissolving the OSSIEC and directing them to

H forthwith vacate their offices in OSSIEC clearly violated the right of the appellants to fair hearing guaranteed by **Section 36(1)** of the **1999 Constitution**, which directs the trial court, in the determination of the Appellant's civil rights and obligations, to give them fair hearing. A determination of the civil rights and

I obligations of parties in flagrant violation of their right to fair hearing is a major or serious infraction of their constitutional right by the trial court that was established by law and constituted in such manner to secure its impartiality to all parties before it. This serious infraction of the fundamental rights provisions of

J the constitution, loud and noisome as it were, ought not to have been ratified or

A affirmed by the court below.

It was argued by the respondents that the orders dissolving the OSSIEC and directing the appellants to forthwith vacate their offices in OSSIEC were consequential upon the trial court granting the five declaratory reliefs. They could not have been. In the first place, the said orders [like the grant of reliefs 1 and 2] were a nullity, having been made against the appellants who were not given an opportunity to be heard on them, in violation of their right to fair hearing.

B Secondly, those orders were fresh orders not contemplated by the 1st respondent, as the claimant, when he formulated the reliefs he had sought from the trial court. A consequential order is an appurtenant to the main or principal relief or order sought. In **EAGLE SUPER PACK (NIG.) LTD. vs. A.C.B. (2006) 19 NWLR (Pt.1013) 20**, it was held that where the claim was for refund in Naira currency, an order made for refund in U.S. Dollars could not be a consequential order.

C At the risk of repetition, the 1st respondent did not, in the originating summons, seek any orders for dissolution of OSSIEC by and immediate vacation from their offices in the OSSIEC by the Appellants who were the incumbent chairman, members and secretary of OSSIEC. The request for those orders, without the amendment of the originating summons, came in only at the stage of reply on points of law when the defence no longer had the right of reply. Reliefs are not sought in the counsel's address or summation. They must be pleaded and served for the defence to respond to it. An address of courses is not, and cannot be, substitute for pleading. See **AYANWOLE vs. ODUSAMI (2011) 11 – 12 SCM (Pt.2) 39; GMB vs. DOSUNMU (2010) 6 SCM 88 at 103-104.**

D In any case, it is only against the parties in the suit that such reliefs can be directed in the pleadings.

E A consequential order is one made to give effect to the judgment which it follows. It does not come from the blues as the two made gratuitously, and capriciously too, by the trial court. The incidence of consequential order is not an occasion or pretext for the trial court to enter into the arena to deliver punches on one of the parties in the contest before it to the obvious disadvantage of the other. The drawing up of consequential order should not make the judge violate the injunction on him to remain independent and impartial in terms of **Section 36(1)** of the **1999 Constitution**. Neither should he shred the plague before him reminding him that, in his business, the rule *I nemo judex in causa sua*.

F In the instant matter both pillars of fair hearing – *audi alteram partem* (give the other party an opportunity) to be heard) and *nemo judex in causa sua*

A (judge should be impartial and not be a judge in his own cause) were all violated by the trial court. The court below, therefore, was wrong to have affirmed the judgment, as it did.

B The 1st respondent had submitted that, because the pending appeal against the decision in his earlier suit **No. HOS/M41/2009** was pending and the purported withdrawal of the appeal was ineffectual, the appellant should not have made “attempt to comply with the decision of the court” he was appealing. The submission sounds preposterous. Nothing in law prohibits a judgment debtor from submitting to the judgment against him, which he is appealing against. In principle, I agree with the court below, where in its judgment at page 345 of the Records, it stated that:

D **“it is reprehensible conduct for any party to appeal, pending in court, to attempt to take the law into his hands without any specific order of court and to do any act which would pre-empt the result of the action”.**

E The peculiar facts of this case, however, do not justify the application of this sound rule of law and prudence. A party who submits to the judgment against him and has taken steps to comply with the judgment, which he had earlier filed notice of appeal against, is in my view law abiding who should be encouraged and commend, rather than vilified.

F Now, to the purported notice of withdrawal of the appeal against the decision in suit **No. HOS/M41/2009**.

G The first defect in the notice to withdraw is that there was no address on the said notice of the respondent in that appeal. This defect is fundamental.

Order 2 Rule 3 of the Court of Appeal Rules, 2007, provides, without ambiguity:

H **“3. Where under these rules, any notice or other process is required to have an address for service endorsed on it, it shall not be deemed to have been properly filed unless such address has been endorsed on it”.**

I The instant notice of withdrawal of the subsisting appeal had no address endorsed on it for service on the respondent in the appeal. The notice is therefore impotent, as submitted by the 1st respondent.

J Order 11 Rules 1, 2, 4 and 5 of the 2007 Rules of the Court of Appeal have

A the following active components/requirements necessary to effectuate a valid notice to withdraw appeal, viz:

B **“(1) The Notice must be filed before the appeal is called on for hearing. [Not relevant for this appeal].**

C **(2) The notice shall be filed with the Registrar of the Court of Appeal [“Registrar” defined by Order Rule 5 is the Registrar of the Court of Appeal, and not the Registrar of the High Court or the court from where the appeal emanates].**

D **(3) The Notice shall/must be served on all parties, particularly the respondent in the appeal”.**

E The service of the notice of withdrawal on the respondent in the appeal, being imperative, the address for service on the respondent of the notice of withdrawal of appeal shall/must be on the notice, failing which the notice of withdrawal of appeal is incompetent and a non-starter by dint of Order 2 Rule 3 of the Court of Appeal Rules.

F The court below, on this issue of the notice of withdrawal being incompetent, was right in holding that:

G **“it is only where a notice of withdrawal had been filed and served on the respondent that the appeal in question is deemed, automatically, dismissed”.**

The court below is quite right on this.

H An appeal which has been withdrawn under Order 11 of the Court of Appeal Rules, 2007, whether with or without an order of the Court of Appeal, shall be deemed to have been dismissed. The only remedy available to the respondent complaining that the notice of withdrawal is ineffectual ordinarily should have been by a way of appeal. This is because a valid notice of withdrawal of appeal, filed in the registry of the Court of Appeal, effectively puts an end to the appeal, and the appeal, in law, is deemed to have been dismissed. In the instant appeal, the purported notice of withdrawal of the appeal, which has no address for service on the respondent, by virtue of Order 2 Rule 3 of the Court of

A Appeal Rules, 2007, is deemed not to “have been properly filed”. Therefore, in the eye of law it does not exist and cannot draw or attract to itself the consequential effect, of the appeal statutorily deemed to have been dismissed, as contained in Order 11, Rule 5.

B In our jurisprudence, a party who is aware that an order is null or invalid should apply to have it set aside. See **ROSSEK vs. ACB (1993) 10 SCNJ 20 at 39-40.**

C In the instant case, the only remedy open to the 1st respondent was to apply by way of an interlocutory application in the appeal, for an Order setting aside the purported notice of withdrawal. His resort to a fresh suit (**No. HOS/M70/2010**) in the matter of the wrong procedure to terminate the appeal against the decision in the previous suit **No. HOS/M41/2009** is an abuse of court's process.

D Consequentially, the subsequent suit **No. HOS/M70/2010** was an abuse of court's process. The suit ought to be and is hereby dismissed.

E On the whole, I find substance in the appeal and it is allowed by me. I hereby adopt the judgment just delivered by my learned brother, SIDI DAUDA BAGE, JSC, including all the orders made therein.

Ejembi Eko
Justice, Supreme Court

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J

**IDU GODWIN EMEKA
AND**

- 1. HON. LYNDACHUBA-IKPEAZU**
- 2. PEOPLES DEMOCRATIC PARTY (PDP)**
- 3. INDEPENDENT NATIONAL ELECTORAL
COMMISSION (INEC)**
- 4. NATIONAL WORKING COMMITTEE,
PEOPLES DEMOCRATIC PARTY**

SC.149/2016

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

FRIDAY, 10TH MARCH, 2017

BEFORE THEIR LORDSHIPS

**MARY UKAEGO PETER-ODILI
CLARA BATA OGUNBIYI
CHIMA CENTUS NWEZE
AMINA ADAMUAUGIE
SIDIDAUDABAGE**

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

ACTION: Cause of action – How determined.

ACTION: Plaintiff claim against defendants – Plaintiff claims did not relate to 3rd party – 3rd party applied to be joined in the suit – 3rd party did not file a counter-claim against plaintiff – Implications.

ACTION: Where the essence of preliminary objection is the enthronement of technicality in theoretical matters nor touching on the substance of the appeal – Effect.

APPEAL: Issues for determination – No issue formulated from a ground of appeal – Implication.

APPEAL: Onus on the applicant where there are concurrent findings of two lower courts.

CASE LAW: Principles in Buhari vs. Obasanjo – Distinguished.

*CASE LAW: Legal Practitioners Act – Signing of legal process – Principles in **SLB Consortium Ltd vs. NNPC (2011) 9 NWLR (Pt. 1252) 317.***

CASE LAW: Legal Practitioners' Act – Signing of legal Process – The Principles in Okafor vs. Nweke (2007) 10 NWLR (Pt. 1043) 521 – Considerations thereof.

EVIDENCE Party denying a fact within his exclusive knowledge – Whether proper to apply the presumption of withholding evidence in S. 167(d) of the Evidence Act.

EVIDENCE: Admissibility – Secondary evidence of official document – No requirement of certification or signing of a certified true copy thereof.

EVIDENCE: When Presumption in S.167(d) of the Evidence Act on withholding of evidence cannot apply against a party.

*EVIDENCE: Withholding of Evidence – **S.167 (d) of the Evidence Act** – Purport.*

EVIDENCE: Admission – Candidate alleged that her name was forwarded to INEC – INEC admits that it received the name of candidate – Whether candidate has discharged the onus of proving her allegation.

EVIDENCE: Admission – Party enjoined by law to forward list of candidates to INEC – List of candidates forwarded to INEC contained name of plaintiff as No 4 Party did not object to the admissibility of list – Party is deemed to have admitted list as that he sent to INEC.

EVIDENCE: Burden of proof on a party who alleges the withholding of evidence in S.167 of the Evidence Act.

EVIDENCE: Conflict in affidavit evidence – Resolution by certified documentation – When applicable.

EVIDENCE: Contents of affidavit – Where contains legal arguments and conclusions – S.115(1)(2) of the Evidence Act – Consideration thereof.

EVIDENCE: Extract of minutes of a meeting – What it presupposes.

EVIDENCE: How standard of proof is discharged in declaratory actions.

EVIDENCE: Onus of Proof – Ratification of candidate decided in a meeting Issue of ratification contained in the minutes of the meeting – Candidate not participant in the meeting – Minutes not in the custody of candidate – Candidate cannot be expected to prove his ratification.

EVIDENCE: Secondary evidence of public documents – Certification S.104 of Evidence Act – Considerations thereof.

EVIDENCE: The standard of proof in civil cases.

EVIDENCE: What amounts to credible evidence?

LEGAL PRACTITIONERS: Legal Practitioners' Act – Signing of Legal Process – How to determine what qualifies as a legal practitioners' signature.

LEGAL PRACTITIONERS: Legal Practitioners' Act – Signing of Legal Process – Signature of Legal Practitioner above the name of a human person known to the legal Practitioners' Act – Significance.

STATUTE : S. 31(1) and (2) of the Electoral Act 2010 – Considerations thereof

STATUTE LAW: Admissibility of Secondary Evidence of Public document – S.104 of Evidence Act 2011 – Considerations thereof.

WORDS AND PHRASES: “Extract” – Meaning.

WORDS AND PHRASES: “Portion” – Meaning.

Issue for Determination

Whether the Court of Appeal was not in error when it held that the 1st respondent was the candidate of the 2nd respondent for the Onitsha North/South Federal Constituency seat in the House of Representatives election of 28th March, 2015 and not the appellant.

Facts of the Matter

The 2nd respondent submitted the name of the 1st respondent to the 3rd respondent on the 18th day of December, 2014 alongside other candidates in Anambra State as its nominated candidate for election to the membership of the House of Representatives for member representing Onitsha North/South Federal Constituency of Anambra State. The 2nd respondent also submitted the name of the appellant to the 3rd respondent as its candidate for the said Federal Constituency. The 3rd respondent published the list and particulars of the candidates submitted but the name and particulars of the 1st respondent was not published.

Consequent upon the above, on the 18th day of March, 2015 the 1st respondent as plaintiff caused an originating summons to be issued against the present 2nd 4th respondents as 1st 3rd defendants respectively. The present appellant applied and joined in the suit by order of court as 4th defendant. The reliefs sought in the originating summons are:

1. **DECLARATION that having regard to section 31 (2) (j), 50 of the Constitution of People's Democratic Party (PDP), Sections 31 (1) (2), 33 of the Electoral Act, 2010 (as amended) 222 (c) Constitution of the Federal Republic of Nigeria, Article 25 (XII) of the Electoral Guidelines for Primary Elections, 2014 of People's Democratic Party:**
 - (i) **No officer of the 1st defendant after 1st defendant has forwarded to the 2nd defendant, the list of its nominated candidates for the 2015 General Election for the House of Representatives Election which included the name of the plaintiff, can lawfully withdraw only the name of the plaintiff and substitute her with another.**
 - (ii) **The decision of the 3rd Defendant (National Working Committee) acting on behalf of the National Executive Committee after full review of reports of the primary election for the candidate of 1st defendant for the Onitsha North/South Federal Constituency for the 2015 General Election to the effect that the plaintiff is the candidate who emerged, is final and binding on all aspirants, officers and organs of the 1st defendant.**
2. **Mandatory injunction compelling the 2nd defendant to publish the plaintiff's name, deal with, recognize and maintain the plaintiff as the**

candidate of the 1st Defendant for the Onitsha North/South Federal Constituency of Anambra State.”

The appellant was joined by order of court as a defendant. At the conclusion of hearing the trial Judge gave judgment for the plaintiff. The joined party being dissatisfied appealed to the Court of Appeal, which dismissed the appeal hence this further appeal to Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *Where appellant did not formulate any issue from a ground of appeal*
Without having to waste any time, I seek to state straight away that the appellant did not formulate any issue from ground 24 of the grounds of appeal. Same is hereby stuck out. See the case of **Ajibulu vs. Ajayi (2014) 2 NWLR (Pt. 1392) 283 at 494. [Iyoho vs. Effiong (2007) 11 NWLR (Pt. 1044) 31 at 49]. (P 302 paras D – E).**

2. *How to determine the cause of action*
The law is well established that it is the plaintiff's claims that determines the cause of action filed in court. In order to ascertain a cause of action, the immediate materials a court should look at are the writ of summons, and the averments in the statement of claim. [**Ossai vs. Wakwah (2006) 4 NWLR (Pt. 969) 208 at 229. Diapianlong vs. Dariy (No.2) (2007) 8 NWLR (Pt. 1036) 332; Ejiro vs. Idris (2006) 4 NWLR (Pt. 971) 538 at 560 – 561].**
In an action commenced by originating summons as it is the case at hand, the processes to be examined are the reliefs sought and the affidavit in support of the originating summons. *(P 307 paras E – G).*

3. *The Standard of proof in civil cases*
The law is also trite that the required standard of proof in civil cases is generally placed on the preponderance of evidence or balance of probabilities. The duty is on the plaintiff to adduce evidence in support of his pleadings. [**Okechukwu vs. A-G Rivers State (2012) 6 NWLR (Pt. 1295) 53 and purification Technique (Nig) Ltd vs. Jubril (2012) 18 NWLR (Pt. 1331) 109]. (P308 paras F – G).**

4. *The meaning of “Extract”*

Exhibit 1 is the purported compliance with the said Order by 2nd and 4th respondents. An examination of Exhibit 1 shows clearly that it is not the minutes of the said 395th meeting that was produced. Rather, it is what is termed “extract” of the said minutes that was attached as Exhibit 1. A perusal of the alleged extract at pages 513-515 of the record of appeal shows without any equivocation whatsoever that what was produced is far from being the minutes or “relevant portion thereof” as ordered by the court. Neither can it be regarded as an “extract” of the said minutes as claimed by the appellant. “Extract” is defined as (1) “A portion or segment, as of a writing. (2) Scots law ESTREAT.” **See Blacks Law Dictionary 8th Edition at page 623.** The meaning of the word “extract” is more illuminated from the definition of ESTREAT at page 391 of the same dictionary which states:

“A copy or duplicate of some original writing or record, esp. of a fine or amercement imposed by a court, extracted from the record; and certified to one who is authorized and required to collect it”.

The **6th Edition of Black's Law Dictionary (Centennial Edition)** is more pictorial about the meaning of the word “EXTRACT”. It defines it as:

“A portion or segment of writing”.

The intendment of an “extract” of minutes of a meeting in my view presupposes the culling out the relevant excerpts of the minutes of the meeting in its original form. It means something extricated from the main body.
(Pp 311–312 Paras D–A)

5. *The meaning of portion*

The word, “Portion” is defined by **Oxford Advanced Learner's Dictionary (7th Edition)** as “one part of something larger”. A relevant portion of the document of minutes of a meeting cannot admit of the supply of another document which does not form part of it. The document titled “EXTRACT” did not meet the requirement of the order of court. It is neither “the minutes” nor “a portion thereof”. (P 312 Paras A–B).

6. *No proof of ratification*

In the circumstances of this case, the ratification of the candidate by the 4th respondent can only be proved by production of the minutes or a portion of it. The concomitant effect is that neither the minutes nor portion of it was produced as ordered by court.

The purport of section 167 (d) of the Evidence Act is that where one party to a suit withholds evidence, if made available, would be against that person. [Amgbare vs. Sylva (2009) 1 NWLR (Pt. 1121) 1 at 63, paras. B-E; Olusanya vs. Osinleye (2013) 12 NWLR (Pt. 1367) 148 at 164; Aliyu vs. State (2013) 12 NWLR (Pt. 1368) 403 at 426; State vs. Azeez (2008) 14 NWLR (Pt. 1108) 439 at 492, paras. C D].

It is pertinent to emphasize that the said minutes of the meeting of the 2nd and 4th respondents dealing with the ratification of a candidate for the election is central and crucial to the just determination of this case, which minutes are under the custody of the 2nd and 4th respondents. The denial of the 2nd respondent in its affidavit of the deposition of the 1st respondent that she was not the one that was sponsored by the party is irrelevant in view of intendment of section 149 (d) now Section 167(d) of the Evidence Act. Reliance on the case of **Buhari vs. Obasanjo (2005) 13 NWLR (Pt. 941)** is of no assistance to the appellant for the facts are distinguishable from the instant case. (*P 312 paras B – G*).

7. *The principle in Buhari vs. Obasanjo*

In the case of Buhari vs. Obasanjo for instance at pages 198–199 Belgore, JSC (as he then was) said:

“In notice to produce procedure, it is supposed that the person asking for the document knows of the contents, perhaps has a copy of it. If the person to produce fails to produce it, the secondary evidence of it can be admitted in evidence. Chief John Ukpa of the ANPP, if he actually wrote the letter of protest in question, he could bring the copy of it for admission. Either the letter did not exist or it existed but Chief John Ukpa refused to bring its copy. If he brought the copy, the presumption can as well be that the contents would not have supported the case of the appellant.”

In the instant case, the 1st respondent herein was not in a position to produce the secondary evidence of the minutes of the 4th respondent which can only be in the custody of the 4th respondent and probably copies with participants at the meeting.

In other words, the 1st respondent was not a participant at the said meeting. Therefore, the contention by the learned senior counsel for the appellant that the proof of ratification of the 1st respondent's candidature by the 2nd respondent was the minutes of 395th meeting of the 4th respondent is greatly misplaced. There can be no question of extract of any minutes, expected from the 1st respondent. The presumption of Section 167(d) of the Evidence Act cannot be applied against the 1st respondent in this situation. The section will rather operate in her favour. (*Pp 312 – 313 paras G – D*).

8. *Effect of the presumption in S. 167(d) of the Evidence Act.*

Contrary to the submission by the senior counsel for the appellant further, the two lower courts could not be faulted when they invoked the provisions of section 167(d) of the Evidence Act against the 4th respondent ipso facto, the 2nd respondent.

Consequently, the effect of the foregoing is that the 1st respondent proved the assertion in her affidavit in support of the originating summons that indeed, it was her name that was forwarded by the 2nd respondent to the 3rd respondent as the candidate ratified by the 2nd respondent for the membership of the House of Representatives for member representing Onitsha North/South Federal Constituency of Anambra State. The denial made by the 2nd respondent is of no consequence therefore. It is not out of place, I hold, that Section 167(d) of the Evidence Act was put in place.

The confirmation holds secure especially when reference is made to the fact that the 3rd respondent, who is the appropriate body in law to receive the list of sponsored candidates for election did not deny that the 2nd respondent forwarded the name of the 1st respondent. It is on record, rather that the 3rd respondent was categorical that it received the list of candidates for the election, which included the 1st respondent. (*P 313 paras D – I*).

9. *A party who did an act is deemed to have admitted the Act.*

From the foregoing, it is reasonable to say that the 2nd respondent, which is enjoined by law to forward form CF001 and the list of candidates sponsored by the party, had no justification to complain about the list forwarded. This is

because the record had shown that the list attached to Form CF.001 contained the name of the 1st respondent as No. 4. Therefore, the said documents are deemed to be admitted by the 2nd respondent as those it sent to the Commission (INEC).

It is even more intriguing that with copious reference made to the depositions in paragraphs 4 and 5 of the 3rd respondent's counter affidavit (reproduced earlier in the course of this judgment) same is an admission also of the avertments of paragraphs 18, 19, 20 and 21 of the 1st respondent's affidavit. Undoubtedly it serves also as an evidence given in support of the case of the 1st respondent, to the effect that her name was indeed forwarded to the 3rd respondent. The assertion, was by that means admitted by the 3rd respondent.

I wish to say at this juncture further that, while the 3rd respondent was emphatic in its response on the 1st respondent at paragraphs 4 and 5 of its counter affidavit, the same cannot be said in respect of the appellant. In other words, the 3rd respondent did not indicate that the appellant's Form CF002 was accompanied by Form FC001 deposited to by all other candidates of the 2nd respondent. (*P* 315 *paras* B – G).

10. *The documents to be forwarded to INEC*

On the question of section 31 of the Electoral Act, 2010, I wish to state that subsection (1) and (2) of same do not envisage sending Form CF002 alone. The reproduction of the sub-sections will give a clear explanation of the point:

“31(1) Every political party shall not later than 60 days before the date appointed for a general election under the provisions of this Act, submit to the Commission, in the prescribed forms, the list of the candidates the party proposes to sponsor at the elections, provided that the commission shall not reject or disqualify candidate(s) for any reason whatsoever.

(2) The list or information submitted by each candidate shall be accompanied by an affidavit sworn to by the candidate at the Federal High Court, High Court of State or Federal Capital Territory, indicating that he has fulfilled all the constitutional requirements for

election into that office.”

By a combined reading of sub-sections (1) and (2) of Section 31 of the Electoral Act, 2010, the submission of the particulars of a candidate sponsored by a party must be accompanied by the list of the candidates proposed for sponsorship by the party for the elections. Thus, Form CF002 as well as Forms CF001 of all the candidates and documents “shall” be forwarded by 2nd respondent to 3rd respondent.

On a careful review and analysis of the evidence on the record of appeal before us, I can safely say that, while the 1st respondent had met with all the requirements relating to her documentation which are in the custody of INEC, the same cannot be said of the appellant. (*Pp 315 – 316 Paras G – B, D – F*)

11. *Appellant did not present authentic documents*

On the allegation of a seeming conflict on the affidavits of the parties, this, I hold is a mere perception by the appellant and which is instantly resolved when regard is had to the authentic documents presented on behalf of the 1st respondent. While the 1st respondent produced certified true copies of her documents from the custody of INEC, those presented by the appellant did not emanate from the custody of 3rd respondent (INEC).

The principle of resolution of affidavit conflict through certified documentation is well entrenched by this court in the case of *Agbakoba vs. INEC* (2008) 18 NWLR (Pt. 1119) 489 at 539 (Para. E-G) thus:

“The fact a party's set of documents as against the ones of his opponent presents a disorderly nature by lying ex facie should not be a ground for alleging the presence of conflicting facts in the documentary exhibit of the parties to necessitate taking oral evidence to resolve it. Even though a factual issue as submitted by 2nd and 3rd respondents, it could be resolved by authentic documents before the court of which there are a number of them here as I will show later on and not only by calling oral evidence. See *Shitta-Bey's case* (supra). More importantly, it is settled that oral evidence cannot be allowed to add to or subtract from or alter or contradict a written document. See Section 132(a) of the Evidence Act, *Nnubia vs. Attorney-General, Rivers State*

(1999) 3 NWLR (Pt. 593) 82; B.O.N Ltd. vs. Akintoye (1999) 12 NWLR (pt. 631) 392; U.B.N. Plc vs. Ozigi (1994) 3 NWLR (Pt. 333) 385; and Koiki vs. Magnusson (1999) 8 NWLR (pt. 615) 492.” (Pp 316–317 Paras F–C).

12. *What is a credible evidence?*

On the credible nature of the 1st respondent's evidence, reference can be made to the case of **Agbi vs. Ogbeh(2006) 11 NWLR (pt. 990) 65 at 116 per Musdapher, (JSC)** (as he then was) wherein his lordship gave a sound description of what amounts to credible evidence which must be:

“Worthy of belief, and for evidence to be worthy of belief and credit, it must not only proceed from credible sense, it must be credible in itself in the sense that it should be natural, reasonable and probable in view of the entire circumstances”

At page 941 of the record of appeal, the lower court rightly restated the position held by the trial court that the 1st respondent did establish her improper substitution by the 2nd and 4th respondents. This was where the trial court did impugn the authenticity of the appellant's form CF001 and said:

“Related to the above also is the fact that the 1st defendant's Exhibit 10 (to its further counter affidavit) which purports to be the form CF001 of the 4th defendant bears a strange signature different from the signature appended by the 4th defendant in the 4th defendant's Exhibit G2 and G3.”

The foregoing position was affirmed by the lower court at pages 942 – 943 of the record of appeal in the following terms wherein **Akomolafe – Wilson (JCA)** in the lead judgment said:

“I am therefore of the view that by the pleading and totality of evidence before the trial court, the 1st respondent discharged the burden of proof placed on her in law. She established sufficient evidence in proof of improper

substitution of the 1st respondent by the 2nd and 4th respondents. She was therefore entitled to the reliefs sought in the originating summons.”

This finding cannot be faulted and I so hold. (*Pp 317–318 Paras D–B*)

13. *Standard of proof in declaratory actions*

The law is trite and well established that declaratory actions in civil matters require proof on the balance of probabilities or on the preponderance of evidence. This court has established this principle firmly in the case of **Onisaodu & Anor vs. Elewaju and Anor (2006) 13 NWLR (Pt. 998) 517 at 527–528. (P 318 para C).**

14. *The concurrent findings of two lower courts*

The law is well established that concurrent findings of the courts below will not be disturbed ordinarily except where they are tainted with miscarriage of justice or shown to be perverse.

The appellant in this appeal has not shown or advanced any cogent reason at all why the concurrent findings should be disturbed. Plethora of authorities are well established in support on this point. See the decision of this court in the case of **Yaki vs. Bagudu (2015) 18 NWLR (Pt. 149) 288. [Igwego vs. Ezeugo (1992) 6 NWLR (Pt. 249) 561, MogoChikwendu vs. Mbamah (1980) 3 SC 31; Ojomu vs. Ajao (1983) 9 SC 22, 53; Lokoyi vs. Olojo (1983) 8 SC 61, 68; Onobruchere & Anor vs. Esegine & Anor (1986) 1 NWLR (Pt. 19) 799 and Kazeem vs. Mosaku (2007) 17 NWLR (Pt. 1064) 523 at 536]. (P 318 paras D–G)**

15. *What qualifies for appropriate signature of a legal practitioner Per Peter Odili (JSC):*

“This court had laid down the ground rules on what should be to qualify for an appropriate signing of a legal practitioner on a legal process especially as it relates to an originating process such as a notice of appeal or such like. In the case of *SLB Consortium Ltd v NNPC* (2011) 9 NWLR (Pt. 1252) 317 at 337-338, the supreme court per Rhodes-Vivour (JSC) stated thus:

**“All processes filed in court are to be signed as follows:
First, the signature of counsel, which may be any
contraption.
Secondly, the name of counsel clearly written.
Thirdly, who counsel represents.
Fourthly, name and address of legal firm.
Once it cannot be said who signed a process, it is
incurably bad, and rules of court that seem to provide
a remedy are of no use as a rule cannot override the law
(i.e. the Legal Practitioners Act)”.**

In the lead judgment, Onnoghen (JSC) (as he then was) at pages 331 – 332 (paras H A) held that:

“.... A process prepared and filed in a court of law by a legal practitioner must be signed by the legal practitioner and that it is sufficient signature if the legal practitioner simple writes his own name over and above the name of his/or firm in which he carries out his practice.

At 332 (Para E) it was further held thus:

“It has been argued that non-compliance with the provision of Order 26 Rule 4(3) supra is a mere irregularity which had been waived as the same involves the procedural jurisdiction of the court. I hold the view that the submission is misconceived on the authority of *Madukolu vs. Nkemdilim* (supra). That part, the provisions of the Legal practitioner Act, 1990 are statutory and therefore matters of substantive law which cannot be waived. The provision of the rules of court involved herein are, by the wordings mandatory not discretionary”.

The court had in ***Okafor vs. Nweke* (2007) 10 NWLR (Pt. 1043) 521** where the process in contention was signed above the name of J.H.COcolo, SAN & CO.

The situation in **Okafor vs. Nweke** (supra) is different from the matter in hand, as in the earlier case the signature was above J.H.C. Okolo, SAN & CO. while in the instant case, the signature was above the name of Paul Erokoro, SAN. The difference is clear in that in the first case the signature was above the name of the legal firm which is not a legal practitioner, while in the latter, the signature is above a human person, legal practitioner known to the Legal Practitioners Act. Therefore, the conditions for validity of the process as prescribed by law and explained in the judicial authorities are met. [**SLB Consortium Ltd vs. NNPC** (Supra); **Okafor vs. Nweke** (supra)].
(Pp 324–325 paras B–B, H–J).

16. *Affidavit shall not contain legal arguments or extraneous matters*
This court had held in **A.G. Adamawa State vs. A.G. Federation (20050 18 NWLR (Pt. 958) 1 at 657** thus:

“There can be no doubt that it is settled that depositions in any affidavit sworn in support of a cause or matter must not be drafted to include legal arguments, conclusions in law or fact. See sections 86 and 87 of the Evidence Act, Cap. 112 and which read thus:

86. Every affidavit used in the court shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true.

87. An affidavit shall not contain extraneous matter, by way of objections, or prayer, or legal argument or conclusion.

This means that where depositions in an affidavit offend this basic law, the offending paragraphs of such an affidavit must be struck out”.

Sections 86 and 87 of the Evidence Act referred to in **A.G. Adamawa State vs. A.G. Federation** (supra) are in parimateria with Section 115 (1) and (2) of the current Law of Evidence 2011.

From what I can see, the preliminary objection is just for the purpose of the enthronement of technicality in theoretical matters while the substance of the appeal is left unattended. I see no merit in the Objection and have no difficulty in dismissing it for lacking in merit. (*P 327 paras B–H*).

17. *Appellant has no leg to stand in this appeal*

“The situation on ground clearly shows a very interesting presentation in that the 1st respondent as plaintiff at the court of first instance took out the suit without the appellant as a party. The appellant therein applied to be joined and the court obliged him. Curiously, the pleadings of the 1st respondent as plaintiff were never amended for the reliefs to concern the appellant and so the trial judge in concluding with his judgment made pronouncements damnifying the 2nd and 4th respondents, who did not appeal to the Court of Appeal and it was this same appellant who appealed to the court below, which court affirmed what the trial court did hence the recourse to the Supreme Court, again, by the appellant and not those ruled against in the first instance court and the Court of Appeal”. (*P 331 paras A–C*).

18. *Concurrent findings*

This court on very many occasions has held its ground on not disturbing concurrent findings and would only go against that principle if certain conditions are at play. The conditions being if the concurrent findings are tainted with miscarriage of justice or shown to be perverse or against the trend of evidence or based on evidence that is inadmissible in law. Failing these extenuating circumstances, this court or any appeal court is loath to interfere with concurrent findings. [*Chukwuogor vs. Obuora* (1987) 3 NWLR (Pt. 61) 454 at 457; *Igwego vs. Ezeugo* (1992) 6 NWLR (Pt. 249) 561; *Yaki v Bagudu* (2015) 18 NWLR (Pt. 1491) 288 per Ogunbiyi JSC; *R-BenkayNig Ltd vs. Cadbury Nigeria Plc* (2012) All FWLR (Pt. 631) 1450 at 1467]. (*P 331 paras G–I*).

19. *Effect of concurrent findings of two courts*

In the present appeal, there is concurrent findings of facts of both the trial Court and the Court of Appeal and this court will not disturb them, as it has not been shown that, there is established miscarriage of justice, or a violation of some principle of substantive law or procedure or a substantial error apparent on the face of the record of proceeding on this, further see: **ENANG vs. ADU (1981) 11-12 S.C.25 at 42; NWADIKE vs IBEKWE (1987) 4 NWLR (Pt. 67) 18; IGWEGO vs EZEUGO (1992) 6 NWLR (Pt. 249) 561 at 576; WOLUCHEM vs.GUDI (1981) 5 S.C. 291 at 326, IKE vs UGBOAJA (1993) 6 NWLR (Pt. 301) 539 at 569; IBRAHIM vs SHAGARI (1983) 2 SCNLR 176]. (Pp 335–336 Paras H–A).**

20. *Where a party who applied to be joined had no counter-claim*

In this case at hand, the act of unlawful substitution was brought by the 1st respondent against the 2nd and 4th respondents in which the appellant had no role and so since he had not counter-claimed as the pleadings of the 1st respondent did not mention him, whatever grouse he had and sought to ventilate when he entered as a party interested, that interest remained unattended. The court cannot go outside the case as showcased by the pleadings of the plaintiff particularly where the appellant who had come in on his volition and without a counter claim. It is logical that there is no legroom on which this appeal can be sustained and so the concurrent findings of the two courts below remain inviolate especially in the absence of an appeal by the 2nd and 4th respondents ruled against. I rely on **Gundiri vs. Nyako (2014) 2 NWLR (Pt. 1391) 211. (P 332 paras A–C).**

21. *The certification of documents*

From the phraseology of the italicized clauses of subsection (2) (supra), a document can only be called a certified copy of a public document if, in addition to the “payment of legal fees prescribed in that respect, together with a certificate written at the foot of such copy that it is a true copy,”[subsection 1, supra], it [the certificate] “is ... dated and subscribed by such officer with his name and his official title...”

In effect, any document that fails below the above mandatory threshold is inadmissible as a certified copy of a public document, [**Omisore vs. Aregbesola and Ors [2015] 15 NWLR(Pt. 1482) 205, 294; Ndayako vs. Mohammed [2006] 17 NWLR (Pt. 1009), 655; Tabik Investment Ltd vs. Guaranty Trust Bank Plc (2011) LPELR 3131 (SC); Nwabuku vs. Onwordi [2006] All FWLR (Pt. 331) 1236, 1251 1252]. (P 333 paras D–G)**

22. *The essence of certification*

The whole essence of the court's insistence on the scrupulous adherence to the above certification requirement of public documents is to vouchsafe their authenticity, vis-à-vis, the original copies, to third parties, [**G and T.I. Ltd and Anor vs. Witt and Bush Ltd (2011) LPELR – 1333 (SC) 42, C-E**].

That explains why, in the absence of the original document only such, properly, certified copies are admissible as secondary copies of public documents “but no other kind of secondary evidence,” [**G and T.I. Ltd and Anor vs. Witt and Bush Ltd (Supra)**; **Araka vs. Egbue [2003] 33 WRN 1**; **Minister of Lands, Western Nigeria vs. Azikiwe [1969] 1 All NLR 499**; **Nzekwu vs. Nzekwu [1989] 2 NWLR [Pt. 104] 373**; **Tabik Investment Ltd and Anor vs. Guarantee Trust Bank Plc [2011] 6 MJSC (Pt. 1) 1, 21**; **Dagaci of Dere vs. Dagaci of Ebwa [2006] 30 WRN**; **Iteogu vs. LPDC (2009) 17 NWLR (Pt. 1171) 614, 634 etc**]. (*Pp 333 – 334 Paras G – A*)

23. *Nature of secondary evidence of public document*

Thus, although the original copies of public documents themselves are admissible, [**Onubruchere and Anor vs. Esegine [1986] 1 NSCC 343 at 350**; **Iteogu vs. LPDC [2009] 17 NWLR (Pt. 1171) 614, 634**; the only pieces of secondary evidence in respect of the original of such public documents that are admissible are the certified copies thereof but no other secondary evidence, **Minister of Lands W.N. vs. Azikiwe [1969] 1 All NLR 49**; **Onubruchere and Anor vs. Esegine (supra)**; **Araka vs. Egbue (supra)**; **SPDC vs. Aswani Textile Industries Ltd [1991] 3 NWLR (Pt. 180) 496, 505**; **Ojibah vs. Ojibah [1991] 5 NWLR (Pt. 191) 296, 312**; **Nzekwu vs. Nzekwu [1989] 2 NWLR (Pt. 104) 373**; **Tabik Investment Ltd and Anor vs. Guarantee Trust Bank Plc (supra)**; **Dagaci of Dere vs. Dagaci of Ebwa (supra)**; **Iteogu vs. LPDC (Supra) 614, 634 etc**].

Put differently, in the absence of the original documents themselves only such properly, certified copies are admissible as secondary copies of such public documents “but no other kind of secondary evidence,” [**G and T. I. Ltd and Anor vs. Witt and Bush Ltd (2011) LPELR 1333 (SC) 42, C-E**; **Araka vs. Egbue (supra)**; **Minister of Lands, Western Nigeria vs. Azikiwe (supra)**; **Nzekwu vs. Nzekwu (supra)**; **Tabik Investment Ltd and Anor vs. Guarantee Trust Bank Plc (supra)**; **Dagaci of Dere vs. Dagaci of Ebwa (supra)**; **Iteogu vs. LPDC (Supra) etc**]. (*P 334 Paras A – F*)

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Amgbare vs. Sylva (2009) 1 NWLR (Pt. 1121) 1;
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SLB Consortium Ltd vs. NNPC (2011) 9 NWLR (Pt. 1252) 317;
SPDC vs. Aswani Textile Industries Ltd [1991] 3 NWLR (Pt. 180) 496;
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Yaki vs. Bagudu (2015) 18 NWLR (Pt. 1491) 288;

Nigerian Statute Cited

The Evidence Act – Section 167(d) of
 The Electoral Act, 2010 Section 31
 The Electoral Act, 2010, Sub-Sections (1) and (2) of Section 31
 The Evidence Act, – Section 132(a)
 The Evidence Act, Cap. 112 – Sections 86 and 87

APPEARANCES:

PAUL EROKORO, (SAN) for the APPELLANT with him: Dr. Samuel E. Mosugu, (SAN); Canice I. Nkpe, (Esq.); Michael Ajara, (Esq.); Omachoko Idoko, (Esq.); Kingsley Odey and Tibileri Mosugu, (Esq.).

DR. ONYECHE IKPEAZU OON, (SAN) for the 1st Respondent with him: Emeka Etiaba, (SAN), FCI Arb; Alex Ejiesieme, (Esq.); Obinna Onya, (Esq.); Nwamaka Ofoegbu (Miss) and Nancy Okoli (Miss).

ECHEZONA ETIABA, (ESQ) for the 2ND AND 4TH RESPONDENTS with him: Prisca Ozoilesike (Miss) and Kasie Ogbuawa (Miss).

T.M. INUWA for the 3RD RESPONDENT with him: R. A. Ugbane (Mrs); W. Kuku

- A (Mrs); R. Aminu (Mrs); A. N. Makwe (Mrs); M. Ibrahim (Mrs); B. M. Abubakar, (Esq.) and C.C. Nnamah (Miss).

B **OGUNBIYI, (JSC) (Delivering the Lead Judgment):** This is an appeal against the judgment of the Court of Appeal, Abuja Division also referred to as court below delivered on 25th December, 2015 which dismissed the appeal filed by the appellant and affirmed the judgment of the trial Federal High Court which granted all the reliefs sought by the 1st Respondent, who was the plaintiff therein.

C

STATEMENT OF FACTS RELEVANT TO THIS APPEAL

D The 2nd respondent submitted the name of the 1st respondent to the 3rd respondent on the 18th day of December, 2014 alongside other candidates in Anambra State as its nominated candidate for election to the membership of the House of Representatives as member representing Onitsha North/South Federal Constituency of Anambra State. The 1st respondent also submitted the name of the appellant to the 3rd respondent as its candidate for the said Federal Constituency.

E The 3rd Respondent published the list and particulars of the candidates submitted but the name and particulars of the 1st respondent was not published.

F Consequent upon the above, on the 18th day of March, 2015 the 1st respondent as plaintiff caused an originating summons to be issued against the present 2nd – 4th respondents as 1st – 3rd defendants respectively. The present appellant applied and joined in the suit by order of court as 4th defendant. The reliefs sought in the originating summons are:

G

3. **DECLARATION that having regard to section 31 (2) (j), 50 of the Constitution of People's Democratic Party (PDP), Sections 31 (1) (2), 33 of the Electoral Act, 2010 (as amended) 222 (c) Constitution of the Federal Republic of Nigeria, Article 25 (XII) of the Electoral Guidelines for Primary Elections, 2014 of People's Democratic Party:**

H

I

- (iii) **No officer of the 1st defendant after 1st Defendant has forwarded to the 2nd Defendant, the list of its nominated candidates for the 2015 General Election for the House of Representatives Election which included the name of the plaintiff, can**

J

- A** lawfully withdraw only the name of the plaintiff and substitute her with another.
- B** (iv) The decision of the 3rd Defendant (National Working Committee) acting on behalf of the National Executive Committee after full review of reports of the primary election for the candidate of 1st Defendant for the Onitsha North/South Federal Constituency for the 2015 General Election to the effect that the Plaintiff is the candidate who emerged, is final and binding on all aspirants, officers and organs of the 1st Defendant.
- C** (v) The 2nd Defendant cannot accept and publish any other name after having received the Nomination forms and INEC form CF. 001 (Affidavit in support of Personal particulars) of all the 1st Defendant's candidates including the plaintiff.
- D** 4. Declaration that having regard to the categorical pronouncement of the 1st Defendant through its National Chairman AHMADU ADAMU MU' AZU, CON in 1st Defendant's letter Ref. PDP/DOM/GF1/495 dated December, 15, 2014 to wit:
- E**
- F** “3..... we hereby notify you that only the candidates approved by the National Executive Committee (through the National Working Committee) of our party are legally authorized to stand elections in the 2015 general election.”
- G**
- H** (i) The 1st Defendant cannot lawfully sponsor a candidate other than the plaintiff whose nomination was confirmed and approved by the 3rd defendant, the National Working Committee of the 1st defendant in its meeting of Wednesday, 17th December, 2014.
- I**
- J** (ii) The 2nd defendant cannot lawfully accept and publish any person as the 1st defendant's candidate for the Onitsha North/South

- A** **Federal Constituency in the 2015 General**
B **Election, other than the plaintiff whose**
C **name was approved by the National**
D **Working Committee of the defendant in its**
E **meeting of 17th December, 2014, as the**
F **Candidate for Constituency.**
- 5. Mandatory injunction compelling the 2nd defendant to publish**
C **the plaintiff's name, deal with, recognize and maintain the**
D **plaintiff as the candidate of the 1st defendant for the Onitsha**
E **North/South Federal Constituency of Anambra State.”**
- D** The facts and exhibits in support of the plaintiff's originating summons are contained in the affidavit deposed to by the plaintiff. (See pages 8 – 294 of Vol. 1 of the record). The 3rd Respondent filed a counter–affidavit to the originating summons (See pages 308 – 309) by which materials facts were deposed and
E placed before the trial court.
- The trial court evaluated all the facts in the various affidavits filed by respective parties as well as the documents before it and came to a conclusion that the 1st respondent's case had merit. The court therefore granted all the reliefs
F sought and having regard to the fact that election in respect of the Constituency has been conducted, made a consequential order amongst others that the 3rd respondent shall issue certificate of return for the Constituency to the 1st respondent.
- G** Aggrieved by the judgment of the Federal High Court, the appellant lodged an appeal at the court below. The appeal was heard and dismissed on the ground that the purported appellant's brief did not bear the stamp and seal of the person who signed it and also on the further ground that the 1st respondent
H established that she was improperly substituted by the 2nd and 4th respondents as the candidate for Onitsha North/South Federal Constituency for the 2015 General Election.
- I** Dissatisfied with the decision of the Court of Appeal, the appellant herein initiated this appeal by virtue of a notice of appeal dated and filed on 22nd February, 2016. The appellant also filed another notice of appeal on 17th March, 2016 and on 29th September, 2016 he was granted leave by the Court to appeal on
J the grounds stated in the said subsequent notice of appeal. For the hearing of this

A appeal, the appellant has now filed a brief of argument based on the notice of appeal of 17th March, 2016.

In accordance with the rules of this court briefs were filed and exchanged by the parties.

B The amended appellant's brief of argument was filed on 23/5/16 and deemed filed on the 29/9/16. A reply brief to the 1st respondent's brief of argument was also filed by the appellant on 13/12/2016 and deemed as properly filed on the 14/12/16. The two briefs were settled by the chambers of Paul Erokoro and Co.

C The 1st respondent's brief of argument was also settled by Dr. Onyechi Ikpeazu, SAN. It was filed 25/11/2016 and deemed filed on 14/12/16.

On behalf of the 3rd respondent a brief of argument was filed on 28/10/16 and settled by T.MInuwa ESQ.

D There are no briefs filed on behalf of the 2nd and 4th respondents.

On the 14th December, 2016 when the appeal was fixed for hearing, the learned senior counsel Mr. Paul Erokoro, (SAN) on behalf of the appellant adopted and relied on their briefs of argument and urged that the appeal be allowed. The learned senior counsel, Mr. Onyechi Ikpeazu, (SAN) representing the 1st respondent also adopted and relied on their brief of argument and urged in the first place, to allow the preliminary objections raised or in the alternative, dismiss the appeal as incompetent.

F On behalf of the 3rd respondent further, their learned counsel Mr. T.M. Inuwa also adopted and relied on their brief of argument. In seeking for a dismissal of the appeal the counsel urges before us that the concurrent findings of the two lower courts should not be disturbed.

G I will seek to say at this point that Mr. Echizona Etiaba as counsel who represented the 2nd and 4th respondents applied to withdraw formally the 2nd and 4th respondent's brief of argument filed 9/12/2016.

H Consequent upon the application, the learned senior counsel Mr. Paul Erokoro (SAN) applied also to withdraw the appellant's reply brief to the said 2nd and 4th respondent's brief. The brief filed 9/12/2016 and the reply brief deemed filed 14/12/16 are both withdrawn without an objection and struck out respectively.

I The amended notice of appeal filed 13/12/16 was deemed filed 14/12/16. From the 25 grounds of appeal filed, the two issues distilled by the appellant are as follows:

J 1) **Whether upon a proper construction of Rule 10(1) of**

- A Rules of Professional conduct and order 10 Rule 1 of the Court of Appeal Rules, 2011, the Court of Appeal was not in error when it held that the appellant's brief was incompetent. (Distilled from Grounds 1, 2 and 3).**
- B**
- 2) Whether the Court of Appeal was not in error when it held that the 1st respondent was the candidate of the 2nd Respondent for the Onitsha North/South Federal Constituency in the House of Representatives election of 28th March, 2015 and not the appellant (distilled from Grounds 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 25).**
- C**
- D** Without having to waste any time, I seek to state straight away that the appellant did not formulate any issue from ground 24 of the grounds of appeal. Same is hereby struck out. See the case of **Ajibulu vs. Ajayi (2014) 2 NWLR (Pt. 1392)**
- E 283 at 494. See also Iyaho vs. Effiong (2007) 11 NWLR (Pt. 1044) 31 at 49.**
The two issues formulated by the appellant are adopted by the 1st respondent. On behalf of the 3rd respondent however, issue 2 only was adopted to the exclusion of the 1st issue.
- F** As a preliminary point to the main appeal, the 1st respondent on the 25/11/2016 filed a notice of preliminary objection to the hearing of this appeal wherein he prays the court as follows:
- G “TAKE NOTICE that the 1st respondent shall contend as a preliminary objection that this appeal is incompetent and ought to be struck out for the reason that in the NOTICE OF APPEAL dated and filed on 17th March, 2016 at pages 978 to 999**
- H of the record, it was not indicated who among the three (3) names above the words “appellant's solicitors” at page 999 that signed the notice of appeal.”**
- I** There are four grounds predicated the application as follows:
- 1) At page 999 of the supplementary record of appeal,**
- J**

- A** **though there are three (3) names above the words “appellant's solicitor” there is no indication which one of them signed the signature on the document.**
- B** **2) Though there is a stamp and seal on the document, that alone is no indication as to who signed the document as in the present case, the appellant's brief at 647 discloses a seal which bears the name .A. IZINYON SAN, but the**
- C** **document was not in fact signed by the learned senior counsel.**
- D** **3) The appearance of stamp and seal of a legal practitioner without move is not proof that the document was signed by he whose stamp and seal was affixed.**
- E** **4) A notice of appeal which is not shown to have been signed by an identified legal practitioner is incompetent.**

F The argument in respect of the notice of preliminary objection was embedded in the 1st respondent's brief of argument vide paragraphs 3.01 – 3.01.5 at pages 2 and 3. In response to the objection is the appellant's reply brief contained in his un-paginated reply to the 1st respondent's brief at paragraphs 1, 2, 3, 4, 5 and 6 shown at the first two pages and concluded at the top of the 3rd page therein.

G I have taken note of the two alternative preliminary objections raised by the 1st respondent.

In my opinion, the nature of same should not operate so as to hinder the hearing of this appeal on its merit. This I consider as paramount and should be given prominence.

H In other words, the preliminary objections are all discountenanced and I hereby proceed to determine the merit of the appeal which I will consider issue 2 as sufficient for its disposal.

I **ISSUE 2**

J **Whether the Court of Appeal was not in error when it held that the 1st respondent was the candidate of the 2nd respondent for the Onitsha North/South Federal Constituency seat in the House of Representatives election of 28th March, 2015 and not**

A the appellant.

It is the submission on behalf of the appellant that from 1st respondent's pleadings the **onus** is on her to prove each and everyone of the following facts that:

- B** 1. She won the primaries.
- 2. The dispute that arose from the primaries was resolved in her favour by the National Working Committee (NWC) of the PDP.
- 3. Her name was submitted to INEC by the PDP as its candidate.
- C** 4. It was the Federal High Court that ordered INEC to publish a name different from hers.
- 5. The person whose name was thus published emerged from a primary election conducted by a state faction of the PDP.
- D** 6. The order of the Federal High Court was subsequently set aside by the Court of Appeal.
- 7. At some point during this saga, PDP or some other person withdrew her name from INEC and substituted another name as the candidate of the
- E** party.

The learned senior counsel for the appellant, while considering the totality of the 1st respondent's case submitted vehemently that the lower court was quite wrong to have held that substitution of names had been proved in this case as the court in effect, failed to follow the standard of proof prescribed by this court in **Agbakoba vs. INEC (2008) 12 SC (Pt. 111) 171**.

It is the submission of senior counsel further that the lower court was equally wrong when it held at pages 921 – 922 of the record that the appellant had admitted in his brief that this case concerned substitution of names under Section 33 of the Electoral Act 2010 (as amended); that the appellant never made that admission. Counsel submits further that the Court of Appeal confused

H “submission of name” with “substitution of name.”

It is the submission of counsel further that by taking the totality of the appellant's brief in the lower court and his 1st issue as well as his counter affidavit at the trial court, it is clear that the appellant disputed the 1st respondent's allegation that her name was substituted with another; that the lower court went against established principles of law on how admissions are to be proved especially the rule in *Titiloye vs. Olupo* (1991) 9 – 10 page 120 at 146.

It is the counsel's submission also that the 1st respondent failed to prove

J any of the 7 (seven) issues thrown up by her originating summons, let alone

- A proving all. It is unfortunate, counsel argued, that the Court of Appeal failed to appreciate this, but rather held that the 1st respondent had discharged the onus of proof in the case. By holding as it did, that the lower court failed to follow binding precedents of this court, especially the rule in **Odofin & Ors vs. Mogaji & Ors** (1978) IV SCC 275 at 277.

B It is the submission of counsel again that the two lower courts failed to put the evidence of both sides on an imaginary scale to see which carried more weight; that if the lower court had done so, it would never have come to the conclusion that the evidence of the 1st respondent “**preponderated better than that of the appellant**”, and would never have decided that the appellant's name was substituted for the 1st respondent.

C It is submitted further by the counsel that the lower court greatly erred again when it proceeded without determining who between the appellant and the 1st respondent actually won the 2nd respondent's primary election, and held that the 1st respondent was the candidate of the 2nd respondent at the election into the House of Representatives.

D Considering the facts of this case and the law applicable, counsel submits that a case of substitution of candidates was not made out as the 1st respondent who alleged substitution, failed to:

- E a. Prove that she won the primary election;
- F b. Prove that her name was ever submitted by PDP to INEC and later withdrawn and substituted with another;
- c. Prove who substituted her name and when and how it was substituted.

G The learned counsel repeatedly holds the lower court in grave error which occasioned a miscarriage of justice against the appellant when it held that the case before it (lower court) was not a case under Section 87(9) but a case under Sections 31, 33, 35 and 36 of the Electoral Act.

H The further error by the lower court, counsel opined, is grossly manifested when it invoked the provisions of Section 167(d) of the Evidence Act, 2011 against the 2nd and 4th respondents and dismissed the appellant's appeal.

I The learned senior counsel holds the decision of the lower court as perverse, having been reached in defiance of the evidence on record and the law applicable thereto.

J In finality, the senior counsel on behalf of the appellant urges this court in conclusion to allow this appeal, set aside the judgment of the lower court, as well

- A** as the orders contained therein the judgment, and uphold the nomination of the appellant as 2nd respondent's candidate and return him to his seat as a member of the House of Representatives representing Onitsha North/South Federal Constituency of Anambra State. A further order for his immediate swearing-in by the Speaker of the House of Representatives was also advocated.

- B** In response to the foregoing submission, the learned senior counsel for the 1st respondent ascribes a complete misconception of the facts of this case by the appellant which counsel argues is borne out by a total failure to appreciate the nature of the case presented by the 1st respondent.

- C** In a nutshell, the 1st respondent's case is that the appellant has no business to do in the case at hand right from its inception. It is counsel's submission further that the appellant was not sued by the 1st respondent in the first place. Rather that the appellant applied unilaterally and was joined; that even upon the joinder of the appellant, the 1st respondent did not amend her reliefs and questions for determination in order to present a case against the appellant.

- D** It is the submission of senior counsel further that the propriety or otherwise of this resort by the 1st respondent is not before the court as no issue was taken by the appellant on this at all stages of the proceedings; that the 1st respondent on her part, saw no need to alter the reliefs or questions as the case presented by her was strictly a case of unlawful substitution by the two (2) culprits, namely the 2nd and 4th respondents herein.

- E** The learned counsel implored the court to make a comprehensive analysis of the originating summons taken out before the trial Federal High Court and also the reliefs sought thereof. The counsel submits as ironical that the appellant against whom no case was presented and who came into the case with no claim of his own, could convert the case before the court from a case of unlawful substitution to a case of who as between the appellant and the 1st respondent won the primary election, which was not the case presented.

- F** The learned counsel further argues that the right of appeal which avails to a party, must however be circumscribed within the precincts of the questions and reliefs in the case. This, the learned counsel maintains because it is the claim of the plaintiff which defines the issues presented and on which pronouncements of the court may be made.

- G** The learned counsel submits further that the two lower courts duly considered the depositions of the parties as well as the admissible documents

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A placed before them in line with the case presented for determination, before arriving at the severe conclusion that the 1st respondent was entitled to the reliefs sought.

B The 3rd respondent's counsel in his brief of argument aligned himself with the submission advanced on behalf of the 1st respondent. It is the contention of the learned counsel that the two lower courts found merit in the originating summons and therefore granted the reliefs sought by the 1st respondent including the consequential reliefs.

C The learned counsel submits finally that the 3rd respondent does not intend to fault the concurrent findings of the two lower courts which were based on the materials placed before the courts.

D **RESOLUTION OF THE ISSUE**

This appeal is hinged on whether the lower court was right in endorsing the trial court's decision wherein it granted the reliefs in favour of the 1st respondent having regard to the evidence before the court.

E The law is well established that it is the plaintiff's case that determines the cause of action filed in court. In order to ascertain a cause of action, the immediate materials a court should look at are the writ of summons, and the averments in the statement of claim. See **Ossai vs. Wakwah (2006) 4 NWLR (Pt. 969) 208 at 229. Diapianlong vs. Dariy (2007) 8 NWLR (Pt. 1036) 332; Ejiro vs. Idris (2006) 4 NWLR (Pt. 971) 538 at 560 – 561.**

F In an action commenced by originating summons as it is the case at hand, the processes to be examined are the reliefs sought and the affidavit in support of the originating summons.

G It is pertinent to say emphatically that in the case now before us, the 1st respondent herein, as plaintiff, at the Federal High Court, Abuja, sought the determination of two questions specifically against the 2nd – 4th respondents who were the 1st – 3rd defendants respectively and sought for a number of reliefs which are all reproduced earlier in the course of this judgment.

H On his own volition, the appellant applied to be joined to the suit as 4th defendant. Consequent upon the hearing of the arguments from the parties, the court delivered its judgment and granted all the reliefs sought by the plaintiff (now 1st respondent) on the originating summons and further made other ancillary orders. Consequently, the 4th defendant/appellant was ordered to vacate his seat in the Federal House of Representatives and the Certificate of Return issued to him

J

- A** was cancelled accordingly. The 2nd defendant now 3rd respondent herein was ordered to issue a Certificate of Return to the plaintiff/1st respondent and the Speaker of the House of Representative and the Clerk of the National Assembly were ordered to swear in the 1st respondent as the Honourable member of the
- B** Federal House of Representatives representing Onitsha North/South Constituency, forthwith.

On appeal to the court below, same was dismissed on merit and the trial court's judgment was affirmed. Hence the appeal now before us which borders on

C the propriety of the lower court in affirming the judgment of the trial Federal High Court.

In other words, the appeal is hinged on whether or not the learned trial judge rightly granted the reliefs in favour of the 1st respondent having regard to

D the evidence before the court.

It is submitted on behalf of the appellant that the 1st respondent failed woefully to discharge the evidential burden of proof placed on her by law. This, the senior counsel for the appellant contends especially where the suit is

E declaratory in nature and the appellant bears the burden of proof and not relying on the weakness of the defence.

The law is also trite that the required standard of proof in civil cases is generally placed on the preponderance of evidence or balance of probabilities. The duty is on the plaintiff to adduce evidence in support of his pleadings. See

F **Okechukwu vs. A-G Rivers State (2012) 6 NWLR (Pt. 1295) 53 and purification Technique (Nig) Ltd vs. Jubril (2012) 18 NWLR (Pt. 1331) 109.**

In the case at hand, paragraphs 10, 17, 18, 19, 20 and 21 of the affidavit in support of the originating summons at pages 9-11 of the record deposed to by the

G plaintiff/1st respondent herself are very crucial to the cause of action and I deem it necessary to reproduce same as follows:

- H** **“10. The names of all the successful candidates were duly embodied in a list produced by the 1st defendant which was attached to the Nomination Form and the INEC Form CF001 (Affidavit in support of personal**
- I** **particulars) of all the candidates for the various Federal Constituencies of Anambra State. My name was in the list forwarded to the 2nd defendant together with the Nomination Forms of all the successful candidates.**

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- A** **17. That National Working Committee minutes and extracts are categorical that it was I who was duly nominated as the candidate for the Onitsha North/South Federal Constituency of Anambra State.**
- B**
- C** **18. The 2nd defendant received my name from the 1st defendant as evidenced by the list attached to the INEC Form CF.001 of the candidates for the 1st defendant for the Federal Constituencies in Anambra State. (Emphasis supplied)**
- D** **19. Despite the foregoing, the 2nd defendant deliberately acceded to the withdrawal of my name as a candidate of the 1st defendant when it knew that it had no right to do so.**
- E** **20. I applied to the 2nd defendant through my lawyers vide a letter dated 10th February, 2015 for a copy of my INEC Form CF. 001 submitted to the 2nd defendant and was issued a certified true copy of same which also embodies the list of candidates containing my name.**
- F**
- G** **21. Hereto delivered and marked Exhibits are the following:**
- H** **i. Constitution of the 1st defendant as Exhibit 1**
- I** **ii. Guidelines of the 1st defendant for 2014 primaries as Exhibit 2**
- J** **iii. Party Membership Card of the plaintiff as Exhibit 3**
- iv. Receipt for Expression of Interest form and copy of Nomination form as Exhibit 4 and 5.**
- v. Result of the Primary Election as Exhibit 6**
- vi. INEC Form CF001 for other candidates as Exhibit D7 to D16**
- vii. My INEC Form CF001 as Exhibit D17**
- viii. Application for a certified true copy of my**

- A** **INEC FORM CF.001 dated 10th February, 2015 as Exhibit D17A**
- ix.** **1st defendant's letter Ref. PDP/DOM/GFI/495 dated December 15, 2014 as Exhibit 8.**
- B** **x. Minutes of the 395th meeting of the 3rd defendant on 17th December, 2014 as Exhibit 9”**
- C** Specific reference should in particular be made to paragraph 18 of the affidavit supra wherein the 1st respondent contends that the 2nd respondent herein forwarded her name to the 3rd respondent (INEC) in a list which embodied names of other candidates to which was attached the Nomination Forms and INEC
- D** Forms CF001 (affidavit in support of personal particulars) of all the candidates of the 2nd respondent for the other Federal Constituencies of Anambra State.
- It was later, in her consternation upon the discovery that her name was omitted from the list published by INEC that, she (1st respondent) by a letter dated
- E** 15/12/2014, thereupon applied to the 3rd respondent who issued her with copies of forms CF001 (Exhibits D7 D16) for all candidates from Anambra State and contained her own Form CF002 (Exhibit D17) which was submitted to the 3rd respondent by the 2nd respondent.
- F** At pages 926, 927, 928 and 929, the lower court in its comprehensive judgment is very apt in capturing extensively the true picture of the state of events that pertains to this case. The reproduction of their Lordships judgment is very pertinent and this is what they said:
- G**
- H** **“The learned senior counsel for the appellant has contended that the only proof of ratification of the 1st respondent's candidature by the 2nd respondent is the minutes of 395th meeting of the 4th respondent wherein the 1st respondent was purportedly ratified. He argued strenuously that the 1st respondent woefully failed to prove her assertion in that the extract of the minutes as Exhibit 1, to the contrary, contained**
- I** **the name of the appellant as the candidate adopted and ratified by the 4th respondent.**
- J** **It is instructive to note that on the same date the suit was filed; the trial court granted the prayers of the 1st respondent's ex-**

A **parte application which included:**

- 1. That an order is hereby made directing the Secretary of the 1st defendant who is also a member of the 3rd defendant to produce vide affidavit evidence of the minutes of the 395th meeting of the 3rd defendant held on Wednesday, 17th December 2014 or the relevant portion thereof dealing with approval of candidates for the 2015 national Assembly Election in Anambra State. (Emphasis Supplied).**
- B**
- C**

Exhibit 1 is the purported compliance with the said Order by 2nd and 4th respondents. An examination of Exhibit 1 shows clearly that it is not the minutes of the said 395th meeting that was produced. Rather, it is what is termed “extract” of the said minutes that was attached as Exhibit 1. A perusal of the alleged extract at pages 513-515 of the record of appeal shows without any equivocation whatsoever that what was produced is far from being the minutes or “relevant portion thereof” as ordered by the court. Neither can it be regarded as an “extract” of the said minutes as claimed by the appellant. “Extract” is defined as (1) “A portion or segment, as of a writing. (2) Scots law ESTREAT.” **See Blacks Law Dictionary 8th Edition at page 623.** The meaning of the word “extract” is more illuminated from the definition of ESTREAT at page 391 of the same dictionary which states:

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E

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“A copy or duplicate of some original writing or record, esp. of a fine or amercement imposed by a court, extracted from the record; and certified to one who is authorized and required to collect it”.

G

H The **6th Edition of Black's Law Dictionary (Centennial Edition)** is more pictorial about the meaning of the word “EXTRACT”. It defines it as:-

“A portion or segment of writing”.

I

The intendment of an “extract” of minutes of a meeting in my view presupposes the culling out the relevant excerpts of the minutes of the meeting in its original

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- A form. It means something extricated from the main body. The word, “Portion” is defined by **Oxford Advanced Learner's Dictionary (7th Edition)** as “one part of something larger”. A relevant portion of the document of minutes of a meeting cannot admit of the supply of another document which does not form part of it.
- B The document titled “EXTRACT” did not meet the requirement of the Order of court. It is neither “the minutes” nor “a portion thereof”. In the circumstances of this case, the ratification of the candidate by the 4th respondent can only be proved by production of the minutes or a portion of it. The concomitant effect is that
- C neither the minutes nor portion of it was produced as ordered by court. **The purport of Section 167 (d) of the Evidence Act is that where one party to a suit withholds evidence, if made available, would be against that person.** See (1) **Amgbare vs. Sylva (2009) 1 NWLR (Pt. 1121) 1 at 63, paras. B-E;**
- D **Olusanya vs. Osinleye (2013) 12 NWLR (Pt. 1367) 148 at 164; Aliyu vs. State (2013) 12 NWLR (Pt. 1368) 403 at 426; State vs. Azeez (2008) 14 NWLR (Pt. 1108) 439 at 492, paras. C – D.**

- E It is pertinent to emphasize that the said minutes of the meeting of the 2nd and 4th respondents dealing with the ratification of a candidate for the election is central and crucial to the just determination of this case, which minutes are under the custody of the 2nd and 4th respondents. The denial of the 2nd respondent in its affidavit of the deposition of the 1st respondent that she was not the one that was
- F sponsored by the party is irrelevant in view of intendment of Section 149 (d) now section 167(d) of the Evidence Act. Reliance on the case of **Buhari vs. Obasanjo (2005) 13 NWLR 1 (Pt. 941)** is of no assistance to the appellant for the facts are distinguishable from the instant case.

- G In the case of **Buhari vs. Obasanjo** for instance at pages 198 199 Belgore, JSC (as he then was) said:

- H **“In notice to produce procedure, it is supposed that the person asking for the document knows of the contents, perhaps has a copy of it. If the person to produce fails to produce it, the secondary evidence of it can be admitted in evidence. Chief John Ukpa of the ANPP, if he actually wrote the letter of protest in question, he could bring the copy of it for admission. Either**
- I **the letter did not exist or it existed but Chief John Ukpa refused to bring its copy. If he brought the copy, the presumption can as well be that the contents would not have supported the case of**

J

A the appellant.”

B In the instant case, the 1st respondent herein was not in a position to produce the secondary evidence of the minutes of the 4th respondent which can only be in the custody of the 4th respondent and probably copies with participants at the meeting.

C In other words, the 1st respondent was not a participant at the said meeting. Therefore, the contention by the learned senior counsel for the appellant that the proof of ratification of the 1st respondent's candidature by the 2nd respondent was the minutes of 395th meeting of the 4th respondent is greatly misplaced. There can be no question of extract of any minutes, expected from the 1st respondent. The presumption of section 167(d) of the Evidence Act cannot be applied against the 1st respondent in this situation. The section will rather operate in her favour.

D Again and contrary to the submission by the senior counsel for the appellant further, the two lower courts could not be faulted when they invoked the provisions of Section 167(d) of the Evidence Act against the 4th respondent ipso facto, the 2nd respondent.

E Consequently, the effect of the foregoing is that the 1st respondent proved the assertion in her affidavit in support of the originating summons that indeed, it was her name that was forwarded by the 2nd respondent to the 3rd respondent as the candidate ratified by the 2nd respondent for the membership of the House of Representatives for member representing Onitsha North/South Federal Constituency of Anambra State. The denial made by the 2nd respondent is of no consequence therefore. It is not out of place, I hold, that section 167(d) of the Evidence Act was put in place.

F The confirmation holds secure especially when reference is made to the fact that the 3rd respondent, who is the appropriate body in law to receive the list of sponsored candidates for election did not deny that the 2nd respondent forwarded the name of the 1st respondent. It is on record, rather than the 3rd respondent was categorical that it received the list of candidates for the election, which included the 1st respondent. Paragraphs 4 and 5 of the counter-affidavit of the 3rd respondent to the originating summons are evident as proof as follows:

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H **“4. I know that the 1st defendant submitted the Forms CF001
 (affidavit in support of personal particulars of persons**

I

A seeking election to the office/membership of House of
B Representatives) of the candidates it intended to sponsor
for the election to the Membership of the National
Assembly in respect of Anambra State to the 2nd
B defendant including that of the plaintiff for Onitsha
North/South Federal Constituency of Anambra State.

C 5. I know all the forms CF001 submitted to the 2nd
D defendant by the 1st defendant in respect of its candidates
in Anambra State has forms CF002 (submission of
Names of Candidates by a political party) attached
thereto including that of the plaintiff.” (Emphasis
supplied).

E Exhibit 17A at page 290 of the record, is a certified true copy of
application made by the 1st respondent to 3rd respondent
(INEC) for a:

F “Copy of INEC Form CF. 001 submitted to the 2nd
defendant and was issued a certified true copy of same
which also embodies the list of candidates containing my
name.”

G (Reference paragraph 20 of the affidavit in support of the
originating summon at page 10 of the record of appeal
reproduced supra).

H It is also instructive to note that Exhibit D17A has the acknowledgment stamp off
the 3rd respondent. Exhibit D7 to D17 are the documents the 3rd respondent
forwarded to the 1st respondent in response to her application.

I I agree with the lower court when it held therefore that the concerted effort
made by the appellant to impugn the authenticity of Exhibits D7 D17 as having
not been signed is in the circumstance futile. This is firmly established when
regard is had to paragraph (m) of the 2nd respondent's counter affidavit at page 399
of the record of appeal in reaction to the 1st respondent, wherein it only addressed
Exhibit 6, D17 and 9 but not D7 to D16 when it deposed thus:

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A

“(m) Exhibit 6, D17 and 9 are worthless pieces of paper prepared by the plaintiff in anticipation of proceedings”.

B From the foregoing, it is reasonable to say that the 2nd respondent, which enjoined by law to forward the forms CF001 and the list of candidates sponsored by the party, had no justification to complain about the list forwarded. This is because the record had shown that the list attached to Form CF.001 contained the name of the 1st respondent as No. 4. Therefore, the said documents are deemed to be admitted by the 2nd respondent as those it sent to the Commission (INEC).

C It is even more intriguing that with copious reference made to the depositions of paragraphs 4 and 5 of the 3rd respondent's counter affidavit (reproduced earlier in the course of this judgment) same is an admission also of the averments of paragraphs 18, 19, 20 and 21 of the 1st respondent's affidavit. Undoubtedly it serves also as an evidence given in support of the case of the 1st respondent, to the effect that her name was indeed forwarded to the 3rd respondent. The assertion, was by that means admitted by the 3rd respondent.

D I wish to say at this juncture further that, while the 3rd respondent was emphatic in its response on the 1st respondent at paragraphs 4 and 5 of its counter affidavit, the same cannot be said in respect of the appellant. In other words, the 3rd respondent did not indicate that the appellant's Form CF002 was accompanied by Form FC001 deposed to by all other candidates of the Electoral Act, 2nd respondent.

E On the question of Section 31 of the Electoral Act, 2010, I wish to state that subsection (1) and (2) of same do not envisage sending Form CF002 alone. The reproduction of the sub-sections will give a clear explanation of the point:

F **“31(1) Every political party shall not later than 60 days before the date appointed for a general election under the provisions of this Act, submit to the Commission, in the prescribed forms, the list of the candidates the party proposes to sponsor at the elections, provided that the commission shall not reject or disqualify candidate(s) for any reason whatsoever.**

G **(2) The list or information submitted by each candidate shall be accompanied by an affidavit sworn to by the candidate at the Federal High Court, High Court of**

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- A** **State or Federal Capital Territory, indicating that he has fulfilled all the constitutional requirements for election into that office.”**
- B** The contention held by the appellant therefore that Exhibits D – D17 are in admissible is not tenable having regard to the fact that they are not the original documents, but certified true copies sent to the 1st respondent in her request for the documents. The law does not require the certification or signing of a certified true copy of a document. See **Ahmed vs. CBN (2013) 11 NWLR (Pt. 1365) 352 at 373 per Onnoghen, JSC** (as he then was).
- C** By a combined reading of sub-sections (1) and (2) of section 31 of the Electoral Act, 2010, the submission of the particulars of a candidate sponsored by
- D** a party must be accompanied by the list of the candidates proposed for sponsorship by the party for the elections. Thus, Forms CF002 as well as Form CF001 of all the candidates and documents “shall” be forwarded by 2nd respondent to 3rd respondent.
- E** On a careful review and analysis of the evidence on the record of appeal before us, I can safely say that, while the 1st respondent had met with all the requirements relating her documentation which are in the custody of INEC, the same cannot be said of the appellant.
- F** On the allegation of a seeming conflict on the affidavits of the parties, this, I hold is a mere perception by the appellant and which is instantly resolved when regard is had to the authentic documents presented on behalf of the 1st respondent. While the 1st respondent produced certified true copies of her documents from the
- G** custody of INEC, those presented by the appellant did not emanate from the custody of 3rd respondent (INEC). The principle of resolution of affidavit conflict through certified documentation is well entrenched by this court in the case of **Agbakoba vs. INEC (2008) 18 NWLR (Pt. 1119) 489 at 539 (Para. E-G)** thus:
- H** **“The fact a party's set of documents as against the ones of his opponent present a disorderly nature by lying ex facie should not be a ground of alleging conflicting facts in the documentary exhibit of the parties to necessitate taking oral evidence to resolve it. Even though a factual issue as submitted by 2nd and 3rd respondent, it could be resolved by authentic documents before the court of which there are number of them here as I will show**
- I**
- J**

A later on and not only by calling oral evidence. See Shitta-Bey's case (supra). More importantly, it is settled that oral evidence cannot be allowed to add to or subtract from or alter or contradict a written document. See section 132(a) of the Evidence Act, Nubia vs. Attorney-General, Rivers State (1999) 3 NWLR (Pt. 593) 82; B.O.N Ltd. vs. Akintoye (1999) 12 NWLR (pt. 631) 392; U.B.NPlc vs. Ozigi (1994) 3 NWLR (Pt. 333) 385; and Koiki vs. Magnusson (1999) 8 NWLR (pt. 615) 492.”

C On the credible nature of the 1st respondent's evidence, reference can be made to the case of Agbi vs. Ogbeh(2006) 11 NWLR (pt. 990) 65 at 116 per Musdapher, (JSC) (as he then was) wherein his lordship gave a sound description of what amounts to credible evidence which must be:

D

E “Worthy of belief, ----- must be credible in itself in the sense that it should be natural, reasonable and probable in view of the entire circumstances”

At page 941 of the record of appeal, the lower court rightly restated the position held by the trial court that the 1st respondent did establish her improper substitution by the 2nd and 4th respondents. This was where the trial court did impugn the authenticity of the appellant's form CF001 and said:

F

G “Related to the above also is the fact that the 1st defendant's Exhibit 10 (to its further counter affidavit) which purports to be the form CF001 of the 4th defendant bears a strange signature different from the signature appended by the 4th defendant in the 4th defendant's Exhibit G2 and G3.”

H The foregoing position was affirmed by the lower court at pages 942 – 943 of the record of appeal in the following terms wherein Akomolafe – Wilson (JCA) in the lead judgment said:

I “I am therefore of the view that by the pleading and totality of evidence before the trial court, the 1st respondent discharged the burden of proof placed on her in law. She established

J

- A** **sufficient evidence in proof of improper substitution of the 1st respondent by the 2nd and 4th respondents. She was therefore entitled to the reliefs sought in the originating summons.”**
- B** This finding cannot be faulted and I so hold.
- The law is trite and well established that declaratory actions in civil matters require proof on the balance of probabilities or on the preponderance of evidence. This court has established this principle firmly in the case of **Onisaodu & Anor vs. Elewuju and Anor (2006) 13 NWLR (Pt. 998) 517 at 527 – 528.**
- C** Furthermore and as rightly submitted by the counsel for the 1st and 3rd respondents respectively, the appeal at hand is against the concurrent findings of facts by the Federal High Court and the Court of Appeal.
- D** The law is well established that concurrent findings of the courts below will not be disturbed ordinarily except where they are tainted with miscarriage of justice or shown to be perverse.
- The appellant in this appeal has shown or advanced any cogent reason at all why the concurrent findings should be disturbed. Plethora of authorities are well established in support on this point. See the decision of this court in the case of **Yaki vs. Bagudu (2015) 18 NWLR (Pt. 149) 288. See also the cases of: Igwego vs. Ezeugo (1992) 6 NWLR (Pt. 249) 561, Mogo Chikwendu vs. Mbamah (1980) 3 SC 31; Ojomu vs. Ajao (1983) 9 SC 22, 53; Lokoyi vs. Olojo (1983) 8 SC 61, 68; Onobruchere & Anor vs. Esegine & Anor (1986) 1 NWLR (Pt. 19) 799 and Kazeem vs. Mosaku (2007) 17 NWLR (Pt. 1064) 523 at 536.**
- E** This appeal from all indications is a mere exploration and a game of chance lacking in dire merit. Same is hereby dismissed by me while the judgment of the Court of Appeal which affirmed that of the trial court is also affirmed. There shall be not order as to costs.
- F** On the totality of this appeal it is hereby dismissed with no order as to costs.
- Clara Bata Ogunbiyi**
Justice, Supreme Court
- I** **PETER-ODILI, (JSC):** I agree with the judgment just delivered by my learned brother, Clara Bata Ogunbiyi (JSC) and to register support for the reasoning, I shall make some remarks.
- J**

A This is an appeal against the judgment of the Court of Appeal, Abuja
 Division also referred to as court below delivered on 25th December, 2015 which
 dismissed the appeal, affirming the judgment of the trial Federal High Court
 which granted all the reliefs sought by the 1st respondent who was plaintiff in that
 B trial court.

The 2nd respondent, PDP submitted the name of the 1st respondent to the 3rd
 respondent, INEC on the 18th day of December, 2014 alongside other
 candidates in Anambra State as its nominated candidate for election to the
 C membership of the House of Representatives as member representing Onitsha
 North/South Federal Constituency of Anambra State. The 2nd respondent also
 submitted the name of the appellant to the 3rd respondent as its candidate for the
 said Federal Constituency. The 3rd respondent published the list and particulars of
 D the candidates submitted but the name and particulars of the 1st respondent was
 not published.

Consequent upon the above, on the 18th day of March, 2015, the 1st
 respondent as plaintiff caused on originating summons to be issued against the
 E present 2nd – 4th respondents as 1st – 3rd defendants. The appellant applied and
 was joined by order of court as the 4th defendant. The reliefs sought in the said suit
 are thus:

- F 1. **DECLARATION that having regard to Section 31 (2) (j),**
50 of the Constitution of People's Democratic Party
(PDP), Section 31 (1) (2), 33 of the Electoral Act, 2010 (as
amended) 222 (c) Constitution of the Federal Republic
 G **of Nigeria, Article 25 (xii) of the Electoral Guidelines for**
Primary Elections, 2014 of People's Democratic Party:
- H (i) **No officer of the 1st defendant, after 1st defendant**
had forwarded to the 2nd defendant, the list of its
nominated candidates for the 2015 General
Election for the House of Representatives Election
which included the name of the plaintiff, can
lawfully withdrew only the name of the plaintiff
 I **and substitute her with another.**
- (ii) **The decision of the 3rd defendant (National**
Working Committee) acting on behalf of the
National Executive Committee after full review of
- J

A reports of the primary election for the candidate of
B 1st defendant for the Onitsha North/South Federal
Constituency for the 2015 General Election to the
effect that the plaintiff is the candidate who
emerged, is final and binding on all aspirants,
officers and organs of the 1st defendant.

C (iii) The 2nd defendant cannot accept and publish any
other name after having received the Nomination
Forms and INEC Form CF.001 (Affidavit in
Support of Personal Particulars) of all the 1st
D defendant's candidates for the 2015 General
Election for the House of Representatives to were
attached the names of all the candidates including
the plaintiff.

E 2. **DECLARATION** that having regard to the categorical
pronouncement of the 1st defendant through its National
Chairman AHMADU ADAMU MU'AZU, CON in 1st
F defendant's letter Ref. PDP/DOM/GFI/495 dated
December 15, 2014 to wit:

G “..... We hereby notify you that only the
candidates approved by the National Executive
Committee (through the National Working
Committee) of our party are legally authorized to
stand elections in the 2015 general election”.

H (i) The 1st defendant cannot lawfully sponsor a
candidate other than the plaintiff whose
nomination was confirmed and approved
by the 3rd defendant, the National Working
Committee of the 1st defendant in its
I meeting of Wednesday, 17th December,
2014.

J (ii) The 2nd defendant cannot lawfully accept

- A** and publish any person as the 1st defendant's candidate for the Onitsha North/South Federal Constituency in the 2015 General Election, other than the
- B** plaintiff whose name was approved by the National Working Committee of the 1st defendant in its meeting of 17th December, 2014, as the candidate for the constituency.
- C**
- D** 3. **MANDATORY INJUNCTION** compelling the 2nd defendant to publish the plaintiff's name, deal with, recognize, and maintain the plaintiff as the candidate of the 1st defendant for the Onitsha North/South Federal Constituency of Anambra State”.

E At the end of the trial, the High Court granted the reliefs prayed for by the 1st respondent as plaintiff. The appellant aggrieved approached the court below which dismissed his appeal hence the recourse to the Supreme Court in this appeal.

F At the hearing on the 14th day of December, 2016, Paul Erokoro (SAN), learned counsel for the appellant adopted the amended appellant's brief of argument filed on the 23rd May, 2016 and deemed filed on the 29th September, 2016, also a reply brief filed on 13th December, 2016 and deemed filed on 14/12/16. In the brief of argument, the appellant identified two issues for determination which are stated hereunder thus:

G

- H** 1. **Whether upon a proper construction of Rule 10(1) of Rules of Professional Conduct and Order 10 Rule 1 of the Court of Appeal Rules, 2011, the Court of Appeal was not in error when it held that the appellant's brief was incompetent. (Distilled from Grounds 1, 2 and 3).**
- I** 2. **Whether the Court of Appeal was not in error when it held that the 1st respondent was the candidate of the 2nd respondent for the Onitsha North/South Federal Constituency in the House of Representatives election of 28th March, 2015, and not the appellant. (Distilled from,**

J

A Grounds 4 – 23 and 25)

B Dr. Onyechi Ikpeazu (SAN), for the 1st respondent adopted her brief of argument filed on 25/11/2016 and deemed filed on 14/12/16. He raised a preliminary objection and proffered arguments in the said brief. Learned counsel however raised two issues for determination in the event that the preliminary objection failed, which issues are thus:

C 1. Whether the learned Justices of the Court of Appeal were correct when they held that there was no valid appellant's brief before the court and thereby dismissed the appeal. Grounds 1, 2, and 3.

D 2. Whether the learned justices of the Court of Appeal were correct when they held that the 1st respondent gave sufficient evidence to prove that she was improperly substituted by 2nd and 4th respondents as the candidate for the Onitsha North/South Federal Constituency for 2015 General Election. Grounds 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 25.

F For the 2nd – 4th respondents were filed no brief by Echezona Etiaba.

G Learned counsel for the 3rd respondent, T.M. Inuwa Esq. adopted his brief of argument filed on 28/10/2016 and he adopted Issue No. 2 as raised by the appellant as the issue for use in the determination of this appeal. It is stated thus:

H Whether the Court of Appeal was not in error when it held that the 1st respondent was the candidate of the 2nd respondent for the Onitsha North/South Federal Constituency in the House of Representatives election of 28th March, 2015 and not the appellant.

I There is of course no gainsaying that the preliminary objection would be first dealt with.

J

A PRELIMINARY OBJECTION

The 1st respondent contends that the appeal is incompetent and ought to be struck out as there is no indication who among the three names indicated as “appellant's solicitors” on the notice of appeal signed the said process.

B Arguing the position for the sustenance of the objection, Dr. Ikpeazu (SAN) contended that even though the seal, stamp and name are those of Alex A. Izinyon (SAN), it is not the said Alex A. Izinyon (SAN) who signed as two other counsel names, also appeared at the signature area. This learned senior counsel
C submits vitiated the notice of appeal as it can be taken that it was not signed. He cited **SLB Consortim Ltd vs. NNPC(2011) 9 NWLR (Pt. 1252) 317; Onward Enterprises Ltd vs. OLAM Int'l Ltd (2010) All FWLR (Pt. 531) 1503 at 1513.**

For the objector, it was further contended that Ground 14 of the Ground of
D Appeal did not arise from the decision of the Court of Appeal and so the ground should be struck out. He cited **Odom v PDP (2015) 6 NWLR (Pt. 1456) 527 at 551 and 553; Vee Pee Ind. Ltd vs. Cocoa Ltd (2008) 13 NWLR (Pt. 1105) 486 etc.**

E Also learned counsel for the objector contended that Ground 22 of the grounds of appeal should be struck out as the particulars are vague and did not arise from the decision of the Court of Appeal. He cited **Akpamgbo – Okadigbo vs. Chidi (NO. 2) (2015) 10 NWLR (Pt. 1466) 124 at 167 – 168;**
F **LAAT vs. Opaluwa(2004) 9 NWLR (Pt. 879) 558; Jev vs. Iyortyom (2014) 14 NWLR (Pt. 1428) 575 etc.**

It was also stated that Ground 24 of the Grounds of Appeal should be struck out as no issue was raised therefrom.

G Paul Erokoro (SAN) for the appellant reacting to the objection stated that there is no difficulty in knowing whose signature was penned on the notice of appeal in line with the case of **Okafor vs. Nweke (2007) 10 NWLR (Pt. 1043) 521; SLB Consortium Ltd vs. NNPC (2011) 9 NWLR (Pt. 1252) 317.**

H He stated that 1st respondent's motion to have the appellant's grounds 14, 22 and 24 as well as appellant's Issue 2 struck out has its supporting affidavit containing legal arguments and conclusions contrary to Section 115 (1) and (2) of the Evidence Act was misconceived. He referred to **A.G. Adamawa State vs.**

I **A.G. Federation (2005) 18 NWLR (Pt. 958) 1 at 657.**

Learned counsel for the 1st respondent queried which counsel signed the supplementary record of appeal since there was a signature and below, three names of solicitors.

J

A Appellant's counsel countered that by stating that the signature is that of the 1st counsel, Paul Erokoro (SAN) and there was no confusion.

B This court had laid down the ground rules on what should be to qualify for an appropriate signing of a legal practitioner on a legal especially as it relates to an originating process such as a notice of appeal or such like. In the case of **SLB Consortium Ltd vs. NNPC (2011) 9 NWLR (Pt. 1252) 317 at 337-338**, the supreme court per Rhodes -Vivour (JSC) stated thus:

C **“All processes filed in court are to be signed as follows”**

First, the signature of counsel, which may be any contraption.

Secondly, the name of counsel written.

Thirdly, who the counsel represent.

D **Fourthly, name and address of legal firm.**

Once it cannot be said who signed a process, it is incurably bad, and rules of court that seem to provide a remedy are of no use as a rule cannot override the law (i.e. the Legal Practitioners

E **Act)”.**

In the lead judgment, Onnoghen (JSC) (as he then was) at pages 331 – 332 (paras H – A) held that:

F **“.... A process prepared and filed in a court of law by a legal practitioner must be signed by the legal practitioner and it is sufficient signature if the legal practitioner simple writes his**

G **own name over and above the name of his/or firm in which he carries out his practice.**

At 332 (Para E) it was further held thus:

H **“It has been argued that non-compliance with the provision of Order 26 Rule 4(3) supra is mere irregularity.... as the same involves the procedural jurisdiction of the court. I hold the view**

I **that the submission is misconceived on the authority of Madukolu vs. Nkemdilim (supra)..... the provision of the rules of court involved herein are, by the wordings mandatory not**

J **discretionary”.**

A This court had in **Okafor vs. Nweke (2007) 10 NWLR (Pt. 1043) 521** where the process in contention was signed above the name of J. H. C Okolo, SAN & CO, stated as follows on what should be thus:

B “..... J. H.C. OKOLO SAN & CO. is not a legal practitioner and
 therefore cannot practice as such by say, filing processes in the
 courts of this country. It is in recognition of this fact that
 C accounts for the argument of learned Senior Advocate for the
 applicants that to determine the actual person who signed the
 processes evidence would have to be adduced which would
 necessarily establish the fact that the signature on top of the
 inscription J.H.C. Okolo, SAN & CO. actually belongs to J.H.C.
 D OKOLO, SAN who is a legal practitioner in the roll. I had
 earlier stated that the law does not say that what should be in
 the roll should be the signature of the legal practitioner but his
 name. That apart, it is very clear that by looking at the
 E documents, the signature which learned senior advocate claims
 to be his really belongs to J.H.C. OKOLO& CO. or was
 appended on its behalf since it was signed on top of that name.
 Since both counsel agreed that J.H.C. OKOLO, SAN & CO. is
 F not a legal practitioner recognized by the law, it follows that the
 said J.H.C. Okolo, SAN & CO cannot legally sign and/or file
 any process in the courts.....” per Onnoghen (JSC) (as he then
 was) at page 531.

G The situation in **Okafor vs. Nweke** (supra) is different from the matter in hand, as
 in the earlier case the signature was above J.H.C. Okolo, (SAN) & CO. while in
 the instant case, the signature was above the name of Paul Erokoro, (SAN). The
 H difference is clear in that in the first case the signature was above the name of the
 legal firm which is not a legal practitioner, while in the latter, the signature is
 above a human person, legal practitioner known to the Legal Practitioners Act.
 Therefore, the conditions for validity of the process as prescribed by law and
 I explained in the judicial authorities are met. See **SLB Consortium Ltd vs. NNPC** (Supra); **Okafor vs. Nweke** (supra).

J On the second leg of the preliminary objection which attacks the
 competence of the some Grounds of Appeal, viz: 14, 22 and 24 on the ground that
 they did not arise from the decision of the Court of Appeal.

- A The learned counsel for the appellant countered by submitting that, it was not the case as the grounds emanated from what was considered in the court below and the 1st respondent in fishing for incompetent areas, infringed provisions of the Evidence Act Section 115 (1) and (2) on the ground that the supporting affidavit in support of the preliminary objection were legal arguments and conclusions.

The said Section 115 (1) and (2) of the Evidence Act provides as follows:

- C **“(1) Every affidavit used in the court shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true.**
- D **(2) An affidavit shall not contain extraneous matter, by way of objection or prayer, or legal argument or conclusion”.**

- E A look at paragraph 3 of the said supporting affidavit would assist as it is averred therein as follows:

- F **“3. I have seen and read the appellant's amended notice and Grounds of Appeal together with my principal in chambers, Dr. Onyechi Ikpeazu, OON, (SAN) who informed me in our office at 46 Oguata Road, Onitsha, Anambra State on 21st of November, 2016 at about 7:00am and I verily believe him as follows:**
- G **i. Ground 14 of the appellant's Ground of Appeal did not arise from the decision of the Court of Appeal and is liable to be struck out.**
- H **ii. Ground 22 of the Grounds of Appeal with the particulars are vague and did not arise from the decision of the Court of Appeal and is liable to be struck out.**
- I **iii. The entire Issue 2 of the appellant's brief of argument together with the argument advanced in support are incompetent being distilled from the incompetent Grounds 14 and 22 and are liable to be struck out.**
- J **iv. No issue was formulated from Ground 24 of the**

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Issue 2 of the appellant is sufficient in the determination of this appeal and I shall utilize it as sole issue.

SOLE ISSUE:

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**A Onitsha North/South Federal Constituency in the House of
Representatives election of 28th March, 2015, and not the
appellant.**

B For the appellant, it was submitted by learned senior counsel that the 1st respondent did not prove that the National Working Committee ever decided that her name be submitted to INEC as the candidate of the party. He referred to 1st respondent's affidavit at the trial court paragraphs 10 and 20. That the 1st respondent needed to strictly prove that her name was actually submitted to INEC by the party and that it was the National Chairman and Secretary of the party that did the submission. He cited **Lawal & Ors vs. Younan & Ors (1961) NSCC 130 at 134.**

D That the Court of Appeal raised the issue of the different dates in the two exhibits *suo motu* without hearing from both parties and thereby fell into error. He cited **Gwede vs. INEC (2014) 18 NWLR (Pt. 1438) 56 at 92 – 93; Ezeonu vs. Onyechi (1996) 3 NWLR (Pt. 438) 499 at 528.**

E Learned counsel for the 1st respondent, Dr. Ikpeazu (SAN) contended that this appeal is against the concurrent findings of fact of the Federal High Court and the Court of Appeal and that the appellant has not shown why this court should interfere with those findings as there is nothing perverse or a miscarriage of justice. He cited **Yaki vs. Bagudu** (supra).

F That at inception appellant was not sued by the 1st respondent and even after the joinder at instance of the appellant, 1st respondent did not amend the reliefs and questions for determination in order to present a case against the appellant. That the propriety or otherwise of this resort by the 1st respondent is not before this court as no issue was taken by the appellant on this at all the stages of the proceedings. That the trial court found in favour of the 1st respondent and made far reaching pronouncements against the 2nd and 4th respondents who were held to have unlawfully substituted the 1st respondent and they did not appeal and so the decision is binding on those parties for all purposes. He cited **Gundiri vs. Nyako (2014) 2 NWLR (Pt. 1391) 211; Amale vs. Sokoto Local Government (2012) 5 NWLR (Pt. 1292) 181.**

I Mr. Inuwa of counsel for the 3rd respondent stated that they do not intend to fault the concurrent findings of the trial Federal High Court which were based on the materials placed before them and so there is no need for this court's interference. He cited **Chukwuogor vs. Obuora (1987) 3 NWLR (Pt. 61) 454;**

J

A Igwego vs. Ezeugo (1992) 6 NWLR (Pt. 249) 561; Kazeem vs. Mosaku (2007) 17 NWLR (Pt. 1064) 523 at 536.

The summary of what the appellant posits are stated hereunder as follows:

B 1. 1st respondent's objection to the competence of the
appellant's brief of argument apart from not being
sustainable under Rule 10 (1) of the Rules of
Professional Conduct, was incompetent having not been
C raised before the hearing of the appeal. The decision of
the lower court nullifying the appellant's brief and
dismissing his appeal was patently unjust.

D 2. The lower court was in grave error when, without determining who between the appellant and 1st respondent actually won the 2nd respondent's primary election, held that the 1st respondent was the candidate of the 2nd respondent at the election into the House of Representatives.

F

3. Considering the facts of this case and the law applicable, a case of substitution of candidates was not made out as the 1st respondent who alleged substitution, failed to:

G

- (a) Prove that she won the primary election;**
- (b) Prove that her name was ever submitted by PDP to INEC and later withdrawn and substituted with another;**
- (c) Prove who substituted her name and when and how it was substituted.**

H

4. The lower court failed to properly evaluate the evidence *as a whole*.

I 5. The lower court was in error which occasioned a miscarriage of justice when it held that the case before it was not a case under Section 87 (9) but a case under Sections 31, 33, 35 and 36 of the Electoral Act.

A

6. **The lower court was in error when it invoked the provisions of Section 167 (d) of the Evidence Act, 2011 against the 2nd and 4th respondents and dismissed the appellant's appeal.**

B

C

7. **The lower court was wrong in its finding that the 1st respondent's name was properly submitted to INEC when the document that allegedly did so was not signed.**

D

8. **The conclusions and decisions of the lower court were perverse, having been reached in defiance of the evidence on record and the law applicable thereto.**

The appellant sought the following reliefs, viz:

E

- (i) **Allow this appeal;**
 (ii) **Set aside the judgment of the lower court;**
 (iii) **Set aside the orders contained in the judgment of the lower court;**

F

- (iv) **Uphold the nomination of the appellant as 2nd respondent's candidate and return him to his seat as a member of the House of Representatives representing Onitsha North/South Federal Constituency of Anambra State and order his immediate swearing-in by the Speaker of the House of Representatives.**

G

H The learned counsel for the 3rd respondent's stance is that the appeal is a mere attempt to have this court disturb the concurrent findings of fact by the two lower courts without the necessary basis.

The 1st respondent's counsel is of the same mind as that of the 3rd respondent.

I

The situation on ground clearly shows a very interesting presentation in that the 1st respondent as plaintiff at the court of first instance took out the suit without the appellant as a party. The appellant therein applied to be joined and the court obliged him. Curiously, the pleadings of the 1st respondent as plaintiff were never amended for the reliefs to concern the appellant and so the trial judge in

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A concluding with his judgment made pronouncements damnifying the 2nd and 4th respondents, who did not appeal to the Court of Appeal and it was this same appellant who appealed to the court below, which court affirmed what the trial court did hence the recourse to the Supreme Court, again, by the appellant and not
 B ruled against in the first instance court and the Court of Appeal. What I see as the bone of contention from inception of the suit at the trial High Court and up to this point is whether or not the 1st respondent was unlawfully substituted by the 2nd and 4th respondents. The two courts below agreed with the 1st respondent and ordered
 C a rectification of whose name should or ought to have been forwarded to the 3rd respondent, INEC. The normalization in keeping with the order of court was effected and those respondents 2nd and 4th ruled against had no grouse against the first ruling hence they did not bother to appeal to the Court of Appeal and even up
 D to this court. It is rather the appellant who had sought at the court of trial to be joined as an interested party and was so joined. However the pleadings of the 1st respondent as plaintiff remained as they were purely against the 2nd and 4th respondents/defendants nothing referring to appellant. On his own part, appellant
 E did not counter-claim and so the two courts below saw nothing on which they could connect him with their judgment and orders.

Therefore what is afoot being an appeal against concurrent findings of two courts below, challenged by the appellant. This court on very many occasions had
 F held its ground on not disturbing concurrent findings and would only go against that principle if certain conditions are at play. The conditions being if the concurrent findings are tainted with miscarriage of justice or shown to be perverse or against the trend of evidence or based on evidence that is inadmissible
 G in law. Failing these extenuating circumstances, this court or any appeal court is loath to interfere with concurrent findings. See **Chukwuogor vs. Obuora** (1987) 3 NWLR (Pt. 61) 454 at 457; **Igwego vs. Ezeugo** (1992) 6 NWLR (Pt. 249) 561; **Yaki vs. Bagudu** (2015) 18 NWLR (Pt. 1491) 288 per Ogunbiyi JSC; **R-BenkayNig Ltd vs. Cadbury Nigeria Plc** (2012) All FWLR (Pt. 631) 1450 at
 H 1467.

In this case at hand, the act of unlawful substitution was brought by the 1st respondent against the 2nd and 4th respondents in which the appellant had no role and so since he had not counter-claimed as the pleadings of the appellant did not mention him, whatever grouse he had and sought to ventilate when he entered as a party interested, that interest remained unattended. The court cannot go outside
 I
 J

- A the case as showcased by the pleadings of the plaintiff particularly where the appellant who had come in on his volition and without a counter claim. It is logical that there is no legroom on which this appeal can be sustained and so the concurrent findings of the two courts below remain inviolate especially in the
- B absence of an appeal by the 2nd and 4th respondents ruled against. I rely on **Gundiri vs. Nyako (2014) 2 NWLR (Pt. 1391) 211.**

C From the foregoing and the fuller reasoning of my learned brother, Ogunbiyi (JSC), I too dismiss this appeal as I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

- D **C.C. NWEZE (JSC):** My Lord, Ogunbiyi, (JSC), obliged me with the draft of the leading judgment just delivered now. I agree that, being unmeritorious, this appeal should be dismissed.

E I am, however, constrained to make a few comments in this contribution if only to debunk the unfounded submissions of the learned senior counsel for the appellant. As, already, shown in the leading judgment, he [learned senior counsel] disclaimed the admissibility of Exhibits D-D17 because, according to him, they are not the original documents. In other words, he would seem to hold

F the view that the said exhibits, that is, Exhibits D-D17, could only be admissible in evidence if they are the original documents and not their, properly, certified versions.

G With respect, this submission [and I believe that I situated it in its proper context] cannot be correct. The drafts person of Section 104 of the Evidence Act, 2011, split its provisions into three subsections unlike the erstwhile Section 111 of the repealed Evidence Act which had just one long-winded provision. This is what the Act has made of the certification provision:

H

104 (1) Every public officer having custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of legal fees prescribed in that respect, together with a certificate written at the foot of such copy that it is a true copy of such document or part of it as the case may be.

I

J (2) The certificate mentioned in subsection (1) of this section

- A** shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized bylaw to make use of a seal, and such copies so certified shall be called certified copies.
- B**
- (3)** An officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section *[Italics supplied for emphasis]*
- C**

From the phraseology of the italicized clauses of subsection (2) (supra), a document can only be called a certified copy of a public document if, in addition to the “payment of legal fees prescribed in that respect, together with a certificate written at the foot of such copy that it is a true copy,”[subsection 1, supra], it [the certificate] “is ... dated and subscribed by such officer with his name and his official title...”

- D**
- E** In effect, any document that fails below the above mandatory threshold is inadmissible as a certified copy of a public document, **Omisore vs. Aregbesola and Ors [2015] 15 NWLR(Pt. 1482) 205, 294; Ndayako vs. Mohammed [2006] 17 NWLR (Pt. 10009), 676; Tabik Investment Ltd vs. Guaranty Trust Bank Plc (2011) LPELR – 3131 (SC); Nwabuoku vs. Onwordi [2006] All FWLR (Pt. 331) 1236, 1251 – 1252.**
- F**

- The whole essence of the court's insistence on the scrupulous adherence to the above certification requirement of public documents is to vouchsafe their authenticity, vis-à-vis, the original copies, to third parties, **G and T.I. Ltd and Anor vs. Witt and Bush Ltd (2011) LPELR – 1333 (SC) 42, C-E.** That explains why, in the absence of the original document only such, properly, certified copies are admissible as secondary copies of public documents “but no other kind of secondary evidence,” **G and T.I. Ltd and Anor vs. Witt and Bush Ltd (Supra); Araka vs. Egbue [2003] 33 WRN 1; Minister of Lands, Western Nigeria vs. Azikiwe [1969] 1 All NLR 499; Nzekwu vs. Nzekwu[1989] 2 NWLR [Pt. 104] 373; Tabik Investment Ltd and Anor vs. Guarantee Trust Bank Plc[2011] 6 MJSC (Pt. 1) 1, 21; Dagaci of Dere vs. Dagaci of Ebwa [2006] 30 WRN; Iteogu vs. LPDC (2009) 17 NWLR (Pt. 1171) 614, 634 etc.**
- H**
- I**

- Thus, although the original copies of public documents themselves are admissible, **Onubruchere and Anor vs. Esegine [1986] 1 NSCC 343 at 350;**
- J** **Iteogu vs. LPDC [2009] 17 NWLR (Pt. 1171) 614, 634;** the only pieces of

- A secondary evidence in respect of the original of such public documents that are admissible are the certified copies thereof but no other secondary evidence, **Minister of Lands W.N. vs. Azikiwe [1969] 1 All NLR 49; Onubruhere and Anor vs. Esegine (supra); Araka vs. Egbue (supra); SPDC vs. Aswani Textile Industries Ltd [1991] 3 NWLR (Pt. 180) 496, 505; Ojibah vs. Ojibah [1991] 5 NWLR (Pt. 191) 296, 312; Nzekwu vs. Nzekwu [1989] 2 NWLR (Pt. 104) 373; Tabik Investment Ltd and Anor vs. Guarantee Trust Bank Plc (supra); Dagaci of Dere v Dagaci of Ebwa (supra); Iteogu vs. LPDC (Supra) 614, 634**
- C etc.

Put differently, in the absence of the original documents themselves only such properly, certified copies are admissible as secondary copies of such public documents “but no other kind of secondary evidence,” **G and T. I. Ltd and Anor**

- D **vs. Witt and Bush Ltd (2011) LPELR – 1333 (SC) 42, C-E; Araka vs. Egbue (supra); Minister of Lands, Western Nigeria vs. Azikiwe (supra); Nzekwu vs. Nzekwu (supra); Tabik Investment Ltd and Anor vs. Guarantee Trust Bank Plc (supra); Dagaci of Dere vs. Dagaci of Ebwa (supra); Iteogu vs. LPDC**
- E **(Supra) etc.**

Against this background, therefore, the submission of the learned senior counsel for the appellant on the point is untenable. It is for these, and the more detailed, reasons in the leading judgment that I, too, shall enter order dismissing this appeal. Appeal dismissed. I abide by the consequential orders in the leading judgment.

Chima Centus Nweze
Justice, Supreme Court

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

- H He addressed the critical issues for determination in the appeal, and it is clear from his well-thought-out reasoning that the appellant, as he concluded, has not shown any cogent reason why the concurrent findings of the two lower court should be disturbed by this court.

- I It is settled that where there is sufficient evidence to support the concurrent findings by the two lower courts, such findings should not be disturbed unless there is substantial error apparent on the record.

- J In other words, this court will only act to the contrary where the findings of the lower courts have been shown to be perverse, or some miscarriage of justice

A or some material violation of some principle of law or procedure is shown – **Amadi vs. Nwosu (1992) 6 SCNJ 59.**

B In this case, the Appellant failed to show any of these lapses in the decisions of the two lower courts, and there is nothing this court can do in the circumstances of this case except to dismiss this appeal.

C I must also add that the appellant did not seem to appreciate the irony of his situation in the scheme of things. He applied to be joined as the 4th defendant to the suit filed by the 1st respondent; however, she did not amend her reliefs and questions for determination to make out a case against him, and he has ended up with nothing to stand on.

Thus, I also dismiss this appeal and I make no order as to costs.

Amina Adamu Augie
Justice, Supreme Court

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SIDI DAUDA BAGE, (JSC): I have had a preview of the Lead Judgment just delivered by my learned brother, Ogunbiyi, (JSC), and I agree with all the reasoning and conclusion arrived at. Just to underscore my support for the reasoning, I shall make some comments. A score card is given, and now settled by this court, on concurrent findings of fact by the two courts below. The decision of the two lower courts being concurrent findings of facts, the appellate court, and indeed this court will be loathe to interfere there with to set them aside, they are not being erroneous or perverse. See **MOGO CHINWENDU vs. NWANEGBO MBAMALI & ANOR (1980) 3/4 S.C. 31 at 53, EZENWANI vs ONWORDI (1986) 4 NWLR (Pt. 69) 1; NWAMGBOMU vs THE STATE (1884) 2 NWLR (Pt. 327) 380 at 402.**

H In the present appeal, there is concurrent findings of fact of both the trial court and the Court of Appeal and this court will not disturb them, as it has not been shown that, there is established miscarriage of justice, or a violation of some principle of substantive law or procedure or a substantial error apparent on the face of the record of proceeding on this, further see: **ENANG vs ADU (1981) 11-12 S.C.25 at 42; NWADIKE vs IBEKWE (1987) 4 NWLR (Pt. 67) 18; IGWEGO vs EZEUGO (1992) 6 NWLR (Pt. 249) 561 at 576; WOLUCHEM vs. GUDI (1981) 5 S.C. 291 at 326, IKE vs. UGBOAJA (1993) 6 NWLR (Pt. 301) 539 at 569; IBRAHIM vs. SHAGARI (1983) 2 SCNLR 176.** In the instant appeal, the concurrent findings of the two courts below stand tall in the absence of an appeal by the 2nd and 4th respondents ruled against.

J From the foregoing and the fuller reasoning of my learned brother Ogunbiyi,

A (JSC), I too dismiss this appeal as I abide the consequential orders made.

Sidi Dauda Bage,
Justice, Supreme Court.

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**INTERDRILL NIGERIA LTD
MR. JOSEPH BOGWU
AND
UNITED BANK FOR AFRICA PLC**

SC. 4/2007

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

FRIDAY, 10TH MARCH, 2017

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	JUSTICE, SUPREME COURT
MUSADATTIJO MUHAMMAD	JUSTICE, SUPREME COURT
CLARA BATA OGUNBIYI	JUSTICE, SUPREME COURT
CHIMA CENTUS NWEZE	JUSTICE, SUPREME COURT
AMIRU SANUSI	JUSTICE, SUPREME COURT

ACTION: Claim for the award of interest on the principal sum – Relevant considerations.

APPEAL: Failure to appeal on a finding of fact – Appellant is estopped from consequently disputing such finding of fact.

CASE LAW: Application of decided cases – Need to consider the prevailing facts and circumstances of each case.

*CASE LAW: Principles in **Boothia Maritime Inc. vs. Far East Mercantils Co. Ltd (2001) FWLR (Pt. 50) 1713** – Consideration thereof.*

*CASE LAW: Principles in **Saleh vs. Bank of the North (2006) 6 NWLR (Pt. 979) 316.** – Applicability.*

COMPANY LAW: Incorporated company – Legal personality – Consideration thereof.

COMPANY LAW: Status of a company – An artificial person – Acts through natural persons.

COURT: Duty of court to properly consider Exhibits – Approach thereto.

COURT: Failure to act on the unchallenged evidence of a witness – Attitude of appellate court thereto.

EVIDENCE: Competent and compellability – Whether an employee of an incorporated company is competent to testify in respect of the transactions of the company which occurred before his employment.

EVIDENCE: Evidence given by an employee of a Bank – Employee testified in respect of a transaction that occurred before his employment – Whether evidence is relevant.

EVIDENCE: Plaintiff adduced oral and documentary evidence in proof – No evidence adduced by the defendant – Minimum proof on the side of plaintiff is required to satisfy standard of proof.

EVIDENCE: Plaintiff claimed interest on the principal sum – Plaintiff tendered document which was signed by defendant containing the interest rate chargeable – No objection by defendant – Whether plaintiff proved the interest rate chargeable.

EVIDENCE: Where a party signs a document without allegation of undue influence, mistake or fraud – Whether contents of the document are binding on the party.

EVIDENCE: Where oral evidence of a witness is supported by documentary evidence the oral evidence becomes more credible.

JUDGMENT AND ORDERS: Circumstances in which court may properly award post judgment interest.

STATUTE: Section 134 of Evidence Act – Consideration thereof.

WORDS AND PHRASES: “Balance of probabilities” – Meaning.

Issues for Determination

1. **Whether the law that any agent or servant can give evidence to establish any transaction (sic) into by a juristic personality is applicable to affidavit evidence.**
2. **Whether the court below was right when it held that the respondent proved interest and the entire indebtedness of the appellants to the respondent having regard to the evidence led?**

Facts of the Matter

The United Bank for Africa Plc (as plaintiff) took out a suit under the Undefended List procedure against the appellants in this appeal (as defendants) at the High Court of Delta State in 2001. The said plaintiff (now, respondent herein) claimed against the defendants (appellants herein) jointly and severally:

1. The sum of N17,835, 802.67 (seventeen million, eight hundred and thirty five thousand, eight hundred and two naira, sixty seven kobo) being the outstanding debit balance in the first defendant's account with the plaintiff as at 2nd February, 2001 which sum is due to the plaintiff from an overdraft facility granted to the first defendant at the first defendant's request and guaranteed by the second defendant, which sum the defendants have failed, neglected, omitted and or refused to pay inspite of repeated demand.
2. 31% per annum on the said sum of N17,835, 802.67 (seventeen million, eight hundred and thirty five thousand, eight hundred and two naira, sixty seven kobo) from February 03, 2001 until judgment and thereafter 10% per annum on the judgment sum until same is fully liquidated.

Satisfied, from the appellants' notice of intention to defend the suit, that a defence on the merits had been made out, the trial court transferred it to the General Cause List "for hearing and determination of the case on the affidavit evidence..."

At the hearing of the suit, PW1, Kelechi Ogbonna, presented the plaintiff's case. He was cross examined. The matter was, then, adjourned to November 3, 2003 for continuation of hearing. On that adjourned date, the appellants, though absent, wrote for an adjournment. Upon the trial court's refusal of the application, it foreclosed the defence and adjourned for judgment on November 20, 2003.

Prior to the date aforesaid, the appellants, strenuously, sought to arrest the judgment through a motion filed on November 10, 2003. Having heard submissions on the application on November 20, 2003, the trial court adjourned its ruling on it to December 5, 2003.

Sequel to its order of the dismissal of the application, it proceeded, on the same day, to dismiss the plaintiff/respondent's case, holding that it could not prove interest on the sum of N10,000,000 (Ten million naira).

The plaintiff's appeal to the Court of Appeal, Benin Division, was successful. The court set aside the judgment of the trial court and entered judgment in favour of the plaintiff. The defendants/respondents have further appealed to the Supreme Court.

Held: (*Unanimously dismissing the appeal*)

1. *A decided case must be applied in the context of the facts of a prevailing case*
As this court has, often, admonished, cases are only authorities for what they, actually, decided in the context of the prevailing facts. That explains why in **Savannah Bank Ltd vs. P.A.S.T.A. Ltd [1987] 1 SC 198, 278, 279, Karibi-Whyte (JSC)** enjoined courts to “consider the claim before the court and the issue which the court was called upon to decide.” (*P 353 paras F – G*).
2. *The principle in Boothia's case*
The question in *Boothia Maritime Inc vs. Far East Mercantile Co Ltd* (*supra*) involved demurrer proceedings. As *Ogwuegbu, (JSC)*, percipiently, explained:

In demurrer proceedings under the rules, ... the plaintiff should have filed a statement of claim. Otherwise, there will be no basis for the defendant to conceive that he has a good legal or equitable defence to the suit. Therefore, as a general rule, the application cannot be brought before the plaintiff files his statement of claim but must be filed before the filing of the statement of defence. In an application under Order 27, the filing of an affidavit in support of the demurrer is unacceptable as it is a written statement of facts on oath sworn or affirmed before someone who has authority to administer it. In civil proceedings parties may agree that their case be tried upon affidavit and the Court may order that any particular facts be proved by affidavit. It is mandatory that affidavit used in court shall contain only a statement of facts and circumstances to which the

witness deposes, either of his own personal knowledge or from information which he believes to be true. (See Section 86 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990) It will therefore be a contravention of Rules 1 and 2 of Order 27 to permit an affidavit supporting an application in demurrer proceedings. An affidavit contains facts alone and a defendant is precluded from answering any questions of fact raised in the statement of claim since he is taken to have admitted the truth of the plaintiff's allegations and no evidence respecting matters of fact and no discussion of questions of fact are allowed". [pages 33-34; italics supplied for emphasis] (*Pp 353 – 354 paras H – F*)

3. *An incorporated company is a juristic person*

Both at common law and under the Nigerian Companies and Allied Matters Act, a duly registered or incorporated company is a personal ficta; a juristic person, **Lennards Carrying Co. vs. Asiatic Petroleum Co. Ltd. [1915] AC 705, 713 – 714**, per Viscount Haldane L.C.; **Bolton (Engineering) Co. Ltd. vs. Graham and Sons Ltd. 1 QB 159, 172 – 173**, Denning, L. J, that can only act through an alter ego, either its agents or servants, **Kate Enterprises Ltd vs. Daewoo Nig Ltd [1985] 2 NWLR (Pt. 5) 116**. (*Pp 354 – 355 paras I – A*)

In **Ishola vs. Society Generale Bank Ltd (1997) LPELR 1547 (SC) 26 – 27; F – D**, this court, further, elaborated on the nuances of this general proposition thus:

....it cannot be over emphasized that a company being a legal person or juristic person can only act through its agents or servants and any agent or servant of a company can therefore give evidence to establish any transaction entered into by that company. Where the official giving the evidence is not the one who actually took part in the transaction on behalf of the company, such evidence is nonetheless relevant and admissible and will not be discountenanced or rejected as hearsay evidence. The fact that such official did not personally participate in the transaction on which he has given evidence may in appropriate cases, however, affect the weight to be attached to such evidence, **Kate Enterprises Ltd**

vs. Daewoo (Nig.) Ltd. [1985] 2 NWLR (Pt. 5) 116; Anyaebosi vs. R.T. Briscoe (Nig.) Ltd [1987] 3 NWLR (Pt. 59) 84; Chief Igunbor and Ors vs. Chief Ugbede [1976] 9 – 10 SC 179, 187 etc. (Pp 354–355 Paras I–F)

4. *When minimum proof is required*
Per Nweze (JSC)

The concern, which learned counsel for the appellant in this appeal expressed, was that the PW1 did not depose to the affidavit accompanying the plaintiff/respondent's suit. The question, therefore, is whether this is an “appropriate case”, *Ishola v Society Generale Bank Ltd* (supra) which should have affected the weight which the trial court ought to have attached to the plaintiff's case.

In my humble view/opinion the appropriate answer is a resounding No! I would, now, invite the lower court to supply further elaborations for this posture. Hear Aderemi, JCA (as he then was):

Having so found (an obvious reference to the trial court's finding that 'The court rejects the defence of the relationship of partnership set up by the defendants. It is a frivolous attempt to defeat the transaction duly entered into by the plaintiff and defendants...') ... the substratum of the defence was knocked out; all that was left was the printed evidence of the appellants, which was supported by oral testimony of PW1. It is now very axiomatic that proof of issues in a civil case is on the balance of probabilities. Where there is nothing to put on the one side of the imaginary scale of justice, minimum evidence on the other side satisfies the requirement of proof even where strict proof, such as proof of special damages, is the matter...”.

Against the background of the above circumstances, therefore, it was wrong of the trial court, as held by the lower court, to have dismissed the plaintiff/respondent's suit. I am, therefore, in agreement with the learned counsel for the respondent that the reasoning in *Boothia Maritime Inc vs. Far East Mercantile Co Ltd* (supra) should be canalized within the peculiar facts that yielded it and the questions before the court.

(Pp 355–356 Paras G–C, H–I).

5. *A bank staff who was not yet employed during transaction may give evidence in court.*

Indeed, from the facts and circumstances of the instant appeal, the apt authority should be the decision of this court in **Saleh vs. Bank of North Ltd [2006] 6 NWLR (Pt. 976) 316, 326 – 327; (2006) LPELR (2991) (SC) 10 – 11; F – A** where it held thus:

The mere fact that a bank staff was not around when a customer's bank account was opened will not be enough to prevent the staff from testifying or giving evidence on the customer's account. [Kate Enterprises Ltd vs. Daewoo (Nig.) Ltd. (1985) 2 NWLR (Pt. 5) 116; Ishola vs. SGB (Nig.) Ltd. [1997] 2 NWLR (Pt. 488) 405; also, Anyaebosi vs. R.T; Briscoe (Nig.) Ltd. [1987] 3 NWLR (Pt. 59) 84; Igboim vs. Obianke [1976] 9-10 SC 179]. Referred to (Pp 326.327, paras H-C).

This posture, no doubt, finds solid anchorage on this court's view in **Kate Enterprises Ltd v Daewoo (Nig.) Ltd [1985] 2 NWLR (Pt. 5) 116** that:

To insist that the very person in the appellant company who negotiated the transaction with the respondents must be called as a witness when the documents relating to the transaction are available and have been admitted in evidence without objection and PW1 is in a position to know about the transaction by the office he holds is, in my view, a negation of the very essence of the corporate personality of the appellants. Companies have no flesh and blood. Their existence is a mere legal abstraction. They must, therefore, of necessity, act through their directors, managers and officials... PW1 was clearly in a position to know enough about the transaction as to testify to it on behalf of the appellants. Besides, his evidence is substantially unchallenged and supported by documents tendered. I am satisfied that if the learned trial judge had borne these facts in mind, he would have given due weight to the oral evidence tendered by the appellants before him. (Pp 356–357 paras I–H)

6. *Where a finding of fact is not appealed*

It has long been settled that a finding of fact not appealed against cannot be disputed, **Commerce Assurance vs. Alli** [1992] 3 NWLR (Pt. 232) 710. In effect, the correctness of such findings cannot be questioned, **Yesufu vs. Kupper International** [1996] 5 NWLR (Pt. 446) 17; **P.N.U. doh Trading Co. Ltd. vs. Abere** [2001] 11 NWLR (Pt. 723) 114, 146.

Instructively, whilst Exhibit STB1 provides for the interest rate chargeable on the above facility; Exhibit STB2, the Guarantee and Indemnity form, was executed by the second appellant for the benefit of the first appellant. These were not disclaimed in the appellant's counter-affidavit at the trial court. This background, undoubtedly, informed the submission on page 15 of the respondent's brief that: "... the plaintiff/appellant (sic) did not only prove its case on the preponderance of evidence, [it] also proved that it was entitled to charge interest on the principal sum..."

(Pp 359; 360 paras D–E; A–C)

7. *The Circumstances in which court may award interest.*

I, entirely, endorse this submission for it accords with this court's position that:

... interest may be awarded in a case in two distinct circumstances, namely: (i) As of right; and (ii) where there is a power conferred by statute to do so, in exercise of the court's discretion. Interest may be claimed as a right where it is contemplated by the agreement between the parties, or under a mercantile custom, or under a principle of equity such as breach of a fiduciary relationship, see, **London, Chatham & amp; Dover Railway vs. S.E. Railway** (1893) A.C. 429 at p. 434. Where interest is being claimed as a matter of right, the proper practice is to claim entitlement to it on the writ and plead fact which show such an entitlement in the statement of claim.

Ekwunife vs. Wayne (West Africa) Ltd [1989] 3 NSCC 352, 359; [Italics supplied for emphasis]; **T.O.N.P.C Unltd vs. Pedmar Nig. Ltd** (2002) LPELR – 3145 (SC) 19 – 20; C – A; **Veepee Industries Ltd vs. Cocoa Industries Ltd** (2008) LPELR – 3461 (SC) 14; C – E. This was, exactly, what the respondents did at the trial court which the lower court affirmed.

(P 360 paras C–H)

8. *A company is an artificial person*

A company is an artificial person. Decisions for, and actions by it are taken by natural persons such as the Board of Directors, individual director, employees and agents. That is to say the company acts through these people.

Officers of a company involved in transaction involving the company and some other party are competent and compellable witnesses in a court of law if and when the transaction becomes subject of litigation. This is also the case where an officer is employed by the company after the transaction was concluded, provided such an officer is fully briefed and documents relevant to the transaction are made available to him by his employers. [**Kate Enterprises Ltd vs. Daewoo (Nig) Ltd 1985 2 NWLR (Pt. 5) p. 116, Saleh vs. Bank of North Ltd (2006) 6 NWLR (Pt. 979) p. 316].**

(P 362 paras C–F)

PW1, the sole witness for the plaintiff/respondent was not in their employment when they granted the appellants' overdraft facility. When he gave evidence he claimed to be the business officer of the plaintiff/respondent, whose duties included managing the relationship between the customer and the bank. He easily qualifies as one of those who acts on behalf of the company, and the fact that he was not in the employment of the plaintiff/respondent when the overdraft facility was granted to the defendant/appellants' does not make his evidence worthless. He is a competent and compellable witness and much weight should have been attached to his testimony. *(P 362 paras F–H)*

Per Sansi (JSC)

“I think I am inclined to agree with the findings of the court below with regard to the competence and compellability of PW1 to testify on behalf of its employer i.e. the respondent. The plaintiff being an artificial entity has the right to institute an action before any court and in that case must use a justice person to ventilate its case or grievances in court. The fact that PW1 was not an employee of the plaintiff/respondent as at the time of the transaction is immaterial. He can by virtue of his position in the bank as business officer who must have been fully briefed and was fully aware of the contents of the document relating to the

transaction. See *Selah vs. Bank of the North Ltd* (2006)6 NWLR (Pt. 976) 316. His oral testimony was supported by the documents he tendered at the trial.

The important thing for the trial court to consider was whether the testimony of PW1 and indeed the documents supporting or governing the transaction were controverted in any material particular. As there was no evidence adduced by the defendant/appellant challenging or contradicting both the oral testimony of the PW1 and the document or exhibits tendered in the case. The trial court should have accepted and acted on them and found that the plaintiff/respondent had proved its case, at least, on balance of probability, rather than to advance those flimsy and untenable reasons for rejecting the evidence adduced in the case by the plaintiff.” (P 368 Paras A–F)

9. *The meaning of balance of probabilities*

Section 134 of the Evidence Act states that burden of proof in civil cases shall be discharged on the balance of probabilities.

Balance of probabilities or preponderance of evidence means that in civil proceedings judgment is given to the party with the greater weight or stronger evidence.

Once documentary evidence supports oral evidence, oral evidence becomes more credible as documentary evidence always serves as a hanger from which to assess oral testimony. See ***Kindey vs. Governor of Gongola State* (1988) 2 NWLR (Pt. 77) p. 445. *Omogbe vs. Lawani* (1980) 3 – 4 SC P. 117.**

When the evidence of the plaintiff is unchallenged, the plaintiff is entitled to judgment. PW1 testified on oath, and his testimony was supported by documentary evidence. Evidence led was one way, in favour of the plaintiff, since there was no evidence led by the defendants'. Documentary evidence to wit: Exhibits STB1 and STB2 support the oral testimony of the sole witness at trial.

That together with the unchallenged testimony of the sole witness entitles the plaintiff to judgment as the plaintiff clearly satisfied the requirements of section 134 of the Evidence Act. The trial judge was wrong to

dismiss the plaintiff's claim and the court of Appeal was right to say so.
(Pp 362 – 363 paras H – C)

10. *The implication of signing a document freely without duress*
Exhibit STB1 states the interest payable on the overdraft facility while exhibit STB 2 is the Guarantee and Indemnity Form.

The 1st respondent signed Exhibit STB1. It was also signed by a Director of the 1st defendant/appellant. The seal of the Company was pasted on to the exhibit after the secretary of the company signed. As regards Exhibit STB2 the 2nd defendant/appellant signed.

As Judges', when we examine exhibits such as these, it is not our business to find out the intention of each party. What we do is to decide what a party was reasonable entitled to conclude from the attitude of the other. So once Exhibits STB1 and STB2 were signed by officials of the appellants, and none of them complained that they signed under undue influence or denied their signature, the contents of both exhibits are binding on them.

(Pp 363 – 364 paras D – E, I – A).

11. *Failure of court to act on the unchallenged evidence of a competent witness.*
A trial court's failure to act on the unchallenged evidence of a competent witness renders its decision manifestly perverse. And that is what entitles an appellate court to interfere by doing the needful: availing itself the evidence ignored by the trial court in arriving at the appropriate decision.

In the instant case, the trial court's decision which runs counter to the lawful evidence the respondent herein, as a plaintiff, led at the court does occasion a miscarriage of justice. [**Irolo vs. Uka (2002) 14 NWLR (Pt. 786) 195 and Atologbe vs. Shorun (1985) 1 NWLR (Pt. 2) 360**].

(P 364 paras D – F)

Nigeria Cases Cited:

Anyaebo vs. R.T; Briscoe (Nig.) Ltd. [1987] 3 NWLR (Pt. 59) 84;

Atologbe vs. Shorun (1985) 1 NWLR (Pt. 2) 360.

Chief Igunbor and Ors vs. Chief Ugbede [1976] 9 – 10 SC 179,

Commerce Assurance vs. Alli [1992] 3 NWLR (Pt. 232) 710.

Ekwunife vs. Wayne (West Africa) Ltd [1989] 3 NSCC 352;

Igbodim vs. Obianke [1976] 9-10 SC 179.

Irolo vs. Uka (2002) 14 NWLR (Pt. 786) 195

- A** *Ishola vs. SGB (Nig.) Ltd.* [1997] 2 NWLR (Pt. 488) 405;
Ishola vs. Society Generale Bank Ltd (1997) LPELR 1547 (SC) 26 – 27; *F – D*,
Kate Enterprises Ltd vs. Daewoo (Nig) Ltd 1985 2 NWLR (Pt. 5) p. 127,
Anyaebose vs. R.T. Briscoe (Nig.) Ltd [1987] 3 NWLR (Pt. 59) 84;
- B** *Kindley & Ors vs. M.G. of Gongola State* (1988) 2 NWLR (Pt. 77) p. 473.
Omeregbe vs. Lawani (1980) 3 – 4 SC P. 117.
Boothia Maritime Inc. Far East Mercantile Co. Ltd (2001) FWLR (pt. 50) 1713,
PNudo Trading Co. Ltd. vs. Abere [2001] 11 NWLR (Pt. 723) 114,
- C** *Saleh vs. Bank of North Ltd* (2006) 6 NWLR (Pt. 979) p. 316.
Savannah Bank Ltd vs. P.A.S.T.A. Ltd [1987] 1 SC 198, 278,
T.O.N.P.C United vs. Pedmar Nig. Ltd (2002) LPELR – 3145 (SC) 19 – 20; *C – A*;
- D** *Veepee Industries Ltd vs. Cocoa Industries Ltd* (2008) LPELR – 3461 (SC) 14; *C E*.
Yesufu vs. Kupper International [1996] 5 NWLR (Pt. 446) 17;

E Foreign Cases Cited

Bolton (Engineering) Co. Ltd. vs. Graham and Sons Ltd. 1 QB 159, 172 – 173,
Dover Railway vs. S.E. Railway (1893) A.C. 429.
Lennards Carrying Co. vs. Asiatic Petroleum Co. Ltd. [1915] AC 705,;

F

Nigerian Statutes Cited

The Evidence Act Cap E 112 L.F.N 1990

G Representations

Ikhide Ehighelua for the appellant;
Ama Etuwewe for the respondent

- H CENTUS NWEZE, (JSC) (Delivering the Lead Judgment):** The United Bank for Africa Plc (as plaintiff) took out a suit under the Undefended List procedure against the appellants in this appeal (as defendants) at the High Court of Delta State in 2001. The said plaintiff (now, respondent herein) claimed
- I** against the defendants (appellants herein) jointly and severally:

- J** **3. The sum of N17,835, 802.67 (seventeen million, eight hundred and thirty five thousands, eight hundred and two naira, sixty seven kobo) being the outstanding debit**

**A balance in the first defendant's account with the plaintiff
as at 2nd February, 2001 which sum is due to the plaintiff
from an overdraft facility granted to the first defendant
at the first defendant's request and guaranteed by the
B second defendant, which sum the defendants have failed,
neglected, omitted and or refused to pay inspite of
repeated demand.**

**C 4. 31% per annum on the said sum of N17,835, 802.67
(seventeen million, eight hundred and thirty five
thousands, eight hundred and two naira, sixty seven
D kobo) from February 03, 2001 until judgment and
thereafter 10% per annum on the judgment sum until
same is fully liquidated.**

**E Satisfied, from the appellants' notice of intention to defend the
suit, that a defence on the merits had been made out, the court
(hereinafter, simply, referred to as "the trial court) transferred
it to the General Cause List "for hearing and determination of
the case on the affidavit evidence..."**

F At the hearing of the suit on August 5, 2003, PW1, Kelechi Ogbonna, presented the plaintiff's case. He was cross examined. The matter was, then, adjourned to November 3, 2003 for continuation of hearing. On that adjourned date, the
G appellants, though absent, wrote for an adjournment. Upon the trial court's refusal of the application, it foreclosed the defence and adjourned for judgment on November 20, 2003.

H Prior to the date aforesaid, the appellants, strenuously, sought to arrest the judgment through a motion filed on November 10, 2003. Having heard submissions on the application on November 20, 2003, the trial court adjourned its ruling on it to December 5, 2003.

I Sequel to its order of the dismissal of the application, it proceeded, on the same day, to dismiss the plaintiff/respondent's case, holding that it could not prove interest on the sum of N10,000,000 (Ten million naira) only although it, still, found that the first appellant collected and utilize the said sum on the basis of banker/customer relationship between the parties.

J

A The plaintiff's appeal to the Court of Appeal, Benin Division, was successful. The court (hereinafter, simply, referred to "the lower court") set aside the judgment of the trial court and entered judgment in favour of the plaintiff.

B The lower court, equally, faulted the trial court's reasons for refusing to accord probative value to the testimony of PW1 [the trial court was of the view that, since the said witness was not in the employment of the plaintiff/Bank when the transaction was made and he was not the deponent to the accompanying affidavit, it would attach no weight to his evidence].

C Aggrieved, the defendants/respondents (now, appellants) have appealed to this court. Their two issues were framed thus:

D 3. **Whether the law that any agent or servant can give evidence to establish any transaction (sic) into by a juristic personality is applicable to affidavit evidence.**

E 4. **Whether the court below was right when it held that the respondent proved interest and the entire indebtedness of the appellants to the respondent having regard to the evidence led?**

F The respondent adopted these two issues which would, therefore, be utilized in the determination of this appeal.

ARGUMENTS ON THE ISSUES

G ISSUE ONE

Whether the law that any agent or servant can give evidence to establish any transaction (sic) into by a juristic personality is applicable to affidavit evidence?

H

APPELLANT'S SUBMISSIONS

I At the hearing of the appeal on December 13, 2016, Ikhide Ehighelua, for the appellants, adopted the brief filed on December 9, 2016, although deemed properly filed on December 13, 2016. As expected, he faulted the lower court's disavowal of the approach of the trial court in refusing to attach probative value to the testimony of the PW1.

J He submitted that affidavit evidence is a special evidence which can only be proved by the deponent, citing **Boothia Maritime Inc v Far East Mercantile**

A Co Ltd [2001] FWLR (Pt 50) 1713, 1714. He canvased the view that, even in matters involving juristic persons, only the deponent can give evidence in proof of facts in an affidavit, **CPC vs. INEC [2011] 18 NWLR (Pt. 1279) 493, 571.** He urged the court to resolve the issue in favour of the appellants.

B

RESPONDENT'S CONTENTION

On his part, Ama Etuwewe, for the respondent, adopted the brief deemed, properly, filed on December 13, 2016. He disclaimed the applicability of the decision in **Boothia Maritime Inc vs. Far East Mecantile Co Ltd (Supra).**

C He pointed out that PW1, Kelechi Ogbonna, testified that she was in the employ of the respondent as a business officer. His duties included managing the relationship between the customer and the respondent and the recovery of money
D which customers owed to it, citing pages 60 – 61 of the record. He noted that, although unchallenged, the trial court failed to attach any probative value to his testimony.

E Citing page 177 of the record, where the lower court overruled the position of the trial court on this point, counsel observed that the approach of the trial court occasioned a miscarriage of justice. Like the lower court, he relied on **Kate Enterprises Ltd vs. Daewoo (Nig) Ltd [1985] 2 NWLR (Pt. 5) 127 and Saleh vs. Bank of the North Ltd [2006] 6 NWLR (Pt. 976) 316, 326 – 327.**

F He maintained that the lower court, rightly, upturned the view of the trial court on the probative value of the evidence of PW1.

RESOLUTION OF THE ISSUE

G What prompted the respondent's appeal against the judgment of the trial court was the, somewhat, contradictory posture of the trial court. First, at page 91 of the record, it held thus:

H **The court prefers the evidence of plaintiff that the nature of the transaction was the grant of facility of N20,000,000 by the plaintiff to the first defendant. By the implied admission of the defendants, the first defendant utilized N10,000,000 – See**
I **paragraph 11 of the affidavit of defendants accompanying the notice of intention to defend and see exhibits 1 and 2 exhibited to the accompanying affidavit to the writ. The court finds as a**
J **fact that there was a banker and customer relationship and the facility was granted in cause (sic) of that relationship... The**

A court rejects the defence of the relationship of partnership set up by the defendants. It is a frivolous attempt to defeat the transaction dully entered into by the plaintiff and defendants... [Italic supplied]

B Although it found that the defence of the relationship of partnership set up by the defendants was a frivolous attempt to defeat the transaction duly entered by the parties, it nonetheless refused to attach probative value to the unchallenged
C testimony of PW1. Listen to this:-

D The court will however attach no weight to the evidence of PW1 in view of his evidence under cross examination that he was not employed when the transaction was made nor did he deposed to the said accompanying affidavit. [page 88 of the record]

E Instructively, at page 80 of the record, the said court had recorded PW1, a credit officer of the plaintiff/respondent thus:

F I am familiar with the transaction that gave rise to this suit. The facility granted to the first defendant was on the 14/8/98 of N10,000,000. 1st defendant withdrew N10,000,000 out of the facility granted. The facility was initiated by an application by the first defendant to the plaintiff which subsequently gave an offer. The first defendant perfected the offer. The facility was
G secured by a legal mortgage on the first defendant's property at No. 81 Airport Road, Warri... [Page 80 of the record].

H The lower court was un-impressed by the posture of the trial court; hence it upturned its verdict. In so doing, it [the lower court] proceeded thus:

I Having so found (an obvious reference to the trial court's finding that "the court rejects the defence of the relationship of partnership set up by the defendants. It is a frivolous attempt to defeat the transaction duly entered into by the plaintiff and defendants....)... the substratum of the defence was knocked out; all that was left was the printed evidence of the appellants,
J which was supported by oral testimony of PW1. It is now very

- A** **axiomatic that proof of issues in a civil case is on the balance of probabilities. Where there is nothing to put on the one side of the imaginary scale of justice, minimum evidence on the other side satisfies the requirement of proof even where strict proof, such as proof of special damages, is the matter... [pages 173 of the record; italics supplied]**
- B**

C The lower court, equally, faulted the reasoning of the trial court on the question of the probative value of the testimony of the said witness. Hear the eloquent reasoning of the court [per Aderemi, JCA, as he then was]:

- D** **The plaintiff/appellant, a limited liability company, is an abstract body that only exists in the eyes of the law. In many ways, it has always being (sic) likened to a human body. The law ascribes to a limited liability company the possession of a brain and a nerve centre, which controls what, it does. Since it cannot form an intention within [pages 174 – 177]**
- E**

F In his spirited attempt to impugn the above reasoning, learned counsel for the appellant cited **Boothia Maritime Inc vs. Far East Mercantile Co Ltd (2001) LPELR – 792 (SC)**. Contrariwise, learned counsel for the respondent disclaimed the applicability of this court's decision in *Boothia Maritime Inc v Far East Mercantile Co Ltd* (supra). I am in agreement with him.

G As this court has, often, admonished, cases are only authorities for what they, actually, decided in the context of the prevailing facts. That explains why in **Savannah Bank Ltd vs. P.A.S.T.A. Ltd [1987] 1 SC 198, 278, 279, Karibi-Whyte JSC** enjoined courts to “consider the claim before the court and the issue which the court was called upon to decide.”

H The question in **Boothia Maritime Inc vs. Far East Mercantile Co Ltd (supra)** involved demurrer proceedings. As Ogwuegbu, JSC, percipiently, explained:

- I** **In demurrer proceedings under the rules, ... the plaintiff should have filed a statement of claim. Otherwise, there will be no basis for the defendant to conceive that he has a good legal or equitable defence to the suit. Therefore, as a general rule, the application cannot be brought before the plaintiff files his**
- J**

- A statement of claim but must be filed before the filling of the statement of defence. In an application under Order 27, the filing of an affidavit in support of the demurrer is unacceptable as it is a written statement of facts on oath sworn or affirmed before someone who has authority to administer it. In civil proceedings parties may agree that their case be tried upon affidavit and the court may order that any particular facts be proved by affidavit. It is mandatory that affidavit used in court shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true. (See Section 86 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990) It will therefore be a contravention of Rules 1 and 2 of Order 27 to permit an affidavit supporting an application in demur proceedings. An affidavit contains facts alone and a defendant is precluded from answering any questions of fact raised in the statement of claim since he is taken to have admitted the truth of the plaintiff's allegations and no evidence respecting matters of fact and no discussion of questions of fact are allowed. [pages 33-34; italics supplied for emphasis]**
- B**
- C**
- D**
- E**
- F**

On the other hand, the question in the instant appeal is the propriety of the lower court's view [per Aderemi, (JSC), as he then was] that:

- G The plaintiff/appellant, a limited liability company, is an abstract body that only exists in the eyes of the law. In many ways, it has always being (sic) likened to a human body. The law ascribes to a limited liability company the possession of a brain and a nerve centre, which controls what, it does. Since it cannot form an intention within [pages 174 – 177]**
- H**

- I My Lords, the above reasoning is un-impeachable. Both at common law and under the Nigerian Companies and Allied Matters Act, a duly registered or incorporated company is a personal ficta; a juristic person, Lennards Carrying Co. vs. Asiatic Petroleum Co. Ltd. [1915] AC 705, 713 – 714, per Viscount Haldane L.C.; Bolton (Engineering) Co. Ltd. vs. Graham and Sons Ltd. 1**
- J**

A QB 159, 172 – 173, Denning, L. J, that can only act through an alter ego, either its agents or servants, Kate Enterprises Ltd vs. Daewoo Nig Ltd [1985] 2 NWLR (Pt. 5) 116.

B – 27; F – D, this court, further, elaborated on the nuances of this general proposition thus:

C it cannot be over emphasized that a company being a legal person or juristic person can only act through its agents or servants and any agent or servant of a company can therefore give evidence to establish any transaction entered into by that company. Where the official giving the evidence is not the one who actually took part in the transaction on behalf of the company, such evidence is nonetheless relevant and admissible and will not be discountenanced or rejected as hearsay evidence. The fact that such official did not personally participate in the transaction on which he has given evidence may in appropriate cases, however, affect the weight to be attached to such evidence, Kate Enterprises Ltd vs. Daewood (Nig.) Ltd. [1985] 2 NWLR (Pt. 5) 116; Anyaebosi vs. R.T. Briscoe (Nig.) Ltd [1987] 3 NWLR (Pt. 59) 84; Chief Igunbor and Ors vs. Chief Ugbede [1976] 9 – 10 SC 179, 187 etc. [Italic supplied]

G The concern, which learned counsel for the appellant in this appeal expressed, was that the PW1 did not depose to the affidavit accompanying the plaintiff/respondent's suit. The question, therefore, is whether this is an “appropriate case”, Ishola vs. Society General Bank Ltd (supra) which should **H** have affected the weight which the trial court ought to have attached to the plaintiff's case.

In my humble opinion, the appropriate answer is a resounding No! I would, now, invite the lower court to supply further elaborations for this posture. **I** Hear Aderemi, JCA (as he then was):

J Having so found (an obvious preference to the trial court's finding that 'The court rejects the defence of the relationship of partnership set up by the defendants. It is a frivolous attempt to

- A** defeat the transaction duly entered into by the plaintiff and defendants...) ... the substratum of the defence was knocked out; all that was left was the printed evidence of the appellant, which was supported by oral testimony of PW1. It is now very
- B** axiomatic that proof of issues in a civil case is on the balance of probabilities. Where there is nothing to put on the one side of the imaginary scale of justice, minimum evidence on the other side satisfies the requirement of proof even where strict proof,
- C** such as proof of special damages, is the matter... [page 173 of the record; italics supplied]

- It is worthy of note that Aderemi, JCA's conclusion was in response to the
- D** elaborate findings of the trial court at page 91 of the record thus:

- E** The court prefers the evidence of plaintiff that the nature of the transaction was the grant of facility of N20,000,000 by the plaintiff to the first defendant. By the implied admission of the defendants, the first defendant utilized N10,000,000. See paragraph 11 of the affidavit of defendants accompanying the notice of intention to defend and exhibits 1 and 2 exhibited to
- F** the accompanying the writ. The courts finds affidavit as a fact that there was a banker and customer relationship and facility was granted in cause (sic) of that relationship... The court rejects the defence of the relationship of partnership set up by the defendants. It is a frivolous attempt to defeat the transaction duly entered into by the plaintiff and defendants...
- G** [Italics supplied]

- H** Against the background of the above circumstances, therefore, it was wrong of the trial court, as held by the lower court, to have dismissed the plaintiff/respondent's suit. I am, therefore, in agreement with the learned counsel for the appellant that the reasoning in Boothia Maritime Inc vs. Far East
- I** Mercantile Co Ltd (supra) should be canalized within the peculiar facts that yielded it and the questions before the court.

- Indeed, from the facts and circumstances of the instant appeal, the apt authority should be the decision of this court in **Saleh vs. Bank of North Ltd**
- J** [2006] 6 NWLR (Pt. 976) 316, 326 – 327; (2006) LPELR (2991) (SC) 10 – 11;

A F – A where it held thus:

B The mere fact that a bank staff was not around when a
C customer's bank account was opened was not enough to
prevent the staff from testifying or giving evidence on
customer's account. See *Kate Enterprises Ltd vs. Daewoo*
(Nig.) Ltd. (1985) 2 NWLR (Pt. 5) 116; See also *Ishola vs. SGB*
(Nig.) Ltd. [1997] 2 NWLR (Pt. 488) 405; also, *Anyaebosei vs.*
R.T; Briscoe (Nig.) Ltd. [1987] 3 NWLR (Pt. 59) 84; *Igbodim*
vs. Obianke [1976] 9-10 SC 179.

D This posture, no doubt, finds solid anchorage on this court's view in *Kate Enterprises Ltd vs. Daewoo (Nig.) Ltd* [1985] 2 NWLR (Pt. 5) 127 that:

E To insist that the very person in the appellant company who
negotiated the transaction with the respondent must be called
as a witness when the documents relating to the transaction are
available and have been admitted in evidence without objection
and PW1 is in a position to know about the transaction by the
office he holds is, in my view, a negation of the very essence of
F the corporate personality of the appellants. Companies have no
flesh and blood. Their existence is a mere legal abstraction.
They must, therefore, of necessity, act through their directors,
managers and officials... PW1 was clearly in a position to know
G enough about the transaction as to testify to it on behalf of the
appellants. Besides, his evidence is substantially unchallenged
and supported by documents tendered. I am satisfied that if the
learned trial judge had borne these facts in mind, he would
H have given due weight to the oral evidence tendered by the
appellants before him. [*Italics supplied for emphasis*]

I In my view, this is, exactly, the point which the lower court endeavoured to make
when it held at page 173 of the record that "... the substratum of the defence was
knocked out; all that was left was the printed evidence of the appellants, which
was supported by oral testimony of PW1."

J In all, I find no merit in the appellants' complaint in this issue which I
resolve against them.

A ISSUE TWO

Whether the court below was right when it held that the respondent proved interest and the entire indebtedness of the appellants to the respondent having regard to the evidence led?

B

On this issue, learned counsel for the appellant sought, most gallantly, I must observe, to impugn the lower court's conclusion. He devoted paragraphs 2.12 – 2.53, pages 5 – 12 of the brief to his efforts in this regard.

C

On his part, counsel for the respondent, spiritedly, debunked these submissions on pages 10 – 18 of the respondent's brief. I must, quickly, point out here that, against the background of the specific findings of the trial court, affirmed by the lower court, learned counsel for the appellant would appear to

D

have labored in vain.

First, I would, once more, refer to the findings of the trial court at page 91 of the record thus:

E

The court prefers the evidence of plaintiff that the nature of the transaction was the grant of facility of N20,000,00 by the plaintiff to the first defendant. By the implied admission of the defendants, the first defendant utilized N10,000,000 – See paragraph 11 of the affidavit of defendant accompanying the notice of intention to defend and see exhibits 1 and 2 exhibited to the accompanying affidavit to the writ. The courts finds as a fact that there was a banker and customer relationship and the facility was granted in cause (sic) of that relationship... the court rejects the defence of the relationship of partnership set up by the defendants. It is a frivolous attempt to defeat the transaction duly entered into by the plaintiff and defendants...

H

[Italics supplied]

Notwithstanding the above finding, the trial court still found against the respondent (as plaintiff) on the flimsy and weak-kneed reasoning at page 88 of

I

the record. It held thus:

J

The court will however attach no weight to the evidence of PW1 in view of his evidence under cross examination that he was not employed when the transaction was made nor did he depose to the said

A **accompanying affidavit.** [page 88 of the record; italics supplied]

This slipshod reasoning prompted the finding of the lower court that:

B **It was even erroneous for the trial judge to later hold otherwise having earlier held that he preferred the evidence of plaintiff that the nature of the transaction was the grant of facility of N20,000,000 to the plaintiff (sic) by the first defendant (sic).**

C At the page 12 of the respondent's brief, it was argued thus "having not appealed against the finding of fact as regards the issue of partnership and the utilization of N10,000,000 based on the banker/customer relationship, the appellants are bound by the findings of fact which the Court of Appeal accepted."

D I, entirely, agree with this submission. It has long been settled that a finding of fact not appealed against cannot be disputed, **Commerce Assurance vs. Alli [1992] 3 NWLR (Pt. 232) 710**. In effect, the correctness of such findings cannot be questioned, **Yesufu vs. Kupper International [1996] 5 NWLR (Pt. 446) 17**; **PNU do Trading Co. Ltd. vs. Abere [2001] 11 NWLR (Pt. 723) 114, 146**. In all, therefore, this settled position, coupled with the exhibits before the trial court, affirmed by the lower court, make the submissions of the appellants' counsel [pages 5 – 2.53 of the brief] otiose.

F Indeed, as the lower court found as follows:

G **Exhibits STB 1 and STB2, copies of which were attached to the supporting affidavit clearly authenticate the interest rate payable. The first respondent signed the Memorandum of Acceptance Column by affixing its common seal and one of its directors by name Joseph Bogwu who, incidentally, is the**

H **second respondent, signing it and the secretary of the company by name Johnson Uwabor also signing. Again the second respondent also signed the Guarantee and Indemityform – exhibit STB2, which itself accompanied the supporting**

I **affidavit. There was no scintilla of evidence denying the signatures of the respondents. In the absence of plea of non est factum or allegation of signing under duress, the mere fact of the signature of a person on a document makes the contents**

J **binding on him. [Pages 178 – 179 of the record; italics supplied**

A for emphasis].

Instructively, whilst exhibit STB1 provides for the interest rate chargeable on the above facility; exhibit STB2, the Guarantee and Indemnity form, was executed by the second appellant for the benefit of the first appellant. These were not disclaimed in the appellant's counter affidavit at the trial court. This background, undoubtedly, informed the submission on page 15 of the respondent's brief that: "... the plaintiff/appellant (sic) did not only prove its case on the preponderance of evidence, [it] also proved that it was entitled to charge interest on the principal sum..."

I, entirely, endorse this submission for it accords with this court's position that:

... interest may be awarded in a case in two distinct circumstances, namely: (i) As of right; and (ii) where there is a power conferred by statute to do so, in exercise of the court's discretion. Interest may be claimed as a right where it is contemplated by the agreement between the parties, or under a mercantile custom, or under a principle of equity such as breach of a fiduciary relationship, see, London, Chatham & Amp; Dover Railway vs. S.E. Railway (1893) A.C. 429 at p. 434. Where interest is being claimed as a matter of right, the proper practice is to claim entitlement to it on the writ and plead fact which show such an entitlement in the statement of claim.

Ekwunife vs. Wayne (West Africa) Ltd [1989] 3 NSCC 352, 359; [Italics supplied for emphasis]; T.O.N.P.C Unltd vs. Pedmar Nig. Ltd (2002) LPELR – 3145 (SC) 19 – 20; C – A; Veepee Industries Ltd vs. Cocoa Industries Ltd (2008) LPELR – 3461 (SC) 14; C – E. This was, exactly, what the respondents did at the trial court which the lower court affirmed. I, therefore, find no merit in the complaint in this issue which I, also, resolve against the appellant.

In consequence of all I have said, I find that this appeal must be, and is hereby, dismissed as being, wholly, unmeritorious. Appeal dismissed. I hereby affirm the judgment of the lower court. No order as to costs.

Chima Centus Nweze
Justice, Supreme Court

J

- A RHODES-VIVOUR, (JSC):** I have had the benefit of reading in draft the leading judgment of my brother, Nweze JSC. I agree with his lordship that the judgment of the Court of Appeal should be affirmed and the appeal dismissed. In view of the reasons given by the trial court dismissing the respondents claim, I
- B** add a few words of mine.

- The respondent granted the 1st defendant/1st appellant an overdraft facility guaranteed by the 2nd defendant/appellant, which as at 2nd February, 2001 amounted to N17,835,802.67 (Seventeen million, eight hundred and thirty-five
- C** thousand, eight hundred and two naira sixty-seven kobo). Unfortunately the 1st defendant failed to meet its obligations to the bank (respondent), despite repeated demands for the sum and interest.

- Owning to the 1st defendants default the respondent as plaintiff filed a suit
- D** under the undefended list procedure for the sums due and interest.

The defendant's/appellants' filed a Notice of intention to defend. After examining it the learned trial judge was satisfied that there was a defence on the merits.

- E** The learned trial judge then transferred trial to the General Cause list. Relying on the affidavit in support and documents relevant for the grant of an overdraft facility the plaintiff called one witness, and tendered through him documents. The plaintiff's sole witness was cross-examined by the defendant's
- F** counsel. At the close of cross-examination further hearing was fixed for 3 November, 2003. On that day the defendants' were absent and not represented by counsel. The learned trial judge fixed judgment for 20 January, 2003. Judgment was delivered, dismissing the plaintiff's claim.

- G** The reasoning of the learned trial judge for dismissing the plaintiff's claim was interesting. His lordship said:

- H** **“..... The court will however attach no weight to the evidence of PW1 in view of his evidence under cross-examination that he was not employed when the transaction was made nor did he depose to the said accompanying affidavit.**

- I** The plaintiff/respondent's case crumbled in the trial court because PW1 the sole witness of the plaintiff:

- J** **1. Was not employed by the plaintiff, when the transaction between the plaintiff and appellant was made.**

**A 2. Did not depose to the affidavit the plaintiff relied on to
 prove their case.
 And so no weight can be attached to the testimony of
 such witness.**

B

The Court of Appeal set aside the judgment of the trial court after it explained the concept of a limited liability company and found that the plaintiff's sole witness was a competent and compellable witness.

C

The court also was satisfied that exhibits were in favour of the plaintiff and the evidence was largely unchallenged.

D

A company is an artificial person. Decisions for, and actions by it are taken by natural persons such as the Board of Directors, individual director, employees and agents. That is to say the company acts through these people. Officers of a company involved in transaction involving the company and some other party are competent and compellable witnesses in a court of law if and when the transaction becomes subject of litigation. This is also the case where an officer is employed by the company after the transaction was concluded, provided such an officer is fully briefed and documents relevant to the transaction are made available to him by his employers. See **Kate Enterprises Ltd vs. Daewoo (Nig) Ltd 1985 2 NWLR (Pt. 5) p. 127, Saleh vs. Bank of North Ltd (2006) 6 NWLR (Pt. 979) p. 316.**

F

G

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PW1, the sole witness for the plaintiff/respondent was not in their employment when they granted the appellants' overdraft facility. When he gave evidence he claimed to be the business officer of the plaintiff/respondent, whose duties included managing the relationship between the customer and the bank. He easily qualifies as one of those who acts on behalf of the company, and the fact that he was not in the employment of the plaintiff/respondent when the overdraft facility was granted to the defendant/appellants' does not make his evidence worthless. He is a competent and compellable witness and much weight should have been attached to his testimony.

Section 134 of the Evidence Act states that burden of proof in civil cases shall be discharged on the balance of probabilities.

I

Balance of probabilities or preponderance of evidence means that in civil proceedings judgment is given to the party with the greater weight or stronger evidence.

J

Once documentary evidence supports oral evidence, oral evidence becomes more credible as documentary evidence always serves as a hanger from

A which to assess oral testimony. See **Kindley & Ors vs. M.G. of Gongola State (1988) 2 NWLR (Pt. 77) p. 473. Omoregbe vs. Lawani (1980) 3 – 4 SC P. 117.**

Furthermore when the evidence of the plaintiff is unchallenged, the plaintiff is entitled to judgment. PW1 testified on oath, and his testimony was supported by documentary evidence. Evidence led was one way, in favour of the plaintiff, since there was no evidence led by the defendants'. Documentary evidence to wit: Exhibits STB1 and STB2 supports the oral testimony of the sole witness at trial.

C That together with the unchallenged testimony of the sole witness entitles the plaintiff to judgment as the plaintiff clearly satisfied the requirements of section 134 of the Evidence Act. The trial judge was wrong to dismiss the plaintiff's claim and the court of appeal was right to say so.

D Finally I must comment on exhibits STB1 and STB2. Exhibit STB1 states the interest payable on the overdraft facility while exhibit STB 2 is the Guarantee and Indemnity Form.

E The 1st respondent signed exhibit STB1. It was also signed by a director of the 1st defendant/appellant. The seal of the company was pasted on to the exhibit after the secretary of the company signed. As regards exhibit STB2 the 2nd defendant/appellant signed.

The Court of Appeal after examination these exhibits observed that:

F **“There was no scintilla of evidence denying the signature of the respondents. In the absence of plea of non est factum or allegation of signing under duress, the mere fact of the signature of a person on a document makes the contents binding on him.”**

H Top officials of the 1st appellant signed exhibit STB1, while the 2nd appellant, who guaranteed the overdraft facility signed exhibit STB2 as guarantor. By no stretch of imagination can it be said that top officials of the 1st appellant and the 2nd appellant signed exhibits STB1 and STB2 without reading the contents. They never complained of being blind. Their signatures on both exhibits implies full agreement with everything in the exhibits. The signatories to the exhibits (supra) must accept the implications and consequences of their signatures on exhibits STB1 and STB2.

J As judges', when we examine exhibits such as these, it is not our business to find out the intention of each party. What we do is to decide what a party was reasonable entitled to conclude from the attitude of the other. So once Exhibit

A STB1 and STB2 were signed by officials of the appellant, and none of them complained that they signed under undue influence or denied their signature, the contents of both exhibits are binding on them.

B It is for this, and the more detailed reasoning in the leading judgment that I too affirm the judgment of the Court of Appeal and dismiss the appeal.

Olabode Rhodes-Vivour
Justice, Supreme Court

C DATTIJO MUHAMMAD, (JSC): Having read in advance the lead judgment of my learned brother Nweze (JSC) just delivered, I agree with his lordship's reasoning and conclusion that the appeal lacks merit and that same should be dismissed.

D I rely on the summary of facts contained in the lead judgment to emphasize that a trial court's failure to act on the unchallenged evidence of a competent witness renders its decision manifestly perverse. And that is what entitles an appellate court to interfere by doing the needful: availing itself the evidence ignored by the trial court in arriving at the appropriate decision.

In the instant case, the trial court's decision which runs counter to the lawful evidence the respondent herein, as a plaintiff, led at the court does occasion a miscarriage of justice.

F See **Irolo vs. Uka (2002) 14 NWLR (Pt. 786) 195 and Atologbe vs. Shorun (1985) 1 NWLR (Pt. 2) 360.**

The lower court's interference with the trial court's manifestly perverse decision, learned respondent's counsel is right, cannot be said to be wrong.

G It is for this and the fuller reasons given in the lead judgment that I dismiss the appeal and abide by the consequential orders therein.

Musa Dattijo Muhammad,
Justice, Supreme Court

H OGUNBIYI, (JSC): I read in draft the lead judgment just delivered by my learned brother, **Nweze, JSC**. I agree that the appeal has no merit and should be dismissed.

I The facts leading to this appeal have been spelt out clearly in the lead judgment.

The respondent herein was the plaintiff at the trial High Court, Delta, who commenced the action under an undefended list against the defendants/

J appellants herein in this appeal. The claim was for the sum of N17,835,802.67k

A being an outstanding debt balance in the first defendant's account with the plaintiff which was due to the plaintiff from an overdraft facility granted to the 1st defendant at the 1st defendant's request and guaranteed by the second defendant.

This sum, the defendants have failed, neglected, omitted and/or refused to

B pay in spite of repeated demands.

2) 31% interest from Feb. 03, 2001 until the date of judgment and thereafter 10% interest until same is fully liquidated.

C Consequent upon the defendants filing a notice of intention to defend, the suit was transferred to the general cause list to be heard on affidavit evidence.

The trial court at the end of the day dismissed the plaintiff's suit at pages 78 95 of the record.

D On an appeal to the lower court, same was allowed and the trial court's judgment was reversed. The plaintiff/appellant before the court was granted the reliefs sought per its claims.

The appeal now before us is predicated on the following two issues:

E **1) Whether the law that any agent/servant can give evidence to establish any transaction entered into by a juristic personality is applicable to affidavit evidence.**

F **2) Whether the court below was right when it held that the respondent proved interest and the entire indebtedness of the appellant to the respondent having regard to the evidence led.**

G

I wish to lend in my comment on the 1st issue raised. It is the submission of the appellant on the said issue that the lower court erred when it held that the trial court was wrong in attaching no weight to the evidence of the plaintiff witness

H (PW1) having regard to the fact that the matter was heard on affidavit evidence.

It is the counsel's submission further that the law that any agent or servant can give evidence to establish any transaction entered into by a juristic personality is not applicable to affidavit evidence; that affidavit evidence is

I special evidence which is not open to another person to prove those facts within the knowledge of another.

As rightly submitted by the respondent's counsel, Mr. Kelechi Ogbonna (PW1) was in the employment of the respondent and was a business officer, at the

J time he testified at the trial court. PW1 also testified further that as a business

A officer, his duties includes managing the relationship between the customer and the bank (respondent) and the recovery of money owned the respondent by its customers.

B It is pertinent to say also that PW1's evidence was not challenged nor controverted. The trial court was therefore wrong in law, in not attaching any weight to the said evidence of PW1. As rightly held by the respondent's counsel therefore, the trial court greatly erred and also occasioned a miscarriage of justice against the respondent as plaintiff.

C Hence the lower court was right in reversing the trial court's decision when it held this at page 177 of the record:

D **“..... I hold that the learned trial judge erred in holding that the evidence of PW1 was lacking in evidential value for the reason stated. Since that evidence was not challenged and there is no legal inhibition militating against it, I hold that the testimony is of high evidential value.”**

E It is trite that a company such as the respondent is a corporate entity and could act only through its servants and agents and as a result thereby any employee who is in a position to have a personal knowledge of a transaction by virtue of his office
F can give evidence of such transaction on behalf of the company. See **Kate Enterprises Ltd vs. Daewoo (Nig) Ltd (1985) 2 NWLR (Pt. 5) P. 127. See also Saleh vs. Bank of the North Ltd. (2006) 6 NWLR (Pt. 976) P. 316 at 326 – 327 wherein Musdapher, JSC said:**

G **“Any agent or servant can consequently give evidence to establish any transaction entered into by a juristic personality. Even, where the official giving the evidence is not the one who actually took part in the transaction on behalf of the company. Such evidence nonetheless is admissible, will not be discountenanced or rejected as hearsay evidence. The learned trial judge was clearly in error to have ignored the evidence led by the respondents that they were not around when the appellant opened its account with the respondent bank.”**

J The above authority is on all fours with the appeal at hand and speak negative volume on the findings by the trial court. The lower court could not be faulted but

A rather deserve commendation for detecting the error fallen into by the trial court and thus rectifying same.

My brother has thrashed out the two issues very well and extensively. With the few words of mine and relying particularly on comprehensive and detailed reasoning in the lead judgment, I also find no merit in this appeal but dismiss same in terms of the lead judgment.

The appeal is hereby dismissed and I abide by all the orders made in the lead judgment.

C

Clara Bata Ogunbiyi
Justice, Supreme Court

AMIRU SANUSI, (JSC): Having perused the Judgment just delivered by my learned brother, Nweze JSC when supplied to me, I find myself in entire agreement with his reason and conclusion that this appeal lacks merit and therefore must be dismissed.

In the present case the facts as could be gleaned from the record of appeal clearly revealed that the respondent herein as plaintiff at the lower court, granted an overdraft facility to the 1st defendant now appellant on 2-2-2001 to the tune of #17,835,802.67. The appellant refused to pay back despite series of demands. The former decided to institute an action under the undefended list procedure for recovery of the loan granted plus the accrued interest. When served with the court process, the appellant as defendant, filed notice of intention to defend, hence the trial court transferred the suit to the general cause list.

At the trial, the plaintiff (now respondent) called one witness who tendered the relevant documents for the grant of the overdraft and after his testimony he was cross examined before the trial court, adjourned the cause for further continuation. On the adjourned date, the defendant/appellant was absent from court and was also not represented. Sequel to that, the trial court fixed the matter to a date for judgment and it delivered same on that day dismissing the plaintiff/respondent's claim on the bizarre reason that PW1 who testified for the plaintiff/respondent was not in the employment of the respondent as at the time of the transaction between the plaintiff/respondent on one hand and defendant/appellant on the other, also because he (PW1) was not the one who deposed to affidavit supporting the claims and therefore, the trial court refused to attach any weight to the testimony of PW1.

On the appeal to the Court of Appeal (the court below), the decision of the trial court was upturned and it held that PW1 was competent to testify on behalf of

A the respondent (plaintiff) which is a limited liability entity. The court below also held that the exhibits tendered on behalf of the plaintiff/respondent were uncontested or challenged.

I think I am inclined to agree with the findings of the court below with
B regard to the competence and compellability of PW1 to testify on behalf of its employer i.e. the respondent. The plaintiff being an artificial entity has the right to institute an action before any court and in that case must use a juristic person to ventilate its case or grievances in court. The fact that PW1 was not an employee of
C the plaintiff/respondent as at the time of the transaction is immaterial. He can by virtue of his position in the bank as business officer who must have been fully briefed and was fully aware of the contents of the document relating to the transaction. See *Selah vs. Bank of the North Ltd* (2006)6 NWLR (Pt. 976) 316.
D His oral testimony was supported by the documents he tendered at the trial.

The important thing for the trial court to consider was whether the testimony of PW1 and indeed the documents supporting or governing the transaction were controverted in any material particular. As there was no
E evidence adduced by the defendant/appellant challenging or contradicting both the oral testimony of the PW1 and the document or exhibits tendered in the case. The trial court should have accepted and acted on them and found that the plaintiff/respondent had proved its case, at least, on balance of probability, rather
F than to advance those flimsy and untenable reasons for rejecting the evidence adduced in the case by the plaintiff.

In the light of these few comments and for the fuller and more elaborate reasoning advanced in the lead judgment which I am at one with, I also hold that
G this appeal lacks merit. I accordingly dismiss it and affirm the judgment of the court of appeal which set aside the decision of the trial court. Appeal is hereby dismissed by me.

H **AMIRU SANUSI**
JUSTICE, SUPREME COURT

I

J

**SAMBO ALH. GALADIMA
AND
THE STATE**

SC.72/2013

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

FRIDAY, 10TH MARCH, 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**

CRIMINAL LAW: Defences – Provocation – When it does not avail an accused.

CRIMINAL LAW AND PROCEDURE: Burden of proof of culpable homicide – What prosecution must prove.

CRIMINAL LAW AND PROCEDURE: Defence of provocation – How to determine when it applies.

CRIMINAL LAW AND PROCEDURE: Proof – Contradictions in the evidence of prosecution witnesses – Non-material contradictions – Whether sufficient to cast doubt in the mind of the court.

CRIMINAL LAW AND PROCEDURE: Proof of cause of death – Medical report – Whether necessary in all cases.

CRIMINAL LAW AND PROCEDURE: Provocation – Onus of proof on the accused – How discharged.

CRIMINAL LAW AND PROCEDURE: Proof of cause of death – Medical certificate – Not material in all situations.

EVIDENCE: Standard of proof – Culpable homicide – How discharged.

Issues for Determination

1. **Whether from the facts and circumstances of this case the learned trial judge and the learned justices of the lower court thoroughly and properly considered the defence of provocation or all the defences available to the appellant before convicting and sentencing the appellant to death instead of terms of imprisonment. (Ground one, three and five).**
2. **Whether the learned trial judge and learned justices of the lower court were right in confining themselves to part of the evidence of the prosecution and defence witnesses and totally ignoring exhibits 1 and 1 (a) in convicting and sentencing the appellant to death (Ground six).**
3. **Whether there are lapses in the investigation of the episode that led to the death as well as in the evidence presented to prove the charge under Section 221 of the Penal Code against the appellant (Grounds two and four).**

Facts of the Matter

The appellant along with four other co-accused persons were arraigned before the trial court charged with the offence of culpable homicide punishable with death, contrary to Section 221 (b) of the Penal Code read with Section 79 of the same code. They were said to have caused the death of their relation one Safiya Nomau by attacking her and beating her with sticks and a hoe on her head and other parts of her body. In its efforts to prove the allegation against the appellant, the respondent as prosecution, called five witnesses and tendered weapon (a hoe) used on her which was admitted in evidence and marked Exhibit 2. Also two writs of possession of a land issued by an Area Court tendered in evidence through PW3, were admitted and marked Exhibits 1 and 1A. They were issued by Babura Area Court over a disputed piece of land in favour of one Usman Magu and Alhaji Galadima, the father of the appellant herein. At the conclusion of the prosecution's case, two of the accused persons were discharged by the trial court for want of proof of the allegation against them, while the appellant and two other co-accused persons continued with the trial.

Held: *(Unanimously dismissing the appeal)*

1. *The burden on the prosecution in a charge of culpable homicide*
It is well-settled law, that the prosecution, in order to obtain conviction in a charge of culpable homicide punishable with death, contrary to Section 221 of

the Penal Code, has the heavy burden of proving the under listed ingredients of the offence beyond reasonable doubt namely:

- (1) **That death of a human being was caused**
- (2) **That the accused was the cause of the deceased person's death.**
- (3) **That the act of the accused leading to the death of the deceased was done intentionally or with knowledge that death or grievous harm was the probable and not only likely consequence of the act. Ogba vs. State (1992) 2 NWLR (Pt. 222) 164.**

In culpable homicide cases like in all criminal offences, the onus is always on the prosecution to prove the guilt of the accused beyond reasonable doubt. Failure to do so, will automatically lead to the discharge of the accused person. See **Onuwogu v The State (1974) 9 SC. (P 382 Paras C–G)**.

2. *Material contradictions in a criminal trial*

Where there is/are material contradiction(s) in the evidence led or adduced by the prosecution, then obviously doubt will be created in the mind of the trial court, hence such doubt will be beneficial to the accused in which case the court should discharge the accused person. See **Almuvs The State (2009) 4 SCNJ 159/160**.

From the above pieces of evidence, there is no doubt that the appellant had a pre-determined plan to kill the deceased woman. These pieces of evidence were not contradicted in any respect. Even DW3 in his testimony white testifying for his defence corroborated the evidence of PW2 and PW4. Also credible evidence abound that the appellant and his co-conspirators attacked the deceased by beating her mercilessly with sticks and hoe which led to her instant death. (*Pp 382; 383 Paras G–H; D–E*).

3. *Medical report of the cause of death*

Although there was no medical report on the cause of the death of the deceased woman, I feel the tendering of medical report to confirm the death of a deceased victim is not material in a situation where death was instantly caused by the act of or attack by the accused person as in this instant case.

Almost all the witnesses called by the respondent confirmed that they saw the dead body of the deceased covered with grass mat at the scene of the incident. A court can always dispense with medical report or is not bound by it, in situation where death can easily be inferred or where there had been direct

account of the act that led to the death of the victim as in this instant case. See **Onyia v State (2006) 11 NWLR (Pt. 991) 267 at 292.**

In the present case, there are eye witnesses account on the attack on the deceased by the appellant and his co-accused, and also on the use of sticks and hoe on the helpless lethargic woman by the appellant and other co-accused and also on vital places on her body on which she was beaten i.e. head and all other parts of her body as well as the fact that the attack on her was not done to repel or retaliate any serious attack on them by the deceased woman. There is no doubt from the evidence led by the respondent that the appellant intended to kill and did kill the deceased woman.

Considering the totality of the evidence adduced in this case, I entirely agree with the findings of the court below that the respondent had proved all the ingredients of the offence as found by the learned trial judge.

In the present case, from the testimonies of PW2 and PW4 as highlighted supra, there had been a pre-meditated plan by the appellant and his co-conspirators to kill the deceased if she dared go to the land to erect a hut there. When they envisaged, rightly or wrongly, that the deceased was going to actualize her plan, they followed her to the farm land and started attacking her some of them shouting kill her! Kill her! Kill her! They then armed themselves with the sticks and hoe which they used to dastardly attack and kill the defenceless and unarmed woman. There was no evidence that she had even attacked any of them and even if she started it, the appellant and other two or three co-accused would not be justified to have pounced on an armed less woman. There was also no apprehension of death or grievous harm on any or all of them. The attack by the appellant was certainly disproportional. There was also no instant or sudden fight to warrant their attack on the deceased woman. For these reasons I also agree with the judgment of the court below that the defence of provocation did not avail the appellant.

(Pp 383 – 385 Paras F – A, I – D)

4. *Necessity for medical evidence*

In my view, the Prosecution's case was watertight. Both PW2 and PW4, eyewitnesses to the dastardly acts of the appellant and his co-conspirators, gave unchallenged testimonies of their perpetration of the offence he (the appellant) was charged with.

Indeed, even the testimony of the DW3 bolstered the grim narrative of how the appellant and his cohorts, mercilessly, pummeled the deceased person

with their cudgels and hoes: unlawful acts from which the instant death of the deceased person eventuated. The circumstances, therefore, obviated any need for tendering any medical evidence.

It could not have been otherwise for it has long been settled that in cases, such as the instant one, where a person was attacked with lethal weapons and he or she died on the spot, the cause of death could be, properly, inferred from the fact that the wound inflicted caused the deceased person's death.

Simply put, therefore, where the cause of death is obvious, medical evidence ceases to be of any practical or legal necessity in homicide cases. Such a situation arises where death was instantaneous or nearly so, **Ben vs. The State (2006) LPELR – 770 (SC) 12 – 13; Bakuri vs. The State (1965) NMLR 163, 164; Uyo vs. Attorney-General of Bendel State [1986] 1 NWLR (Pt. 17) 418; Onwumere vs. The State [1991] 4 NWLR (Pt. 186) 428; Nwachukwu vs. The State [2002] 12 NWLR (Pt. 782) 543; Oforlete vs. The State (2000) LPELR – 2270 (SC); Ogbu vs. The State (1992) LPELR – 2292 (SC) 18; B-C. (Pp 386–387 Paras I–E).**

5. *Alleged contradictions not material*

It is noted by me, that the appellant raised the issue of contradictions in the evidence adduced by the respondent. To my mind, even if there had been any contradiction in the testimonies of prosecution/respondents witnesses, such contradictions (even if available), were not material contradictions as would cast or raise doubts in the mind of the trial court.

At best, such contradictions are mere contradictions which are often and naturally noticed or found in testimonies of witnesses due to human error or due to long period between the date the event happened which usually result in the witness forgetting all or some of the events. In fact, the alleged contradictions cited by the appellant are in my humble view, not on material points which are fatal to the case of the prosecution/respondent and they were also not on material or crucial points. (P 384 Paras A–D).

6. *How to establish the defence of provocation.*

With due deference to the learned counsel for the appellant, the defence of provocation avails an accused person who killed his victim in heat of passion before the time to cool down. For the defence of provocation to benefit an accused person and also for same to be upheld, the accused must clearly show

or establish the under mentioned conditions:

- (a) **That the act he relied on is actually provocative.**
- (b) **That the provocative act deprived him of self-control.**
- (c) **The provocative act came from the deceased.**
- (d) **The sudden fight between the accused and the deceased was instantaneous and continuous with no time to cool down; and**
- (e) **The force used by the accused in repelling the provocation is not disproportional in the circumstance.**

See **Nwede vs. State (1985) 3 NWLR (Pt. 13) 444**, **Akalezi vs. State (1993) 3 NWLR (Pt. 273) 1**; **Okonji vs. State (1987) 1 NWLR (Pt. 52) 659**; **Ekpenyong vs. State (1993) 5 NWLR (Pt. 295) 513**. **Frank Uwagboe vs. The State (2008) 12 NWLR (Pt. 1102) 621.** (*P 384 Paras E–I*)

7. *How to determine whether provocation applies*

It is trite law, that the first test to be applied in determining whether the defence of provocation could avail an accused person is the effect of alleged provocation would have had on a reasonable man. The act of provocation must be one which could incite a reasonable man of the appellant's/accused standing in life and education, to lose his self-control. **Adebiye vs. State (2013) 7 NWLR (1354) 597**; **Musa vs. State (2009) 15 NWLR (Pt. 1165) 467.** (*P 385 Paras D–E*).

Nigerian Cases cited

Adebiye vs. State (2013) 7 NWLR (1354) 597;
Akalezi vs. State (1993) 3 NWLR (Pt. 273) 1;
Almu vs. The State (2009) 4 SCNJ 159/160.
Bakuri vs. The State (1965) NMLR 163, 164;
Ben vs. The State (2006) LPELR – 770 (SC) 12 – 13;
Ekpenyong vs. State (1993) 5 NWLR (Pt. 295) 513.
Frank Uwagbae vs. The State (2008) 12 NWLR (Pt. 1102) 621.
Musa vs. State (2009) 15 NWLR (Pt. 1165) 467.
Nwachukwu vs. The State [2002] 12 NWLR (Pt. 782) 543;
Nwede vs. State (1985) 3 NWLR (Pt. 13) 444,
Oforlete vs. The State (2000) LPELR 2270 (SC);
Ogba vs. State (1992) 2 NWLR (Pt. 222) 164.
Ogbu vs. The State (1992) LPELR 2292 (SC) 18; B-C.

- A** *Okonji vs. State* (1987) 1 NWLR (Pt. 52) 659;
Onuwogu vs. The State (1974) 9 SC.
Onwumere vs. The State [1991] 4 NWLR (Pt. 186) 428;
Onyia vs. State (2006) 11 NWLR (Pt. 991) 267.
- B** *Uyo vs. Attorney-General of Bendel State* [1986] 1 NWLR (Pt. 17) 418;

Nigeria Statutes Cited

Penal Code Law – Ss 221(b) and 79

C

APPEARANCES

N.A. Dangiri and A.L. Likko for the Appellant.

Sani Hussaini Garun Gabbas Hon. Attorney General Jigawa State with him:

- D** Adamu Mukhtar DDCL, Hussaini Abdullahi DDL, Mustapha B. Adamu ACSC, Yahaya Abdullahi ACSC, Zakiyyu Muhammad PSC and Muhammad El-Usman SSC for the Respondent.

- E** **AMIRU SANUSI, (JSC) (Delivering the Lead Judgment):** This appeal is against the judgment of the Court of Appeal, Kaduna Division (the court below) delivered on the 8th of February, 2013 which affirmed the decision of Jigawa State High Court (the trial court).

- F** The facts of the case giving rise to this appeal are summarized bellow. The appellant along with four other co-accused persons were arraigned before the trial court charged with the offence of culpable homicide punishable with death, contrary to Section 221 (b) of the Penal Code read with Section 79 of the same
- G** code. They were said to have caused the death of their relation one Safiya Nomau by attacking her and beating her with sticks and a hoe on her head and other parts of her body. In its efforts to prove the allegation against the appellant, the respondent as prosecution, called five witnesses and tendered weapon (a hoe)
- H** used on her which was admitted in evidence and marked Exhibit 2. Also two writs of possession of a land issued by an Area Court tendered in evidence through PW3, were admitted and marked Exhibits 1 and 1A. They were issued by Babura Area Court over a disputed piece of land in favour of one Usman Magu and Alhaji
- I** Galadima, the father of the appellant herein. At the conclusion of the prosecution's case, two of the accused persons were discharged by the trial court for want of proof of the allegation against them, while the appellant and two other co-accused persons continued with the trial. After the prosecution/respondent
- J** closed its case, the appellant, opened his defence. He testified for his defence as

In the end, the trial court found the appellant and his other co-accused guilty, convicted and sentenced them to death.

Aggrieved by his conviction and sentence by the trial court, the appellant and the other co-accused person appealed to the court below separately. The court below on the 8th of February, 2013 affirmed the conviction and sentence of the appellant and his co-accused earlier made by the trial court and subsequently dismissed their appeals which they filed and argued separately at the court below on separate Notices of Appeal dated 20th of February, 2013 each containing six grounds of appeal.

Further dissatisfied with the judgment of the court below, the present appellant appealed to this court vide a notice of appeal dated 20/2/2013 but filed on 21/2/2013. In his Brief of Argument filed on 24/4/2013 settled by one Nasiru Audu Digiri Esq, three issues were distilled from the grounds of appeal for the determination of this appeal. The issues are reproduced hereunder:

4. Whether from the facts and circumstances of this case the learned trial judge and the learned justices of the lower court thoroughly and properly considered the defence of provocation or all the defences available to the appellant before convicting and sentencing the appellant to death instead of terms of imprisonment. (Ground one, three and five).

5. Whether the learned trial judge and learned justices of the lower court were right in confining themselves to part of the evidence of the prosecution and defence witnesses and totally ignoring Exhibits 1 and 1 (a) in convicting and sentencing the appellant to death (Ground six).

6. Whether there are lapses in the investigation of the episode that led to the death as well as in the evidence presented to prove the charge under Section 221 of the Penal Code against the appellant (Grounds two and four).

Upon being served with the appellant's brief of argument, the respondent on

A 18/11/2015 filed its Amended Respondent's Brief of Argument. It however adopted the three issues for determination raised in the appellant's brief as reproduced above.

B The appellant's learned counsel decided to argue all the three issues for determination together in view of their similarity. I think he is right on that, hence I will also treat the three issues together, but before doing so, I will first of all deal with the Preliminary Objection raised and argued in the Amended Respondent's Brief.

C It is worthy of note that the preliminary objection raised in the Respondent's brief of argument is challenging the competence of this appeal and thus seeking the striking out of the appeal. As had been the practice in this court, preliminary objection once raised by a respondent either in its brief or in a motion
D on notice, such objection must be disposed of first, before considering the main appeal. I shall therefore consider the preliminary objection first for whatever it is worth, before determining this appeal. The respondent's Preliminary Objection was hinged on two grounds as follows:

- E**
- (i) That all the three issues relied on (sic) by the appellant in challenging the decision of the Court of Appeal under his issues were not canvassed and argued before the two lower courts.**
 - F (ii) No leave of this court was sought and obtained before arguing the said issues in this brief.**

G In his response, the learned appellant's counsel in his Appellant's Reply Brief, submitted that all the grounds of appeal from which he encapsulated or raised his three issues for determination, arose from the decision of the court below and he tied each of the three issues to the relevant ground or grounds of appeal. He went
H further to identify each of the issues to the ground or grounds of appeal and the portion of the judgment of the court below he lifted the issues from. Without much ado, I do not think the determination of the preliminary objection requires any waste of time or energy. It appears to me that the learned Attorney General for
I the respondent missed the point. This court is concerned solely with the decision of the court below and not that of the trial court because there is no right of appeal to this court direct from the decision of the trial court. All that this court is concerned with in hearing the appellant's appeal, is to consider the judgment of
J the court below and decide whether it is wrong in law or if it is perverse.

A The respondent had even conceded that the issues raised were derived from the decision of the court below. I have closely considered all the three issues for determination and have noticed that all of them were posing challenges on the decision of the court below and NOT the judgment of the trial court. Whatever
B anomaly the respondent observed in the decision of the trial court should or ought to have been raised at the court below and not in this court since there is no right of appeal direct to this court from the decision of the trial court. Similarly, I do not think that any leave was required by the appellant to raise any of or all the grounds
C of appeal from which the three issues for determination were formulated or encapsulated in the appellant's brief. I therefore hold the preliminary objection to be lacking in substance and was merely raised in an effort to waste this court's precious time. The preliminary objection is therefore not well-taken and is
D accordingly overruled for want of merit. It is accordingly dismissed.

On the appeal proper, the learned counsel for the appellant conceded that the deceased died as a result of the injuries she sustained as a result of the attack and the beatings by the three accused persons including the appellant herein. He
E submitted that the two lower courts did not thoroughly consider the evidence presented in this case. The incident that led to the death of the deceased had to do with a land dispute. He argued that a fight broke out between the deceased and the appellant on one hand and the three co-accused on the other and the fight took
F place in the farm land that was found by the Upper Area Court, to belong to the appellant's father and the two writs of possession were issued to that effect. He referred to the evidence of PW2, PW3, PW4, and DW1, DW2 and DW3 at pages 13-28 of the record. Learned counsel for the appellant further argued that in spite
G of and notwithstanding the admission of the Writs of possession in evidence as Exhibits 1 and 1(A), the two lower courts did not utilize the said evidence in considering the defence available to the appellant. He contends that there is no proper investigation of what led to the death of the deceased as the evidence of the
H prosecution witnesses in relation to the ownership of the land which they said belonged to the deceased which had contradicted the evidence of the three appellants as was supported by Exhibits 1 and 1 (A) (Pages 48-49) of the record. He also referred to other contradictions in the evidence of PW2 at pages 13 and 14
I of the record. He submitted that the lower court did not properly consider or evaluate the above pieces of evidence and that the failure has occasioned gross miscarriage of justice against the appellant. He contended that the deceased was an aggressor and trespasser as adjudged by the Upper Area Court Ringim and the
J fact that the prosecution witnesses encouraged the deceased to enter into the land

- A** in dispute and erect a hut constitutes enough reason to consider that piece of evidence. He submitted that the pieces of evidence given by the prosecution witnesses contain the good, the bad and the ugly and that contradicts the decisions of the two lower courts. He referred to pages 48-49 of the record. He also argued
- B** that the trial court completely ignored part of evidence of prosecution witnesses that there was a fight. He submitted that, had the two lower courts given consideration to those pieces of evidence, they could not have escaped coming to the conclusion that the defence of provocation was properly raised.
- C** He remarked that there was no evidence that the police had investigated the allegation of the appellant that the deceased trespassed on the land and even erected a hut which was confirmed by PW2, PW3, PW4 & PW5. He referred to the case of **AREMU vs. THE STATE (1984) All NWR 314 at 316** where per
- D** **Obaseki J.S.C (RTD)** said:

E **“I would in the circumstances acquit the appellant of the offence of murder but convict him for manslaughter. There was no evidence of investigation of the allegation of the appellant.....”**

F He submitted that had the two lower courts properly considered the issue of provocation, they would not have imposed a higher sentence on the appellant. He urged this court to substitute the death sentence with a term of imprisonment.

G In his response, the learned respondent's counsel submitted on the defence of provocation raised by the appellant, that for the defence of provocation to avail an accused person under Section 222 (1) of the Penal Code, it must be grave and sudden as would deprive the accused of the power of control. He argue that the appellant is in the best position to say whether there was any act done by the deceased to the appellant that was grave and sudden and capable of

H making him lose his self-control to justify killing the deceased, by furnishing particulars of defence of provocation raised by him. He referred to the case of **YARO vs. STATE (2007) 18 NWLR (Pt. 1066) P. 215 at 234** where the Supreme Court held as below:

I **“The defence of provocation like other defences cannot hang in the air without supporting evidence. Nor can it be built on scanty foundations in order to establish it, it is the duty of the**

J **accused person to adduce credible or positive evidence to**

A support the alleged provocation. Where the accused person failed to adduce evidence in support of his defence, as in the present case, the trial court has to rely on the evidence before it adduced by the prosecution.....”

B Based on the above, he submitted that the appellant has failed woefully in discharging the burden of furnishing the trial court with particulars of the defence of provocation he raised. He referred to the evidence of DW3 at page 28 of the
C record as follows:

“When the deceased came and met her senior sister with us, she started abusing us but I told them not to mind her”

D He admitted that although the word “abuse” was held to be capable of provoking a person, but he argued that the appellant had ruled out the possibility of being provoked when he said:

E “Do not mind her (meaning the deceased person) (page 28) of the record.”

F He stated that evidence of possible provocation might be drawn from beating the appellant when the appellant stated thus:

G “From there she took a hoe and started beating the 1st accused person two times but he was dodging” (see page 28).”

The learned counsel argued that from the above, the deceased only beat the co-accused persons and not the appellant and therefore the defence of provocation
H cannot avail a person where it was a third party that is provoked and not the accused. He also stated that the third possibility of provocation could be that the deceased entered the farm land in dispute.

He stated that the appellant had never shown that her entering into the land
I made him lose control. He urged this court to resolve this against the appellant.

On the 2nd issue which borders on exclusion of Exhibit 1 and 1(A), he argued that failure of the trial court in making reference to the said exhibits has not occasioned any miscarriage of justice. He referred to Section 227(2)

J

A Evidence Act 2004 which provides thus:

- “The wrongful exclusion of evidence shall not of itself be a ground for reversal of any decision in any case if it appears to the court on that had the evidence excluded been admitted it may reasonably hold that the decision would have been the same.”**
- C He argued that the issue canvassed by the appellant on the alleged failure of the trial court or the court below to evaluate evidence of PW2, PW3 and PW4 on the said documentary evidence i.e. Exhibit 1 and 1(A), were not supported by evidence. He cited the case of OKWEJINOR vs. GBAKEJI (2008) 5 NWLR (Pt. 1079) 172 at 181. Here, the attitude of Supreme Court with regard to concurrent findings of lower court is pertinent as adjudged by the lower court, unless a miscarriage of justice is occasioned by the finding. He argued further, that it is not on every occasion that the Supreme Court will vary the decision of lower court for failure to properly evaluate evidence furnished. On the issue of contradictions in the evidence led by the prosecution on Exhibits 1 and 1(A), he argued that the said contradiction with regard to the ownership of the land cannot be fatal to the case of prosecution. He argued that the main issue is whether it was the act of the appellant that caused the death of the deceased which was done with intent to kill her or cause grievous bodily harm on her. He referred to page 8 paragraph 5.03 of the appellant brief of argument. He referred to the case of AKPANU vs. STATE (2008) 14 NWLR (Pt. 1106) p. 72 at 90, where the supreme court had provided the ingredients of the offence of culpable homicide punishable with death which must be proved by the prosecution in a charge under section 221(b) of the Penal Code as listed below:
- H (i) That the death of a human being has take place.
(ii) That such death was caused by the accused.
(iii) That the act was done with intention of causing death.
(Iv) That the accused knew or had reason to know that death
I would be probable consequence for the proof of 1st
J ingredient.

Learned counsel for the respondent referred to the evidence of PW2, PW3 &

- A** PW4 at page 14 of the record, and submitted that with the evidence of PW2, PW3 & PW4, the prosecution has discharged the burden of proof on the first ingredient. On the proof of second ingredient, he referred the evidence of PW2 at page 13 where the role played by the appellant was described. On the third
- B** ingredient, the evidence of PW2, PW3, PW4 and PW5 were used in proving the ingredient, whether death is the probable consequence.

- He argued that the above pieces of evidence were neither shaken contradicted nor were they cross examined on it. He then urge this court to also
- C** resolve this issue in favour of the respondent and dismiss his appeal.

- It is well-settled law, that the prosecution, in order to obtain conviction in a charge of culpable homicide punishable with death, contrary to Section 221 of the Penal Code, has the heavy burden of proving the under listed ingredients of the
- D** offence beyond reasonable doubt namely:

- (4) That death of a human being was caused
- (5) That the accused was the cause of the deceased person's death.
- E** (6) That the act of the accused leading to the death of the deceased was done intentionally or with knowledge that death or grievous harm was the probable and not only
- F** likely consequence of the act.

- See **Ogba vs. State (1992) 2 NWLR (Pt. 222) 164**. In culpable homicide cases like in all criminal offences, the onus is always on the prosecution to prove the
- G** guilt of the accused beyond reasonable doubt. Failure to do so, will automatically lead to the discharge of the accused person. See **Onuwogu vs. The State (1974) 9 SC**. Where there is/are material contradiction(s) in the evidence led or adduced by the prosecution, then obviously doubt will be created in the mind of the trial
- H** court, hence such doubt will be beneficial to the accused in which case the court should discharge the accused person. See **Almu vs. The State (2009) 4 SCNJ 159/160**.

- In this instant case, PW2 and PW4 were eye witnesses to the commission of the offence. Part of these two eye witnesses testimonies (who are key witnesses for the prosecution) as borne out by the record, read as below:
- I**

For instance; PW2 had this to say at page 13 of the record.

“PW2: On Friday night the deceased that is when she was alive,

J

A reported to the ward head that since she was not given
B the land she would go to her father's land and erect a hut,
 she also notified the village head of her intention. The
C Galadima family members also planned that if they see
 the deceased in the land they would kill her” And at page
D 17 of the Record, PW4 said thus:

PW4: Before I reached the farm I saw all the accused going
 towards the place where the deceased woman wanted to
 erect a hut, I then heard them saying kill her, kill her,
 meaning the deceased woman. I retreated backwards
 and waited when they started beating her I hide
 myself.....”

D From the above pieces of evidence, there is no doubt that the appellant had a pre-
 determined plan to kill the deceased woman. These pieces of evidence were not
 contradicted in any respect. Even DW3 in his testimony white testifying for his
E defence corroborated the evidence of PW2 and PW4. Also credible evidence
 abound that the appellant and his co-conspirators attacked the deceased by
 beating her mercilessly with sticks and hoe which led to her instant death.
 Although there was no medical report on the cause of the death of the deceased
F woman, I feel the tendering of medical report to confirm the death of a deceased
 victim is not material in a situation where death was instantly caused by the act of
 or attack by the accused person as in this instant case. Almost all the witnesses
 called by the respondent confirmed that they saw the dead body of the deceased
G covered with grass mat at the scene of the incident. A court can always dispense
 with medical report or is not bound by it, in situation where death can easily be
 inferred or where there had been direct account of the act that led to the death of
 the victim as in this instant case. See *Onyia vs. State* (2006) 11 NWLR (Pt. 991)
H 267 at 292.

In the present case, there are eye witnesses account on the attack on the
 deceased by the appellant and his co-accused, and also on the use of sticks and
 hoe on the helpless lethargic woman by the appellant and other co-accused and
I also on vital places on her body on which she was beaten i.e. head and all other
 parts of her body as well as the fact that the attack on her was not done to repel or
 retaliate any serious attack on them by the deceased woman. There is no doubt
 from the evidence led by the respondent that the appellant intended to kill and did
J kill the deceased woman. Considering the totality of the evidence adduced in this

A case, I entirely agree with the findings of the court below that the respondent had proved all the ingredients of the offence as found by the learned trial judge.

It is noted by me, that the appellant raised the issue of contradiction in the evidence adduced by the respondent. To my mind, even if there had been any contradiction in the testimonies of prosecution/respondents witnesses, such contradiction (even if available), were not material contradictions as would cast or raise doubts in the mind of the trial court.

At best, such contradiction are mere contradictions which are often and naturally noticed or found in testimonies of witnesses due to human error or due to long period between the date the event happened which usually result in the witness forgetting all or some of the events. In fact, the alleged contradictions cited by the appellant are in my humble view, not on material points which are fatal to the case of the prosecution/respondent and they were also not on material or crucial points.

This brings me to the defence of provocation raised and relied on by the appellant. In presenting his defence while testifying the appellant raised the defence of provocation. With due deference to the learned counsel for the appellant, the defence of provocation avails an accused person who killed his victim in heat of passion before the time to cool down. For the defence of provocation to benefit an accused person and also for same to be upheld, the accused must clearly show or establish the under mentioned conditions:

- (f) **That the act he relied on is actually provocative.**
- (g) **That the provocative act deprived him of self-control.**
- G** (h) **The provocative act came from the deceased.**
- (i) **The sudden fight between the accused and the deceased was instantaneous and continuous with no time to cool down; and**
- (j) **The force used by the accused in repelling the provocation is not disproportional in the circumstance.**
- H**

See *Nwede vs. State* (1985) 3 NWLR (Pt. 13) 444, *Akalezi vs. State* (1993) 3 NWLR (Pt. 273) 1; *Okonji vs. State* (1987) 1 NWLR (Pt. 52) 659; **I** *Ekpenyong vs State* (1993) 5 NWLR (Pt. 295) 513. *Frank Uwagbae vs. The State* (2008) 12 NWLR (Pt. 1102) 621.

In the present case, from the testimonies of PW2 and PW4 as highlight supra, there had been a pre-meditated plan by the appellant and his co-conspirators to kill the deceased if she dared go to the land to erect a hut there.

J

- A** When they envisaged, rightly or wrongly, that the deceased was going to actualize her plan, they followed her to the farm land and started attacking her some of them shouting kill her! Kill her! Kill her! They then armed themselves with the sticks and hoe which they used to dastardly attack and kill the
- B** defenceless and unarmed woman. There was no evidence that she had even attacked any of them and even if she started it, the appellant and other two or three co-accused would not be justified to have pounced on an armed less woman. There was also no apprehension of death or grievous harm on any or all of them.
- C** The attack by the appellant was certainly disproportional. There was also no instant or sudden fight to warrant their attack on the deceased woman. For these reasons I also agree with the judgment of the court below that the defence of provocation did not avail the appellant.

- D** It is trite law, that the first test to be applied in determining whether the defence of provocation could avail an accused person is the effect the alleged provocation would have had on a reasonable man. The act of provocation must be one which could incite a reasonable man of the appellant's/accused standing in
- E** life and education, to lose his self-control. **Adebiye vs. State (2013) 7 NWLR (1354)597; Musa vs. State (2009) 15 NWLR (Pt. 1165) 467.**

- Therefore, considering the surrounding circumstances of this case, I am at one with the findings of the court below that the defence of provocation cannot be
- F** beneficial to the present appellant. Such defence was therefore rightly rejected by the two lower courts.

- The resultant effect of all that I have stated above is that the prosecution/respondent had proved all the ingredients of the offence of culpable
- G** homicide punishable with death against the appellant as rightly found by the two courts. The court below therefore is right in rejecting the defence of provocation raised by the appellant at the trial court. I finally resolve the three issues raised by the appellant against him and in favour of the respondent herein.

- H** Having resolved all the issues against the appellant, I have no reason to disturb or interfere with the concurrent findings of the two lower courts.

- In the result, I adjudge this appeal to be devoid of any merit.
- I accordingly dismiss the appeal and affirm the judgment of the court below
- I** which had earlier affirmed the decision of the trial court. Appeal dismissed.

Amiru Sanusi

Justice, Supreme Court

RHODES-VIVOUR, (JSC): I have had the privilege of reading before now the

J

A leading judgment just delivered by my learned brother, Sanusi, JSC.

From the reasons given in the said leading judgment I have no reason to depart from them.

Furthermore I am satisfied that concurrent findings of the two courts

B below are correct.

I therefore also dismiss the appeal.

Olabode Rhodes-vivour
Justice, Supreme Court

C

DATTIJO MUHAMMAD, (JSC): Having read in draft the lead judgment of my learned brother Amiru Sanusi JSC just delivered, I imbibe the reasoning and conclusion in dismissing the appeal and abide by the consequential judgment

D therein.

Musa Dattijo Muhammad
Justice, Supreme Court

E OGUNBIYI, (JSC): My learned brother Sanusi, JSC has treated this appeal comprehensively and I adopt his judgment as mine.

For all intents and purposes, I find the concurrent judgments of the two lower courts very encompassing and conclusive. I do not therefore, wish to add

F anything further but make an order that the appeal herein has no merit and is hereby dismissed also by me.

The conviction and sentence of the appellant by the two lower courts are hereby also affirmed by me.

G The appeal is accordingly dismissed.

Clara Bata Ogunbiyi
Justice, Supreme Court

H CENTUS NWEZE, (JSC): My Lord, Sanusi, JSC, obliged me with the draft of the leading judgment just delivered now. I, entirely, agree with His Lordship that this appeal is, wholly, devoid of merit and ought to be dismissed.

This short contribution is only intended to expatiate on the necessity
I velnonof tendering medical evidence as hinted in the leading judgment. In my view, the Prosecution's case was watertight. Both PW2 and PW4, eyewitnesses to the dastardly acts of the appellant and his co-conspirators, gave unchallenged testimonies of their perpetration of the offence he (the appellant) was charged

J with.

A Indeed, even the testimony of the DW3 bolstered the grim narrative of
 how the appellant and his cohorts, mercilessly, pummeled the deceased person
 with their cudgels and hoes: unlawful acts from which the instant death of the
 deceased person eventuated. The circumstances, therefore, obviated any need for
 B tendering any medical evidence.

It could not have been otherwise for it has long been settled that in cases,
 such as the instant one, where a person was attacked with lethal weapons and he
 or she died on the spot, the cause of death could be, properly, inferred from the
 C fact that the wound inflicted caused the deceased person's death.

Simply put, therefore, where the cause of death is obvious, medical
 evidence ceases to be of any practical or legal necessity in homicide cases. Such a
 situation arises where death was instantaneous or nearly so, **Ben vs. The State**
 D **(2006) LPELR – 770 (SC) 12 – 13; Bakuri vs. The State (1965) NMLR 163,**
164; Uyo vs. Attorney-General of Bendel State [1986] 1 NWLR (Pt. 17) 418;
Onwumere vs. The State [1991] 4 NWLR (Pt. 186) 428; Nwachukwu vs. The
State [2002] 12 NWLR (Pt. 782) 543; Oforlete vs. The State (2000) LPELR –
 E **2270 (SC); Ogbu vs. The State (1992) LPELR – 2292 (SC) 18; B-C.**

It is for these, and the more detailed, reasons in the leading judgment that I,
 too, shall dismiss this appeal for lacking in merit. As already shown above,
 medical evidence is not, always essential where, as in this case, the victim died on
 F the spot or in circumstances in which there is abundant evidence of the manner of
 death [as narrated by the PW2; PW4 and DW3], **Ogbu vs. The State (supra);**
Salako v Attorney-General, Western Nigeria (1965) NMLR 107; R. vs.
Omoni 12 WACA 511.

G **Chima Centus Nweze**
Justice, Supreme Court

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**SHABE ALH. GALADIMA
AND
THE STATE**

SC.71/2013

**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
AMIRU SANUSI**

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

CRIMINAL LAW: Capable homicide – Elements – Onus on prosecution.

CRIMINAL LAW: Defences – Provocation when avails an accused

*CRIMINAL LAW AND PROCEDURE: Contradictions in Evidence of Prosecution
witness – Non material contradictions – Not sufficient to raise doubt in the
mind of the trial court.*

*CRIMINAL LAW AND PROCEDURE: Culpable homicide – Proof –
Uncontradicted evidence that appellant and his co-conspirators attacked the
deceased and beat her mercilessly with sticks and hoe – Effect on burden of
proof.*

*CRIMINAL LAW AND PROCEDURE: Proof of cause of death – Medical certificate –
Not material in all situations.*

EVIDENCE: Culpable homicide – Burden of proof – How discharged.

Issues for Determination

1. **Whether from the facts and circumstances of this case the learned trial judge and the learned justices of the lower court thoroughly and properly considered the defence of provocation or all the defences available to the appellant before convicting and sentencing the appellant to death instead of terms of imprisonment (ground one, three and five)**
2. **Whether the learned trial judge and learned justices of the lower court were right in confining themselves to part of evidence of the prosecution and defence witnesses and totally ignoring Exhibits 1 and 1 (A) in convicting and sentencing the appellant to death (Ground Six)**
3. **Whether there are lapses in the investigation of the episode that led to the death of the deceased as well as in the evidence presented to prove the charge under section 221 of the Penal Code against the appellant (ground two and four).**

Facts of the Matter

The appellant and his two brothers/co-accused were jointly arraigned before the Jigawa State High Court (the trial court), on charge No. JDV/21C)96 and tried on the offence of culpable homicide punishable with death for causing the death of their cousin Safiya, contrary to Section 221 of the Penal Code read with Section 79 of the Penal Code. In a considered judgment delivered by the trial court on 10th October, 2000, the appellant and the other two co-accused person were found guilty as charged, convicted and sentenced to death.

Dissatisfied with his conviction and sentence, the appellant and the two other convicts jointly appealed to the Court of Appeal, Kaduna Division (the court below) which dismissed their appeals for want of merit in a single judgment delivered on 8th February, 2013 and affirmed the conviction and sentence passed on them by the trial court. The appellant further appealed to this court. This judgment relates only to the present appellant SHABEALH GALADIMA.

The brief facts giving rise to this appeal as could be deduced from the testimonies of the witnesses in the record are simply summarized as below.

The appellant herein, along with his two other co-accused person jointly tried at the trial court were alleged to have caused the death of their cousin (sister) Safiya Nomau by attacking the latter and beating her with sticks and hoe. They were alleged to have mercilessly beaten her on her head and all over her body which resulted in her

instant death. At the trial, the prosecution, now respondent, called five witnesses to prove its case. It tendered the hoe used by the appellant and other co-accused and marked Exhibit 2. Also tendered in evidence, were two Writs of Possession of land issued in favour of the Appellant's father by Ringim Upper Area Court which were marked as Exhibits 1 and 1(A). The land, for which the Writs of Possession of land were issued was the remote cause of the dispute between the deceased and her cousins (brothers) i.e. the appellant and other co-accused persons. After the prosecution closed its case, the defence or appellant called two other witnesses to testify.

As I said supra, the trial court convicted and sentenced the appellant who unsuccessfully appealed to the court below, as the latter court dismissed his appeal and affirmed the conviction and sentence passed on him by the trial court. Sequel to that, the appellant herein, further appealed to this court.

Held: *(Unanimously dismissing the appeal)*

1. Onus on prosecution in a charge of culpable homicide

It is well-settled law, that the prosecution, in order to obtain conviction in a charge of culpable homicide punishable with death, contrary to section 221 of the Penal Code, has the heavy burden of proving the under listed ingredients of the offence, beyond reasonable doubt namely:

- (1) That death of a human being was caused**
- (2) That the accused was the cause of the deceased person's death.**
- (3) That the act of the accused leading to the death of the deceased was done intentionally or with knowledge that death or grievous harm was the probable and not only likely consequence of the act.**

See Ogba vs. State (1992)2 NWLR (Pt. 222) 164.

In culpable homicide cases like in all criminal offences, the onus is always on the prosecution to prove the guilt of an accused person beyond reasonable doubt. Failure to do so, will automatically lead to the discharge of the accused person. See **Onuwogu vs. The State (1974) 9 SC**. Where there is/are material contradiction(s) in the evidence led or adduced by the prosecution, then obviously doubt will be created in the mind of the trial court, hence such doubt will be beneficial to the accused in which case, the court should discharge the accused person. See **Almu vs. The State (2009) 4 SCNJ 159/160. (Pp 400–401 Paras I–E)**

2. *Appellant had a preplan to kill the deceased*

From the above pieces of evidence, there is no clown of doubt that the appellant had a pre-determined plan to kill the deceased woman. These pieces of evidence were not contradicted in any respect. Even DW3 in his testimony while testifying for his defence corroborated the evidence of PW2 and PW4. Also credible evidence abound, that the appellant and his co-conspirators attacked the deceased by beating her mercilessly with sticks and hoe which led to her instant death. (P 402 Paras B – C)

3. *Tendering of medical certificate not material in all cases*

Although there was no medical report on the cause of the death of the deceased woman, I feel the tendering of medical report to confirm the death of a deceased victim is not material in a situation where death was instantly caused by the act of or attack by the accused person as in this instant case. Almost all the witness called by the respondent confirmed that they saw the dead body of the deceased covered with grass mat at the scene of the incident. A court can always dispense with medical report or is not bound by it, in situation where death can easily be inferred or where there had been direct account of the act that led to the death of the victim as in this instant case. See **Onyia vs. State (2006) 11 NWLR (Pt. 991) 267 at 292.** (P 402 Paras C – F)

4. *The prosecution proved the offence of culpable homicide*

In the present case, there are eye witnesses account on the attack on the deceased by the appellant and his co-accused, and also on the use of sticks and hoe on the helpless lethargic woman by the appellant and other co-accused and also on various parts on her body on which she was beaten i.e. head and all other parts of her body as well as the fact that the attack on her was not done to repel or retaliate any serious attack on them by the deceased woman. There is no doubt from the evidence led by the respondent that the appellant intended to kill and did kill the deceased woman. Considering the totality of the evidence adduced in this case, I entirely agree with an endorse the findings of the court below that the respondent had proved all the ingredients of the offence as found by the learned trial judge. (P 402 Paras F – H)

5. *Non material contradictions*

It is noted by me, that the appellant raised the issue of contradiction in the evidence adduced by the respondent. To my mind, even if there had been any contradiction in the testimonies of prosecution/respondents witnesses, such

contradiction (even if available), were not material contradictions as would cast or raise doubts in the mind of the trial court.

At best, such contradictions are mere and usual contradictions which are usually and naturally noticed or found in testimonies of witnesses due to human error or due to long period between the date the event happened which usually result in the witnesses forgetting some of the events. In fact, the alleged contradictions cited by the appellant are in my humble view, not on material points which could be fatal to the case of the prosecution/ respondent and they were also not on material or crucial points.

(Pp 402 – 403 Paras I – B)

6. *When provocation avails an accused*

This brings me to the defence of provocation raised and relied on by the appellant. In presenting his defence while testifying the appellant raised the defence of provocation. With due deference to the learned counsel for the appellant, the defence of provocation avails an accused person who killed his victim in heat of passion before the time to cool down. For the defence of provocation to benefit an accused person and also for same to be upheld, the accused must clearly show or establish the under mentioned conditions:

- (a) **That the act he relied on is actually provocative.**
- (b) **That the provocative act deprived him of self-control.**
- (c) **The provocative act came from the deceased.**
- (d) **The sudden fight between the accused and the deceased was instantaneous and continuous with no time to cool down; and**
- (e) **The force used by the accused in repelling the provocation is not disproportional in the circumstance.**

See *Nwede vs. State* (1985) 3 NWLR (Pt. 13) 444, *Akalezi vs. State* (1993) 3 NWLR (Pt. 273) 1; *Okonji vs. State* (1987) 1 NWLR (Pt. 52) 659; *Ekpenyong vs. State* (1993) 5 NWLR (Pt. 295) 513. *Frank Uwagbae vs. The State* (2008) 12 NWLR (Pt. 1102) 621. *(P 403 Paras B – G)*

Nigerian Cases Cited

Akalezi vs. State (1993) 3 NWLR (Pt. 273) 1;
Almu vs. The State (2009) 4 SCNJ 159/160.
Ekpenyong vs. State (1993) 5 NWLR (Pt. 295) 513.
Frank Uwagbae vs. The State (2008) 12 NWLR (Pt. 1102) 621.

- A** Nwede vs. State (1985) 3 NWLR (Pt. 13) 444,
 Ogba vs. State (1992) 2 NWLR (Pt. 222) 164.
 Okonji vs. State (1987) 1 NWLR (Pt. 52) 659;
 Onuwogu vs. The State (1974) 9 SC.
- B** Onyia vs. State (2006) 11 NWLR (Pt. 991) 267 at 292.

Nigerian Statutes Cited

Section 221 of the Penal Code

- C** Section 79 of the Penal Code

APPEARANCES

N.A. Dangiri and A. L. Likko for the Appellant.

- D** Sani Hussaini Garun Gabbas Hon. Attorney General Jigawa State with him:
 Adamu Mukhtar DDCL, Hussaini Abdullahi DDLD, Mustapha B. Adamu
 ACSC, Yahaya Abdullahi ACSC, Zakiyyu Muhammad PSC and Muhammad El-
- E** Usman SSC for the Respondent.

AMIRU SANUSI, (JSC): (Delivering the Lead Judgment): The appellant herein and two other co-accused are members of the same family. The deceased person called Safiya Nomau was their cousin, as her father and the father of the appellant and the two other co-accused persons were brothers. All of them are therefore members of the same family. The appellant and his two brothers/co-accused were jointly arraigned before the Jigawa State High Court (the trial court), on charge No. JDV/21C)96 and tried on the offence of culpable homicide punishable with death for causing the death of their cousin Safiya, contrary to Section 221 of the Penal Code read with Section 79 of the Penal Code. In a considered judgment delivered by the trial court on 10th October, 2000, the appellant and the other two co-accused person were found guilty as charged, convicted and sentenced to death.

- I** Dissatisfied with his conviction and sentence, the appellant and the two other convicts jointly appealed to the Court of Appeal, Kaduna Division (the court below) which dismissed their appeals for want of merit in a single judgment delivered on 8th February, 2013 and affirmed the conviction and sentence passed on them by the trial court. The appellant further appealed to this court. This judgment relates only to the present appellant SHABEALH GALADIMA.

J

A BRIEF FACTS OF THE CASE

The brief facts giving rise to this appeal as could be deduced from the testimonies of the witnesses in the record, are simply summarized as below.

- B** The appellant herein, along with his two other co-accused person jointly tried at the trial court were alleged to have caused the death of their cousin (sister) Safiya Nomau by attacking the latter and beating her with sticks and hoe. They were alleged to have mercilessly beaten her on her head and all over her body which resulted in her instant death. At the trial, the prosecution, now respondent, **C** called five witnesses to prove its case. It tendered the hoe used by the appellant and other co-accused and marked Exhibit 2. Also tendered in evidence, were two writs of possession of land issued in favour of the appellant's father by Ringim Upper Area Court which were marked as Exhibits 1 and 1(A). The land, for which **D** the writs of possession of land were issued was the remote cause of the dispute between the deceased and her cousins (brothers) i.e. the appellant and other co-accused persons. After the prosecution closed its case, the defence or appellant called two other witnesses to testify.

- E** As I said supra, the trial court convicted and sentenced the appellant who unsuccessfully appealed to the court below, as the latter court dismissed his appeal and affirmed the conviction and sentence passed on him by the trial court. Sequel to that, the appellant herein, further appealed to this court.

- F** Due to his dissatisfaction with the judgment of the court below, the appellant appealed to this court vide a notice of appeal dated 20th February 2013 but filed on 21st February, 2013, containing six grounds of appeal.

- G** In keeping with rules and practice applicable in this court, learned counsel to the parties filed and exchanged briefs of argument. The appellant, on 24/4/2013 filed appellant's brief of argument, settled by one Nasir Abdu Dagari Esq, wherein he distilled three issues for the determination of the appeal out of the six grounds of appeal contained in the notice of appeal. The three issues for **H** determination are reproduced hereunder:

- I** **4. Whether from the facts and circumstances of this case the learned trial judge and the learned justices of the lower court thoroughly and properly considered the defence of provocation or all the defences available to the appellant before convicting and sentencing the appellant to death instead of terms of imprisonment (ground one, three and five)**
- J**

- A** **5. Whether the learned trial judge and learned justices of the lower court were right in confining themselves to part of evidence of the prosecution and defence witnesses and totally ignoring Exhibits 1 and 1 (A) in convicting and sentencing the**
- B** **appellant to death (Ground Six)**
- C** **6. Whether there are lapses in the investigation of the episode that led to the death of the deceased as well as in the evidence presented to prove the charge under section 221 of the Penal Code against the appellant (ground two and four).**

The appellant also filed appellant's reply brief on 27/1/2016.

- D** Upon being served with the appellant's brief of argument, the respondent also filed, amended respondent's brief of argument on 18/11/2015 which was deemed filed on 13th January, 2015. The said amended respondent's brief was settled by Sani Hussaini Garun Gabas Esq, the Hon, Attorney General of Jigawa
- E** State. In the said amended brief of argument, the learned Attorney General also proposed three issues for the determination of this appeal as reproduce below:

- F** **A- Whether the justices of the lower court were right in affirming the conviction and sentencing (sic) of the appellant by the trial court.**
- G** **B- Whether the defence of provocation or any other defence was available to the appellant having regard to the circumstance and evidence adduced in the case.**
- H** **C- Whether from the totality of evidence adduced and the circumstances of the case, exhibit 1 and 1 (a) (sic) when properly evaluated will affect the case of the prosecution and can therefore make this Honourable Court vary the conviction and sentencing (sic) of the appellant."**

- I** It is worthy of note, that the respondent raised preliminary objection in his amended respondent's brief of argument challenging the competence of this appeal and seeking the striking out of the same by this court. As has been the
- J** practice in this court, preliminary objection once raised by a respondent either in

A its brief of argument or in a motion on notice or in a notice of preliminary objection, such objection must be disposed of first, before considering the main appeal. I shall therefore first of all consider the preliminary objection for whatever it is worth, before determining the appeal. The respondent's preliminary
B objection was hinged or predicted on two grounds, as follows:

(i) **That all the three issues relied in (sic) by the appellant in challenging the decision of the Court of Appeal under his issues were not canvassed and argued before the two lower courts.**
C

(ii) **No leave of this court was sought and obtained before arguing the said issues in this brief.**
D

In his response, the learned appellant's counsel in his appellant's reply brief, submitted that all the grounds of appeal from which he encapsulated or raised his
E three issues for determination, arose from the decision of the court below he tied each of the three issues to the relevant ground or grounds of appeal. He went further to identify each of the issues to the ground or grounds of appeal and the portions of the judgment of the court below he lifted those issues from. Without
F much ado, I do not think the determination of the objection requires any waste of time or energy. It appears to me that the learned Attorney General for the respondent missed the point.

This court is always concerned solely with the decision of the court below
G and NOT that of the trial court, because there is no right of appeal to this court direct from the decision of the trial court. All that this court is concerned with in hearing the appellant's appeal, is to consider the judgment of the court below and decide whether it is wrong in law or if it is perverse. The respondent had even
H conceded that the issues raised were derived from the decision of the court below. I have closely considered all the three issues and noticed that all of them were posing challenges against the decision of the court below and not the judgment of the trial court. Whatever anomaly the respondent observed in the decision of the
I trial court should or ought to have been raised at the court below and not in this court, since there is no right of appeal direct to this court from the decision of the trial court. Similarly, I do not think that any prior leave was required by the appellant to raise any of or all the grounds of appeal from which the three issues
J for determination were formulated or encapsulated in the appellant's brief. I

- A** therefore regard the preliminary objection to be lacking in substance and was merely raised in an effort to waste this court's precious time. The preliminary objection is not well-taken and is therefore overruled for want of merit. It is accordingly dismissed.
- B** On the appeal proper, the learned counsel for the appellant conceded that the deceased died as a result of injury she sustained as a result of the attack on her by the three accused persons including the appellant herein. He submitted that the two lower courts did not thoroughly consider the evidence presented in this case.
- C** The incident that led to the death of the deceased had to do with a land dispute. He argued that a fight broke out between the deceased and the appellant and the three co-accused and the fight took place in the farm land that was found by the Ringim Upper Area Court to belong to the appellant's father and two Writs of Possession
- D** (Exhibits 1 and 1A) were issued to that effect. He referred to evidence of PW2, PW3, PW 4 and DW1, DW2 and DW3 at pages 13-28 of the record. Learned counsel for the appellant further argued that in spite of and notwithstanding the two writs of possession admitted in evidence as exhibits 1 and 1 (A), the two
- E** lower courts did not utilize the said evidence in considering the defence available to the appellant. He contends that there is no proper investigation on what led to the death of the deceased, as the evidence of the prosecution witnesses in relation to the ownership of the land which they said belonged to the deceased had
- F** contradicted the evidence of the three appellants which was supported by exhibits 1 and 1(A) at (pages 48 – 49) of the record. He also referred to other contradictions in the evidence of PW2 at pages 13 and 14 of the record. He submitted that the lower court did not properly consider and evaluate the above
- G** pieces of evidence and that had occasioned a gross miscarriage of justice against the appellant. He contended that the deceased was an aggressor and trespasser as adjudged by the Upper Area Court, Ringim and the fact that the prosecution witnesses encouraged the deceased to enter the land in dispute and erect a hut,
- H** constitutes enough reason for the trial court to consider that piece of evidence. He submitted that the pieces of evidence given by the prosecution witnesses contain the good, the bad and the ugly as the learned counsel put it, and that contradicts the decisions of the two lower courts. He referred to pages 48-49 of the record. He
- I** also argued that the trial court completely ignored part of evidence of prosecution witnesses that there was a fight. He submitted that, had the two lower courts given consideration to those pieces of evidence, they could not have escaped coming to the conclusion that the defence of provocation was properly raised. He remarked
- J** that there was no evidence that the police had investigated the allegation of the

A appellant that the deceased trespassed on their land and even erected a hut which was confirmed by PW2, PW3, PW4 & PW5. He referred to the case of **AREMU VS. THE STATE (1984) All NWLR 314 at 316** where this court per Obaseki (JSC) (RTD), said:

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“I would in the circumstances acquit the appellant of the offence of murder but convict him for manslaughter. There was no evidence of investigation of the allegation of the appellant.....”

C

He submitted that had the two lower courts properly considered the issue of provocation, they would not have imposed a higher sentence on the appellant. He urged this court to substitute the death sentence with a term of imprisonment.

D

In his response, the learned respondent's counsel submitted on the defence of provocation raised by the appellant, that for the defence of provocation to avail an accused person under section 222(1) of the Penal Code, it must be grave and sudden as would deprive the accused of the power of control. He argued that the appellant is in the best position to say whether there was any act done by the deceased to the appellant that was grave and sudden and capable of making him lose his self-control to justify killing the deceased, by furnishing particulars of defence of provocation raised by him. He referred to the case of **YARO vs. STATE (2007) 18 NWLR (Pt. 1066) P. 215 at 234** where the Supreme Court held thus:

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“The defence of provocation like other defences cannot hang in the air without supporting evidence. Nor can it be built on scanty foundations in order to establish it, it is the duty of the accused person to adduce credible or positive evidence to support the alleged provocation. Where the accused person failed to adduce evidence in support of his defence, as in the present case, the trial court has to rely on the evidence before it adduced by the prosecution...”

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I

Based on the above, he submitted that the appellant has failed woefully in discharging the burden of furnishing the trial court with particulars of the defence of provocation that he raised. He referred to the evidence of DW3 at page 28 of the record as follows:

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A “When the deceased came and met her senior sister with us, she started abusing us but I told them not to mind her”

He admitted that although the word “abuse” was held to be capable of provoking a person, but he argued that the appellant had ruled out the possibility of being provoked when he said:

B “Do not mind her” (meaning the deceased person) (page 28) of
C the record.

He stated that evidence of possible provocation might be drawn from the appellant when the appellant stated thus:

D “From there she took a hoe and started beating the 1st accused person two times but he was dodging” (See page 28)

E The learned respondent's counsel argued that from the above, the deceased only beat the co-accused persons and not the appellant and therefore the defence of provocation cannot avail a person where it was a third party that was provoked and not the accused now appellant. He also stated that the third possibility of provocation could be that the deceased entered the farm land in dispute. He stated that the appellant had never shown that her entering into the land made him lose control. He urged the court to resolve this first issue against the appellant.

F On the 2nd issue which relates to the alleged exclusion of exhibits 1 and 1(A), he argued that failure of the trial court to make reference to the said exhibits had not occasioned any miscarriage of justice. He referred to section 227(7) Evidence Act 2004 which provides thus:

G “The wrongful exclusion of evidence shall not of itself be a ground for reversal of any decision in any case if it appears to the court that had the evidence excluded been admitted it may reasonable hold that the decision would have been the same.”

H He further argued that the issue canvassed by the appellant on the alleged failure of the trial court or the court below to evaluate evidence of PW2, PW3 and PW4 on the said documentary evidence i.e. exhibits 1 and 1 (A), were not supported by evidence. He cited the case of OKWEJIMINOR VS. GBAKEJI (2008) 5

I J

A NWLR (Pt. 1079) 172 at 181 with regard to the attitude of Supreme Court on concurrent findings of two lower courts as pertinent because it is an area of non-interference by the apex court unless a miscarriage of justice is occasioned by the findings or the findings are perverse. He argued further, that it is not in every
B occasion, that the Supreme Court will vary the decision of lower court for its failure to properly evaluate the evidence adduced in the case. On the issue of contradictions in the evidence led by the prosecution vis-à-vis exhibits 1 and 1(A), he argued that the said contradiction with regard to the ownership of the
C land cannot to be fatal to the case of the prosecution. He argued that the crucial issue is whatever it was the act of the appellant that caused the death of the deceased which was done with intent to kill her or to cause grievous bodily harm on her. He referred to page 8 paragraph 5.03 of the appellant brief of argument. He
D also referred to the case of **AKPANU VS. THE STATE (2008) 14 NWLR (Pt. 1106) p. 72 at 90**, where the Supreme Court had provided the ingredients of the offence of culpable homicide punishable with death which must be established by the prosecution in a charge under section 221(b) of the Penal Code as listed
E below:

- (i) That the death of a human being has taken place.**
- (ii) That such death was caused by the accused.**
- F (iii) That the act was done with intention of causing death.**
- (iv) That the accused knew or had reason to know that death would be probable consequence of his act.**

G Learned counsel for the respondent referred to the evidence of PW2, PW3 & PW4 at page 14 of the record, and submitted that with the evidence of PW2, PW3 & PW4, the prosecution has discharged the burden of proof on the first ingredient. On the proof the second ingredient, he referred the evidence of PW2 at
H page 13 where the role played by the appellant was described. On the third ingredient, the evidence of PW2, PW3, PW4 and PW5 were apt in proving the ingredient, whether death is the probable consequence. He argued that the above pieces of evidence were neither shaken nor contradicted since they were not cross
I examined on it. He then urged this court to also resolve this issue in favour of the respondent and dismiss his appeal.

It is well-settled law, that the prosecution, in order to obtain conviction in a charge of culpable homicide punishable with death, contrary to section 221 of the
J Penal Code, has the heavy burden of proving the under listed ingredients of the

A offence, beyond reasonable doubt namely:

- (4) That death of a human being was caused
- (5) That the accused was the cause of the deceased person's death.
- B (6) That the act of the accused leading to the death of the deceased was done intentionally or with knowledge that death or grievous harm was the probable and not only
- C likely consequence of the act.

See **Ogba v State (1992)2 NWLR (Pt. 222) 164.**

- D In culpable homicide cases like in all criminal offences, the onus is always on the prosecution to prove the guilt of an accused person beyond reasonable doubt. Failure to do so, will automatically lead to the discharge of the accused person. See **Onuwogu vs. The State (1974) 9 SC**. Where there is/are material contradiction(s) in the evidence led or adduced by the prosecution, then
- E obviously doubt will be created in the mind of the trial court, hence such doubt will be beneficial to the accused in which case, the court should discharge the accused person. See **Almu vs The State (2009) 4 SCNJ 159/160**. In this instant case, PW2 and PW4 were eye witnesses to the commission of the offence. Part of
- F these two eye witnesses testimonies (who are key witnesses for the prosecution) as borne out by the record, read as follows:

For instance; PW2 had this to say at page 13 of the record.

- G “PW2: On Friday night the deceased that is when she was alive, reported to the ward head that since she was not given the land she would go to her father's land and
- H erect a hut, she also notified the village head of her intention. The Galadima family members also planned that if they see the deceased in the land they would kill her” And at page 17 of the Record, PW4 said thus:

- I And PW4 had this to say:

- J PW4: Before I reached the farm I saw all the accused going towards the place where the deceased woman

A wanted to erect a hut, I then heard them saying kill her, kill her, meaning the deceased woman. I retreated backwards and waited when they started beating her I hide myself.....”

B From the above pieces of evidence, there is no clown of doubt that the appellant had a pre-determined plan to kill the deceased woman. These pieces of evidence were not contradicted in any respect. Even DW3 in his testimony while testifying
C for his defence corroborated the evidence of PW2 and PW4. Also credible evidence abound, that the appellant and his co-conspirators attacked the deceased by beating her mercilessly with sticks and hoe which led to her instant death. Although there was no medical report on the cause of the death of the deceased
D woman, I feel the tendering of medical report to confirm the death of a deceased victim is not material in a situation where death was instantly caused by the act of or attack by the accused person as in this instant case. Almost all the witness called by the respondent confirmed that they saw the dead body of the deceased
E covered with grass mat at the scene of the incident. A court can always dispense with medical report or is not bound by it, in situation where death can easily be inferred or where there had been direct account of the act that led to the death of the victim as in this instant case. See **Onyia vs State (2006) 11 NWLR (Pt. 991) 267 at 292.**

F In the present case, there are eye witnesses account on the attack on the deceased by the appellant and his co-accused, and also on the use of sticks and hoe on the helpless lethargic woman by the appellant and other co-accused and
G also on various parts on her body on which she was beaten i.e. head and all other parts of her body as well as the fact that the attack on her was not done to repel or retaliate any serious attack on them by the deceased woman. There is no doubt from the evidence led by the respondent that the appellant intended to kill and did
H kill the deceased woman. Considering the totality of the evidence adduced in this case, I entirely agree with an endorse the findings of the court below that the respondent had proved all the ingredients of the offence as found by the learned trial judge.

I It is noted by me, that the appellant raised the issue of contradiction in the evidence adduced by the respondent. To my mind, even if there had been any contradiction in the testimonies of prosecution/respondents witnesses, such contradiction (even if available), were not material contradictions as would cast
J or raise doubts in the mind of the trial court.

- A** At best, such contradictions are mere and usual contradictions which are usually and naturally noticed or found in testimonies of witnesses due to human error or due to long period between the date the event happened which usually result in the witnesses forgetting some of the events. In fact, the alleged
- B** contradictions cited by the appellant are in my humble view, not on material points which could be fatal to the case of the prosecution/respondent and they were also not on material or crucial points.

- C** This brings me to the defence of provocation raised and relied on by the appellant. In presenting his defence while testifying the appellant raised the defence of provocation. With due deference to the learned counsel for the appellant, the defence of provocation avails an accused person who killed his victim in heat of passion before the time to cool down. For the defence of
- D** provocation to benefit an accused person and also for same to be upheld, the accused must clearly show or establish the under mentioned conditions:

- E** (f) **That the act he relied on is actually provocative.**
 (g) **That the provocative act deprived him of self-control.**
 (h) **The provocative act came from the deceased.**
 (i) **The sudden fight between the accused and the deceased was instantaneous and continuous with no time to cool down; and**
- F** (j) **The force used by the accused in repelling the provocation is not disproportional in the circumstance.**

- G** See *Nwede vs. State* (1985) 3 NWLR (Pt. 13) 444, *Akalezi vs. State* (1993) 3 NWLR (Pt. 273) 1; *Okonji vs. State* (1987) 1 NWLR (Pt. 52) 659; *Ekpenyong vs. State* (1993) 5 NWLR (Pt. 295) 513. *Frank Uwagbae vs. The State* (2008) 12 NWLR (Pt. 1102) 621.

- H** In the present case, from the testimonies of PW2 and PW4 as highlight supra, there had been a pre-meditated plan by the appellant and his co-conspirators to kill the deceased if she dared go to the land to erect a hut there on. When they envisaged rightly or wrongly that the deceased was going to actualize
- I** her plan, they followed her to the farm land and started attacking her with some of them shouting kill her! Kill her! Kill her! They then armed themselves with the sticks and hoe which they used to dastardly attack and kill the defenceless and unarmed woman. There was no evidence that she had even attacked any of them
- J** and even if she started it, the appellant and other two or three co-accused would

- A** not be justified to have pounced on a defenceless and armed less woman. There was also no apprehension of death or grievous harm on any or all of them. The attack by the appellant was certainly disproportional. There was also no instant or sudden fight to warrant their attack on the deceased woman. For these reasons I
- B** also agree with the judgment of the court below that the defence of provocation did not avail the appellant.

- It is trite law, that the first test to be applied in determining whether the defence of provocation could avail an accused person is the effect of alleged
- C** provocation would have had on a reasonable man. The act of provocation must be one which could incite a reasonable man of the appellant's/accused standing in life and education, to lose his self-control.

- Adebiye v State (2013) 7 NWLR (1354)597; Musa v State (2009) 15**
- D NWLR (Pt. 1165) 467.**

- Therefore, considering the surrounding circumstance of this case, I am at one with the finding of the court below that the defence of provocation cannot be beneficial to the present appellant. Such defence was therefore rightly rejected by
- E** the two lower courts.

- The resultant effect of all that I have stated above is, that the prosecution/respondent had proved all the ingredients of the offence of culpable homicide punishable with death against the appellant as found by the two lower
- F** courts. The court below therefore is right in rejecting the defence of provocation raised by the appellant at the trial court. I finally resolve all the three issues raised by the appellant against him and in favour of the respondent herein.

- Having resolved all the issues against the appellant, I have no reason to
- G** disturb or interfere with the concurrent findings of the two lower courts which in my view, are neither perverse nor based on misconception of the law.

- On the whole, I adjudge this appeal to be devoid of any merit. I accordingly dismiss the appeal and affirm the judgment of the court below
- H** which had earlier affirmed the decision of the trial court. Appeal dismissed.

Amiru Sanusi
Justice, Supreme Court

- I RHODES-VIVOUR, JSC):** I have had the advantage of reading before now the leading judgment just delivered by my learned brother, Sanusi, JSC.

- From the reasons given in the said leading judgment I have no reason to depart from them.

J

A From the reasons given in the said leading judgment I have no reason to depart from them.

Furthermore I am satisfied that concurrent findings of the two courts below are correct.

B I therefore also dismiss the appeal.

Olabode Rhodes-vivour
Justice, Supreme Court

C DATTIJO MUHAMMAD, (JSC): I adopt as mine the lead judgment of my learned brother AmiruSanusiJSCin dismissing this unmeritorious appeal. I abide by the consequential orders made in the lead judgment.

Musa Dattijo Muhammad
Justice, Supreme Court

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E CENTUS NWEZE, (JSC): My Lord, Sanusi, JSC, obliged me with the draft of the leading judgment just delivered now. I, entirely, agree with His Lordship that this appeal is, wholly, devoid of merit and ought to be dismissed.

F This short contribution is only intended to expatiate on the necessity velnon of tendering medical evidence as hinted in the leading judgment. In my view, the Prosecution's case was watertight. Both PW2 and PW4, eyewitnesses to the dastardly acts of the appellant and his co-conspirators, gave unchallenged testimonies of their perpetration of the offence he (the appellant) was charged with.

G Indeed, even the testimony of the DW3 bolstered the grim narrative of how the appellant and his cohorts, mercilessly, pummeled the deceased person with their cudgels and hoes: unlawful acts from which the instant death of the deceased person eventuated. The circumstances, therefore, obviated any need for tendering any medical evidence.

H It could not have been otherwise for it has long been settled that in cases, such as the instant one, where a person was attacked with lethal weapons and he or she died on the spot, the cause of death could be, properly, inferred from the fact that the wound inflicted caused the deceased person's death.

I Simply put, therefore, where the cause of death is obvious, medical evidence ceases to be of any practical or legal necessity in homicide cases. Such a situation arises where death was instantaneous or nearly so, **Ben vs. The State (2006) LPELR – 770 (SC) 12 – 13; Bakuri vs The State (1965) NMLR 163, J 164; Uyo vs. Attorney-General of Bendel State [1986] 1 NWLR (Pt. 17) 418;**

A Onwumere vs The State [1991] 4 NWLR (Pt. 186) 428; Nwachukwu v The State [2002] 12 NWLR (Pt. 782) 543; Oforlete vs. The State (2000) LPELR – 2270 (SC); Ogbu vs. The State (1992) LPELR – 2292 (SC) 18; B-C.

B It is for these, and the more detailed, reasons in the leading judgment that I, too, shall dismiss this appeal for lacking in merit. As already shown above, medical evidence is not, always essential where, as in this case, the victim died on the spot or in circumstances in which there is abundant evidence of the manner of death [as narrated by the PW2; PW4 and DW3], **Ogbu vs. The State (supra);**
C Salako vs. Attorney-General, Western Nigeria (1965) NMLR 107; R. vs. Omoni 12 WACA 511.

Appeal dismissed. I abide by the consequential orders in the leading judgment.

D **Chima Centus Nweze**
Justice, Supreme Court

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