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2017
JSCNLR VOL. 9

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CONTENTS

Editorial Board	iv
List of Justices of the Supreme Court of Nigeria	v
Index of Cases Reported	viii
Index of Subject Matter	ix
Index of Nigeria Cases Cited	xxviii
Cases Reported	1

INDEX OF CASES REPORTED [2017] JSCNLR, VOL. 9

Barr. Benjamin Wayo And Engr. George T.A. Nduul (2017) JSCNLR (Vol. 9), 1 S.C.

Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

Dr. Samuel U. Isitor And Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Hon. Jumare Tanimu And Hon. Lawal Muhd Rabiw (2017) JSCNLR (Vol. 9), 261 S.C.

Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

INDEX OF SUBJECT MATTER

ACTION: Originating process – Defect thereof – Implication – Whether the failure to commence proceedings with a valid writ of summons goes to the roof of the proceedings and any order made thereon liable to be set aside – The principle in *Kida Vs. Ogunmola* (2006) 6 SC 147.
Hon. Jumare Tanimu And Hon. Lawal Muhd Rabi (2017) JSCNLR (Vol. 9), 261 S.C.

APPEAL: Notice of appeal – Where defective – Whether the appeal thereon will collapse.
Hon. Jumare Tanimu And Hon. Lawal Muhd Rabi (2017) JSCNLR (Vol. 9), 261 S.C.

APPEAL: Fresh issues – When cognizable by an appellate court – General principles thereof.
Dr. Samuel U. Isitor And Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

APPEAL: Ground of appeal – Waiver – When appellant can validly waive a ground of appeal – Implication thereof.
Dr. Samuel U. Isitor And Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

APPEAL: Raising of fresh point – Conditions thereof.
Dr. Samuel U. Isitor And Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

APPEAL: Affirming a judgment on other grounds – Need to file a respondent's notice – Whether the Court of Appeal can also affirm a judgment on other grounds by virtue of its rules – Conditions thereof – Or. 51 Rule 20(4) Court of Appeal Rules 1981.

**Edilcon Nigeria Ltd And United Bank For Africa Plc (2017)
JSCNLR (Vol. 9), 148 S.C.**

APPEAL: Concurrent findings – Attitude of Supreme Court thereto –
Relevant principles.

Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

APPEAL: Concurrent findings – Interference therewith – Whether the
Supreme Court will not interfere where there are no exceptional
circumstances to do so.

Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

APPEAL: Concurrent findings – Reversal thereof – Whether there must be
clear error of law or fact on record before Supreme Court can reverse
concurrent findings – Principles in *Ogundiyan Vs. State* (1991)3
NWLR (Pt. 181) 519.

Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

APPEAL: Concurrent findings – Attitude of Supreme Court thereto.

**Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol.
9), 22 S.C.**

APPEAL: Concurrent findings of fact – Where appellant challenges
concurrent findings of fact on appeal – Onus thereon – How
discharged.

**Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol.
9), 22 S.C.**

APPEAL: Issue of credibility – Approach thereto – Relevant principles
thereof.

Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

APPEAL: Issues for determination – Proliferation thereof – Whether a poor
practice.

**Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR
(Vol. 9), 294 S.C.**

APPEAL: Nature thereof – Whether does not constitute a new action but namely a rehearing – Implication.

Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

APPEAL: Notice of appeal – Fundamental nature thereof – Whether the foundation upon which an appeal is based – Relevant considerations thereof.

Hon. Jumare Tanimu And Hon. Lawal Muhd Rabi (2017) JSCNLR (Vol. 9), 261 S.C.

APPEAL: Notice of Appeal – Rule of professional conduct – Where a notice of appeal is not signed, stamped and sealed – Effect – Whether it is incompetent and robs the court of jurisdiction.

Barr. Benjamin Wayo And Engr. George T.A. Nduul (2017) JSCNLR (Vol. 9), 1 S.C.

APPEAL: Notice of appeal – Where violates the Rules of professional conduct – Implication – Whether notice of appeal to be struck out.

Barr. Benjamin Wayo And Engr. George T.A. Nduul (2017) JSCNLR (Vol. 9), 1 S.C.

APPEAL: Record thereof – Extraneous matter – Whether not proper for court or parties to read in extraneous matter into record of Appeal.

Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

CASE LAW: Saka Oladejo Vs. The State (1987)3NWLR (Pt. 61) 419 – Inconsistency Rule – Principles thereof – Whether has been overruled by the Supreme Court in Egboghonome Vs. The State.

Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

CONTRACT: Agreement by parties – Where parties have voluntarily entered into an agreement – Whether there are bound thereby – Exceptions thereto – Relevant considerations thereof.

**Edilcon Nigeria Ltd And United Bank For Africa Plc (2017)
JSCNLR (Vol. 9), 148 S.C.**

CONTRACT: Execution of agreement – Where a party impliedly adopted an agreement by his subsequent conducts – Whether the parties will be bound by the terms of the agreement.

**Edilcon Nigeria Ltd And United Bank For Africa Plc (2017)
JSCNLR (Vol. 9), 148 S.C.**

COURT: - Disputed signature – Duty thereon – Whether court cannot determine the authenticity of a document not objected to.

**Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385
S.C.**

COURT: Appellate Court – Jurisdiction – Whether has no Jurisdiction to delve into a matter not placed before it.

**Dr. Samuel U. Isitor And Mrs. Margaret Fakorade (2017) JSCNLR
(Vol. 9), 47 S.C.**

COURT: Court of Appeal – Source of power and Jurisdiction – Whether can properly adjudicate on grounds of appeal before it – Whether the Court of appeal cannot commit an error on a ground not before it.

**Dr. Samuel U. Isitor And Mrs. Margaret Fakorade (2017) JSCNLR
(Vol. 9), 47 S.C.**

COURT: Supreme Court – Jurisdiction – S. 233 of CFRN 1999 (as amended) – Whether does not have Jurisdiction to take appeals directly on decisions of High Courts.

**Dr. Samuel U. Isitor And Mrs. Margaret Fakorade (2017) JSCNLR
(Vol. 9), 47 S.C.**

COURT: Appellate Court – Concurrent findings – Interference therewith – Conditions thereof.

**Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385
S.C.**

COURT: Award of reliefs – Where a defendant is granted a relief not sort by way of counter-claim – Impropriety thereof.

Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

COURT: Competence thereof – Factors relevant thereto – Relevant considerations thereof.

Hon. Jumare Tanimu And Hon. Lawal Muhd Rabi (2017) JSCNLR (Vol. 9), 261 S.C.

COURT: Conviction – Where court relies on a confessional statement – Requirement to test the truth thereof – Procedure to be adopted – The six relevant questions to be applied.

Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

COURT: Evaluation of evidence – Primary duty of a trial court – Whether the trial court has the primary duty of ascribing probative value to the evidence of a witness – Rationale thereof.

Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

COURT: Findings of fact – When are the findings of fact of a court perverse – Circumstances thereof – Meaning of perversity.

Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

COURT: Findings of fact – Where a trial court makes findings of fact – Whether there is a presumption though rebuttable that such findings are correct.

Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

COURT: Grant of reliefs – A court may grant less than the claims and not more – Relevant principles that guide court in the award of claims.

**Edilcon Nigeria Ltd And United Bank For Africa Plc (2017)
JSCNLR (Vol. 9), 148 S.C.**

COURT: Issues for determination – Where issues are properly placed before court – Whether court is bound to determine such issues.

**Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR
(Vol. 9), 294 S.C.**

COURT: Jurisdiction – How determined – Whether determined by the plaintiffs claim.

**Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR
(Vol. 9), 294 S.C.**

COURT: Jurisdiction – Issues of law and jurisdiction can be raised at any stage – Where a statute has prescribed a particular mode of raising thereof – Whether an exception to the general rule – Principles in Adejobi Vs. State (2011) 12 NWLR (Pt....) 351.

Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

COURT: Murder trial – Duty thereon – Whether has a duty to consider all possible defences available to the accused on the evidence before it.

Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

COURT: No case submission – Credibility of witnesses not to be determined at this stage – Whether if the evidence of prosecution witnesses is believed there is something requiring the accused to explain – Principles in Adaku Vs. FRN (2009) 4 NCC 350.

Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

COURT: No case submission – Whether at this stage the trial court should not determine if there is sufficient evidence to justify conviction of the accused. – The need to determine whether there is a prima facie case sufficient to call upon the accused to explain – The principle in Abogede Vs. The State (1996) 5 NWLR (pt. 118) 270.

Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

COURT: Plea – Where it was not recorded that “charge was read and explained to the accused to the satisfaction of the court” – Whether failure will not nullify the trial of the accused.
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

COURT: Power to award claims – Duty on court thereto – Whether not a charitable institution.
Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

COURT: Provocation – Resolution thereof – Where court applied the principles of self defence in determining – Whether or not provocation applies – Impropriety thereof.
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

COURT: Self defence – The test for its reasonableness – Factors relevant thereto.
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

COURT: Substantial justice – Whether the need to do substantial justice does not include illegality or encouragement of anything goes.
Hon. Jumare Tanimu And Hon. Lawal Muhd Rabiou (2017) JSCNLR (Vol. 9), 261 S.C.

CRIMINAL LAW AND PROCEDURE: Accused statement – Objection to its voluntaries – Failure to conduct trial – Within trial – Whether its admissibility will be set aside on appeal.
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

CRIMINAL LAW AND PROCEDURE: Arraignment – Valid arraignment – Elements thereof.
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

CRIMINAL LAW AND PROCEDURE: Arraignment – Valid arraignment – Meaning – Conditions thereof – Principles in Chikaodi Madu Vs. The State (2012) NCC 553.

Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

CRIMINAL LAW AND PROCEDURE: Burden of proof – The onus is on the prosecution to prove that accused took part in the robbery either alone or with others – Section 138 of the Evidence Act 2011 – Whether an accused is deemed innocent until proved guilty – S. 36(5) of CFRN 1999 (as amended).

Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

CRIMINAL LAW AND PROCEDURE: Confession – Meaning thereof – When not admissible.

Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

CRIMINAL LAW AND PROCEDURE: Failure to appeal on a material finding – Where the learned trial judge held that Exh. A is not credible – Respondent failed to appeal against this finding – Whether respondent cannot assert the credibility of Exh. A on appeal.

Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

CRIMINAL LAW AND PROCEDURE: Guilt of accused – Onus on prosecution thereon – How established.

Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

CRIMINAL LAW AND PROCEDURE: Irregular procedure – Where an accused acquiesced to an irregular procedure at the trial – Whether he cannot properly complain on appeal – The principle in Egbedi Vs. State.

Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

CRIMINAL LAW AND PROCEDURE: No case submission – Purport – Principles thereof.

Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

CRIMINAL LAW AND PROCEDURE: Plea – Where the plea of each accused was not recorded separately and directly as pleaded – Whether

failure will not be fatal to their plea.

Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

CRIMINAL LAW AND PROCEDURE: Police investigation – S. 4 of the Police Act – Order of investigation – Whether there is no law which prescribes the order in which investigation is to be carried out.

Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

CRIMINAL LAW AND PROCEDURE: Proof – Whether prosecution is not bound to produce any number of witnesses.

Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

CRIMINAL LAW AND PROCEDURE: Self defence – Onus on accused thereto – What he must establish.

Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

CRIMINAL LAW AND PROCEDURE: Statement of accused – Where not made voluntarily – Whether will be set aside on appeal – Principles in *Asuquo Vs. The State* (2016) LPELR 40597 SC.

Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

CRIMINAL LAW AND PROCEDURE: Weapon used for crime – Whether the non-tendering of the knife used as weapon by the appellant is not fatal.

Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

CRIMINAL LAW: Defence – Provocation – Where after the alleged provocative act of the deceased there was sufficient time for anger to cool – Whether provocation will not avail the accused – The principle in *Igwe Vs. Queen* (1963) 1SCNLR 307.

Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

CRIMINAL LAW: Defence – Provocation – Where the accused did the unlawful act in the heat of passion – Whether the defence of provocation applies.

Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

CRIMINAL LAW: Defence – Provocation – Whether the age of the accused is a relevant factor in considering how he responded in the provocation.
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

CRIMINAL LAW: Defences – Alibi – Failure to raise at the earliest opportunity – Effect thereof.
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

CRIMINAL LAW: Defences – Self defence – Where successfully pleaded – Effect.
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

CRIMINAL LAW: Provocation – Elements thereof.
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

CRIMINAL LAW: Rape – When is it committed – Relevant considerations thereof.
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

ELECTION PETITION: Aspirant – Meaning – Section 87(9) of Electoral Act 2010.
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

ELECTION PETITION: Election Appeal Committee – Incompetence thereof – Where a party claims candidate of a political party based on the decision of an incompetent election committee – Whether the basis of his claim is null and void.
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

ELECTION: Conduct thereof – Where there are admission that election was conducted by State Executive Committee instead of National Working Committee – Effect – Whether election ultra vires.
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

ELECTION: Electoral Act 2010 – Section 87(9) – Locus to sue thereon – Where an aspirant who scored the highest number of votes in a primary election does not have his name submitted to INEC – Whether can sue under S. 87(9) of the Electoral Act 2010.
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

EVIDENCE: Estoppel by conduct – S. 169 of Evidence Act, 2011 – Nature, purport and application.
Dr. Samuel U. Isitor And Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

EVIDENCE: Accused statement – Admissibility thereof – Whether no statement of the accused is admissible against him unless it is shown to be accused voluntary statement – SS 28 and 29 Evidence Act 2004.
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

EVIDENCE: Confessional statement – Conviction thereon – Requisite conditions thereof.
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

EVIDENCE: Confessional statement – Import and significance – Whether court can convict solely on the confessional statement – Relevant considerations thereof.
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

EVIDENCE: Confessional statement – Nature – Whether it can be relied solely upon for the conviction of an accused.

Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

EVIDENCE: Confessional statement – Where there are no basis to sustain retraction and found to be direct and positive – Whether can sustain the conviction of accused.

Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

EVIDENCE: Contradictions thereon – It is only when contradictions in the evidence of prosecution witnesses materially affect the charge that it will create doubt that will be resolved in favour of the accused.

Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

EVIDENCE: Corroboration – What constitutes in law – Relevant considerations thereof.

Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

EVIDENCE: Dying declarations – Conditions thereof – Principle in *Isiekwe Vs. The State* (1999)9 NWLR (Pt. 617) 43.

Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

EVIDENCE: Evaluation thereof – Unsigned document – Trial court erroneously ascribing same thereto – Whether the document can be used to hold that an event occurred.

Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

EVIDENCE: Inconsistency rule – Application thereof – Whether applies only to statement and evidence of witnesses – Non application to confessional statements of accused.

Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

EVIDENCE: Inconsistency rule – Nature and application

Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

EVIDENCE: Inconsistency rule – Principles in *Asanya Vs. State* (1991) 3 NWLR (Pt. 180) 422 – Whether no longer sustainable – Whether has been overruled in *Egboghonome Vs. The State* (1993) 7 NWLR (Pt. 306) 383.

Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

EVIDENCE: Inconsistency rule – Statement of witnesses – Whether inconsistency rule applies only to extra-judicial statements of witness which is inconsistent with that testimonies in court.

Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

EVIDENCE: Inconsistency rule – Where an accused gives evidence inconsistent with his confessional statement – Application thereof.

Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

EVIDENCE: Inconsistency rule – Where principle is extended to cover confessional statements of accused persons – Implication – Principle in *Egboghonome Vs. State*.

Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

EVIDENCE: Proof – Where facts alleged are not denied – Whether such facts are deemed accepted and taken as established.

Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

EVIDENCE: Proof of signature – Where appellant disputes his signature in a document – Whether his signatures on other documents in evidence can be used to prove the disputed signature – Section 101(1) of Evidence Act 2011 – Relevant considerations.

Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

EVIDENCE: Where evidence is cogent, unchallenged, and uncontradicted – Whether court can rely on such evidence.

Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

JUDGMENT AND ORDERS: Where a court makes a decision – Whether valid and subsisting until set aside.

Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

JUDICIAL PRECEDENT: Stare decisis – Application thereof – Whether court are bound thereby – The principles in *Fatayi Sule Dakan vs. Alhaji Lasisi Asalu & Ors* (2015) LPELR (SC).

Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

LEGAL PRACTITIONERS: Error of Counsel – The error of Counsel should not be visited on litigant – Rationale therefore – Whether there are exceptions thereto.

Dr. Samuel U. Isitor And Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

LEGAL PRACTITIONERS: Mistake of Counsel – The general rule that error of Counsel cannot be visited on the litigant – Exceptions thereto – Whether failure of tactics or strategy of counsel is excluded therefrom.

Dr. Samuel U. Isitor And Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

LEGAL PRACTITIONERS: Address of counsel – Whether cannot substitute for legally admissible evidence.

Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

LEGAL PRACTITIONERS: Rules of Professional conduct – Rule 10 (1) (2) and (3) thereof – Import – The principles in *Yaki vs. Bagudu* (2015) 18 NWLR (Pt.1491) 288.

Barr. Benjamin Wayo And Engr. George T.A. Nduul (2017) JSCNLR (Vol. 9), 1 S.C.

PRACTICE AND PROCEDURE: Evaluation of facts and evidence – Whether an appellate court can embark in exceptional circumstances – Relevant principles thereof.

Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

PRACTICE AND PROCEDURE: Failure to appeal – Where a party affected fails to appeal on any decision of court on law or fact – Effect – Whether he is deemed to have accepted therewith – Principles in *APGA Vs. Senator Christiana N. D. Anyanwu & Ors* (2014) LPELR 20213 SC.

Dr. Samuel U. Isitor And Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

PRACTICE AND PROCEDURE: Written or documentary evidence – Whether cannot be supplanted by oral evidence – Relevant considerations thereof.

Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

PRACTICE AND PROCEDURE: Award of interest – Relevant situations thereof – Guiding principles.

Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

PRACTICE AND PROCEDURE: Documents in court – Whether court can look at documents in court files and utilize them to support proved facts.

Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

PRACTICE AND PROCEDURE: Failure to comply with procedure – Distinction between failure that affected substantial justice and failure that did not – The principles in Anthony Okoro Vs. State (2012) 7 N.C.C. 184.

Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

PRACTICE AND PROCEDURE: Filing of process – Where a legal practitioner files a document without the seal and stamp of that legal practitioner – The principles in Yaki vs. Bagudu (2015) 18 NWLR (Pt. 1491) 288.

Barr. Benjamin Wayo And Engr. George T.A. Nduul (2017) JSCNLR (Vol. 9), 1 S.C.

PRACTICE AND PROCEDURE: Issues of law and jurisdiction – Can be raised at any stage – Need to avoid springing surprise or taking the adverse party unawares – Principles in Jov. Vs. Dom (1999) 9 NWLR (Pt. 620) 538.

Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

PRACTICE AND PROCEDURE: Pleadings – Evidence in support thereof – Where there is no evidence in support of pleaded facts – Whether pleadings are deemed to have been abandoned.

Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

PRACTICE AND PROCEDURE: Powers of Supreme Court to rehear an application which has been set aside – Conditions thereof – Whether the principle in Amoo Vs. Alabi (2003) 12 NWLR (Pt. 835) 537 no longer represents the position of the law.

Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

PRACTICE AND PROCEDURE: Setting aside judgment – Where the judgment of the Supreme Court is reached per incuriam – Proper procedure thereof – Or. 2 Rule 29(1) Supreme Court Rules 1985.

**Edilcon Nigeria Ltd And United Bank For Africa Plc (2017)
JSCNLR (Vol. 9), 148 S.C.**

PRACTICE AND PROCEDURE: Supreme Court – Power to rehear a dismissed application – Where the Supreme Court dismissed an application – Whether it has power to rehear it if the order dismissing the application is set aside – The principles in PDP Vs. Asadu (2016) 17 NWLR (Pt. 1541) 215.

**Edilcon Nigeria Ltd And United Bank For Africa Plc (2017)
JSCNLR (Vol. 9), 148 S.C.**

RULES: Professional Conduct 2007 – S. 10 (1) (2) and (3) thereof – Purport, import and imperatives – Whether authenticates the signature on the legal document.

**Hon. Jumare Tanimu And Hon. Lawal Muhd Rabi (2017) JSCNLR
(Vol. 9), 261 S.C.**

Statute: Electoral Act 2010 – Section 87(9) thereof – Purport and import – The Principles in Adugu Gbileve & Anor vs. Addingi & Anor (2014) LPELR-2214(Sc).

**Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR
(Vol. 9), 294 S.C.**

STATUTE: Electoral Act 2010 – SS 31(1), (2), (3) and (7) and 32(1) and (2) thereof – Purport and import.

**Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR
(Vol. 9), 294 S.C.**

STATUTE: Evidence Act – SS 29(2) (3) (4) and (5) thereof – Procedure for proving voluntariness of a confessional statement – Whether the trial court can *suo motu* require the prosecution to establish the voluntariness of a confessional statement.

Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

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

Hon. Jumare Tanimu And Hon. Lawal Muhd Rabi (2017) JSCNLR (Vol. 9), 261 S.C.

STATUTE: Legal Practitioners Act: – SS. 2 (1) and 24 thereof – Non-compliance therewith – Whether fundamentally affects the legal process that initiated the proceedings – Not a mere technicality that can be brushed aside – Principle in *Adenwumi & Ors Vs. Oketade*.

Hon. Jumare Tanimu And Hon. Lawal Muhd Rabi (2017) JSCNLR (Vol. 9), 261 S.C.

STATUTE: Rules of professional conduct – Rule 10(3) thereof – Purport – Whether non compliance thereof renders such document voidable and can be remedied at any stage in the proceedings.

Barr. Benjamin Wayo And Engr. George T.A. Nduul (2017) JSCNLR (Vol. 9), 1 S.C.

STATUTE: S. 77 of Armed Forces Act – Requirement of lack of consent as ingredient of offence of rape – Meaning of consent therein.

Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

STATUTE: S.77 of Armed Forces Act – Requirement of consent – Whether where consent is required before an act, failure to obtain necessary consent renders the act invalid.

Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

STATUTE: Supreme Court Act 2004 – S. 22 thereof – Where the lower court fails to resolve an issue – Whether the Supreme Court can invoke S. 22 of the Supreme Court Act and resolve such issue.

Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

WORDS AND PHRASES: Elected – Meaning.

Dr. Samuel U. Isitor And Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

WORDS AND PHRASES: Appellant – Meaning – Or. 1 Rule 5, Court of Appeal Rules, 2011.

Hon. Jumare Tanimu And Hon. Lawal Muhd Rabi (2017) JSCNLR (Vol. 9), 261 S.C.

WORDS AND PHRASES: Carnal knowledge – Meaning.

Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

WORDS AND PHRASES: Consent – Meaning.

Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

WORDS AND PHRASES: Dying declarations – Meaning.

Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

WORDS AND PHRASES: Legal Practitioner – Meaning – S. 24 Legal Practitioners Act, 2004.

Hon. Jumare Tanimu And Hon. Lawal Muhd Rabi (2017) JSCNLR (Vol. 9), 261 S.C.

WORDS AND PHRASES: Prima facie – Meaning.

Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

**INDEX
OF
NIGERIAN CASES CITED**

A.G Federation Vs. Guardian Newspapers Ltd. (1969) 9 NWLR (Pt. 618) 187;
**Hon. Jumare Tanimu And Hon. Lawal Muhd Rabi (2017) JSCNLR
(Vol. 9), 261 S.C.**

A.G. Bendel State Vs. Aideyan (1989) 4 NWLR (Pt.118) 646;
**Dr. Samuel U. Isitor and Mrs. Margaret Fakorade (2017) JSCNLR
(Vol. 9), 47 S.C.**

A.G. Federation Vs. AIC Ltd (2000) 10 NWLR (Pt. 675) 293;
**Edilcon Nigeria Ltd And United Bank For Africa Plc (2017)
JSCNLR (Vol. 9), 148 S.C.**

A.G. Rivers State Vs. A.G. Akwa-Ibom State (2011) 8 NWLR (Pt. 1248) 31;
**Edilcon Nigeria Ltd And United Bank For Africa Plc (2017)
JSCNLR (Vol. 9), 148 S.C.**

Abacha Vs. State (2002) 11 NWLR (Pt. 779) 437 SC;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Abegunrin Vs. The State (2009) LPELR-8282 CA;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Abogede Vs. The State (1996) 5 NWLR (Pt. 118);
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Ada Vs. The State (2008) 13 NWLR (Pt.1103) 14;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Ada Vs. The State (2008) 13 NWLR (Pt.1103) 149;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Adedumola Vs. State (1988) 1 NWLR (Pt. 73) 683;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

Adegoke Vs. Adibi (1992) 5 NWLR (Pt. 242) 410;
**Edilcon Nigeria Ltd And United Bank For Africa Plc (2017)
JSCNLR (Vol. 9), 148 S.C.**

Adejobi Vs. State (2011) 12 NWLR (Pt.....) 351;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Adekoya Vs. The State (2017) 1 SC (pt.11) 1;
**Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol.
9), 22 S.C.**

Adekunle Oluwafemi Vs. The State (2015) LPELR-24404 (SC);
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Adekunle Vs. State (1989) 5 NWLR (Pt. 123) 505;
**Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 353
S.C.**

Adeleke Vs. Aserifa (1990) 3 NWLR (Pt.136) 94;
**Dr. Samuel U. Isitorand Mrs. Margaret Fakorade (2017) JSCNLR
(Vol. 9), 47 S.C.**

Adeleke Vs. Iyanda [2001] 12 NWLR(Pt. 729) 1;
**Edilcon Nigeria Ltd And United Bank For Africa Plc (2017)
JSCNLR (Vol. 9), 148 S.C.**

Adelu Vs. State (2014) 13 NWLR (Pt. 1425) 465;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

Adeniji Vs. Adeniji (1972) 1 All NLR (Pt. 1) 298;
**Edilcon Nigeria Ltd And United Bank For Africa Plc (2017)
JSCNLR (Vol. 9), 148 S.C.**

Adegunmi & ors. Vs. Oketade (supra);
Hon. Jumare Tanimu And Hon. Lawal Muhd Rabi (2017) JSCNLR
(Vol. 9), 261 S.C.

Adeye and Ors Vs. Adesanya and Ors [2001] 6 NWLR (Pt. 708) 1;
Edilcon Nigeria Ltd And United Bank For Africa Plc (2017)
JSCNLR (Vol. 9), 148 S.C.

Adeyemi Vs. Olakunri (1999) 14 NWLR (Pt.638) 204;
Dr. Samuel U. Isitor and Mrs. Margaret Fakorade (2017) JSCNLR
(Vol. 9), 47 S.C.

Adeyeye Vs. The State (2011) ALL FWLR (Pt.562) 1766;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Adimora Vs. Ajufo (1988) 3 NWLR (Pt.80) 1;
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol.
9), 22 S.C.

Adimore vs. Ajufo (1989) 3 NWLR (Pt. 80) 1,
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR
(Vol. 9), 294 S.C.

Adonike Vs. State (2015) 7 NWLR (Pt. 1458) 237;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385
S.C.

Adugu Gbileve & anor. vs. Addingi & anor (2014) LPELR-2214 (SC)
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR
(Vol. 9), 294 S.C.

Aduku Vs. FRN (2009) 4 NCC 350;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Adwale Joseph Vs. The State (2012) 7 NCC Pg. 38;

Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

Afolabi & Ors. Vs. Adekunle & Ors (1983)14 SC 398;
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

Agbasi Vs. Ebikorefe (1991)4 NWLR (Pt. 502) 630;
Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

Agbi & Ors. Vs. Ogbah (2006) 11 NWLR (Pt. 990) 65;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

Agbomeji Vs. Bakare (1998) 9 NWLR (Pt.564);
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

Ajakaiye Vs. Idehia (1993) 8 NWLR (Pt. 364) 504;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Ajayi Vs. State (2013) 9 NWLR (Pt. 1360) 589;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

Ajayi Vs. Zaria N.ANO. 2(1964) NNLR 61;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Ajidagba Vs. Inspector General of Police (1958) SCNLR 60;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Ajidagbe Vs. I.G.P. (1958) SCNLR 60;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Ajuluchukwu Vs. The State (2012) 7 WCC 281;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Ajunwa Vs. The State (1988) 4 NWLR (Pt. 89) 380;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Akalezi Vs. The State (1993) 2 NWLR (Pt.273) 1;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Akanbi Vs. Alao (1989) 3 NWLR (Pt. 108) 118 SC;
Dr. Samuel U. Isitorand Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

Akinbisade Vs. State (2006) 17 NWLR (Pt. 1007) 184;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

Akpan Vs. State (2001) 15 NWLR (Pt. 737) 748;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

Akpan Vs. State (2001) 5 NWLR (Pt. 737) 745;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

Akpan Vs. The State (1994) 9 NWLR (Pt. 368) 347;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Akpan Vs. The State (2001) 15 NWLR (Pt. 737) 745;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

Akpan Vs. The State (Supra);
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Alabi Vs. State (1993) 7 NWLR (Pt. 307);
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Aladu Vs. State (1998) 8 NWLR (Pt. 563) 618;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Alarape Vs. State (2001) 18 NWLR (Pt 746) 793;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Alarape Vs. The State (2000) 5 NWLR (Pt. 705) 79;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

Alawiye Vs. Ogunsanya (2012) 12 S.C. (Pt. 111) 1;
Hon. Jumare Tanimu And Hon. Lawal Muhd Rabi (2017) JSCNLR (Vol. 9), 261 S.C.

Alawiye Vs. Ogunsanya (2013) 5 NWLR (Pt. 1348) 570;
Hon. Jumare Tanimu And Hon. Lawal Muhd Rabi (2017) JSCNLR (Vol. 9), 261 S.C.

Alhaji Baba Bakin Salati Vs. Alhaji Talle Shehu (1986) ANLR 53;
Dr. Samuel U. Isitor and Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

Alhaji Taofeek Alao Vs. ACB Ltd. (2000) 2 SCNQR 1067;
Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

Alhaji Tsoho Dan Amale Vs. Sokoto Local Government (2012) LPELR 7842 (SC) P.23;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Alsthom Vs. Saraki (2004) 4 SCNJ 249;
Dr. Samuel U. Isitor and Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

Amachukwu Vs. F.R.N (2009) 4 WCC;
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

Amaechi Vs. Inec (2007) 7 10 SC 172;
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

Amaefule Vs. The State (1988) 2 NWLR (Pt. 75) 165;
Dr. Samuel U. Isitorand Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

Amala Vs. The State (2004) ALL FWLR (Pt.219) 1102; (2004) LPELR-453;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

American Cynamid Vs. Vitality Pharmaceutical Ltd (1991) 2 NWLR (Pt. 171) 15;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

Amoo Vs. Alabi (2003) 12 NWLR (Pt. 835) 537;
Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

Anthony Okoro Vs. State (2012) 7 NCC, 184;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Anudu Vs. State (1985) 1 NWLR (Pt. 1) 55;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

Anyanwu & Ors vs. Uzowuaka & Ors (2009) LPELR-515 (SC).
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

APGA Vs. Senator Christiana N.D. Anyanwu & Ors. (2014) LER SC 20/2013;
Dr. Samuel U. Isitorand Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

Apugo Vs. The State (2006) 16 NWLR (Pt.1002) 227;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Arabambi Vs. Advance Beverages Ind. Ltd (2005) 19 NWLR (Pt. 959);
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Ardo vs. Nyako (2014) LPELR 22878 (SC) @ 31 B;
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

Aremu & Anor. Vs. The State (1991) 7 NWLR (Pt. 201) 1;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

Ariori Vs. Elemu (1983) 1 SC. 13;
Dr. Samuel U. Isitorand Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

ARTA Ind. Ltd Vs. NBCI (1997) 1 NWLR (Pt. 483) 574;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Aruna Vs. State (1990) 6 NWLR (Pt. 155) 125;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Asanya Vs. The State (1991) 3 NWLR (Pt. 180) 422;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

Asari Vs. State (2009) 4 WCC 199;
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

Asariya Vs. The State (1987) 4 NWLR (Pt 67) 709;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Asuquo Okon Asuquo Vs. The State (2016) LPELR-40597 (SC);
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Atolagbe Vs. Shorun (1985) 1 NWLR (Pt.2) 360;
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

Atolagbe Vs. Shorun (1985) 4 SC (Pt. 1) 250;
Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

Atolagbe Vs. Shorun [1985] LPELR-592 (SC) 31;
Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

Auta Vs. The State (1975) 1 All N.L.R. 163;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

Babalola & Ors Vs. The State (1989) 4 NWLR (pt 115) 264;
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

Bakare Vs. The State (1987) 1 NWLR (Pt.52) 579;
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

Bankole & Or. Vs. M 5 6Y Pelu & Ors. (1991) 8 NWLR (Pt. 211) 523;
Dr. Samuel U. Isitorand Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

Baridam Vs. The State (1994) 1 NWLR (Pt. 320) 250;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Bassey Vs. State (1993) 7 NWLR (Pt. 306) 469;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

Bassey Vs. The State (1993) 7 NWLR (Pt. 306) 469;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

Bello Sarakin Yaki (Rtd.) & Anor. Vs. Senator Atiku Abubakar Bagudu & Ors.
(2015) LPELR SC.722/2015;
Hon. Jumare Tanimu And Hon. Lawal Muhd Rabiu (2017) JSCNLR
(Vol. 9), 261 S.C.

Bello Vs. A.G. Oyo State (1986) 5 NWLR (Pt. 45) 828;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

Bello Vs. State (2007) 10 NWLR (pt. 1043) 546;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Benson Agbule Vs. Warri Refinery & Petrochemical Co. Ltd (2012) LPELR-
20625 (SC) 13;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Benson Vs. Nigeria AGIP Co. Ltd. (1982) 5 SC. 1;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Bossom Ventures Ltd. Vs. FCDA & Anor (2012);
Hon. Jumare Tanimu And Hon. Lawal Muhd Rabiu (2017) JSCNLR
(Vol. 9), 261 S.C.

Bozin Vs. State (1985) 2 NWLR (Pt. 8) 463;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

Braide Vs. The State (1997) 5 NWLR (Pt.504) 141;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Buhari Vs. INEC (2008) 19 NWLR (Pt. 1120) 246;
Edilcon Nigeria Ltd And United Bank For Africa Plc (2017)
JSCNLR (Vol. 9), 148 S.C.

C.C.C.T.S Ltd. & Ors. Vs. Ekpo (2008) 1 -2 229; (2008) 6 NWLR (pt 1083)
362;
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol.
9), 22 S.C.

- C.P.C. & anor vs. Ombugadu & anor (2013) LPELR-21007 (SC),
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.
- Chief Adenigba Afolayan Vs. Oba Joshua Ogunrinde & Ors (1990) NWLR (Pt 727) 369;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.
- Chief Adeyemi & Ors vs. Opayori (1976) 9-10 SC 455
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.
- Chief Agbaisi & 3 Ors. vs. Ebikorefe & 6 ors. (1997) 4 NWLR (Pt. 502) 630.
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.
- Chief Emmanuel Eze Onwuka vs. Engineer Samuel Ononuju & Ors (2009) LPELR-2721 (SC); (2009) 11 NWLR (Pt. 1151) 174
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.
- Chief S. O. Agbareh & 1 Or. Vs. Mr. Anthony Mimra (2008) 2 NWLR (Pt. 1071) 378;
Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.
- Chikaodi Madu Vs. The State (2012) NCC;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.
- Chukwu Vs. The State (2007) ALL FWLR (Pt. 389) 1224;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.
- Chukwu Vs. The State (2012) LPELR-9829 SC;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

- Coker JSC in Okpere Vs. The State (1971) All NLR 1;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.
- Consortium Ltd. Vs. NNPC (2011) 9 NWLR (Pt. 1252) 317;
Hon. Jumare Tanimu And Hon. Lawal Muhd Rabiou (2017) JSCNLR (Vol. 9), 261 S.C.
- Corporal Jona Dawa & Anor Vs. State (1980) 12 SC 334;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.
- Dabo Vs. State (1977) 5 SC 122;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.
- Dakat Vs. Dashe (1997) 12 NWLR (Pt. 531) 46;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.
- Daniel Vs. INEC (2015) 3 4 SC (Pt.111) 76;
Hon. Jumare Tanimu And Hon. Lawal Muhd Rabiou (2017) JSCNLR (Vol. 9), 261 S.C.
- David Chukwuemeka Obiefuna & Anor Vs. Christopher Obioso & Ors (2010) 8 NWLR (Pt. 1195) 145;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.
- Dawa Vs. State (1980) 8-11 SC 236;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.
- Dawodu vs. NPC (2000) 6 WRN 116.
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.
- Dick Vs. C.O.P (2009) 9 NWLR (Pt. 1147) 530;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Dingyadi Vs. INEC (2011) 18 NWLR (Pt. 1224) 154;
Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

Dipcharima vs. Ali (1974) 9 SC 596;
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

Dr. Olu Onagoruwa Vs. The State (1993) 7 NWLR (Pt. 303) 49;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Duru Vs. Nwosu (1989) 1 NWLR (Pt. 113) 24;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Durwode Vs. State (2000) 15 NWLR (Pt. 691) 467;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Durwode Vs. State (2000) 15 NWLR (Pt. 691) 467;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Ebba Vs. Ogodo [1984] 1 SCNLR 372; [1984] 4 SC 84;
Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

Ebeneh Vs. State (2009) 4 WCC 58;
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

Ebong & Anor Vs. State (2011) LPELR-3789 CA;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Edache Vs. The Queen (1962) NNL 56;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Edet Vs. State (1988) 4 NWLR (Pt. 91) 722;

Dr. Samuel U. Isitor and Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

Edibo Vs. The State (2007) 13 NWLR (Pt. 1051) 306;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Edoho Vs. State (2004) 5 NWLR (Pt 865) 17;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Edwin Ezigbo Vs. The State (2012) 7 NCC Pg.426;
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

Egbedi Vs. The State (1981) 11-12 SC. 98;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Egbogbonome Vs. The State (1993) 7 N.W.L.R. (Pt. 306) 383;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

Egboghonome Vs. State (1993) 7 NWLR (Pt. 306) 383;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

Egharevba vs. Osagie (2009) 18 NWLR (Pt. 1173) 299;
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

Eholor Vs. Osayande (1992) 6 NWLR (pt. 249) 524;
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

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Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Ejinima Vs. State (1991) 6 NWLR (Pt. 200) 627;

Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

Eke Vs. State (2011) 3 NWLR (Pt. 1235) 589;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Ekpenyong Vs. Nyong (1967) 2 SC. 71;
Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

Ekpenyong Vs. The State (1993) 6;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Ekpeyong Vs. The State (1991) 6 NWLR (Pt. 200) 683;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

Ekwunife Vs. Wayne (W/Africa) Ltd [1989] 5 NWLR ((Pt 122) 422;
Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

Eme Orji Vs. The State (2008) 10 NWLR (Pt. 1094) 31;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

Emeka vs. Okadigbo (2012) 18 NWLR (Pt. 1331) 55
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

Emeka Vs. The State (2001) 14 NWLR (Pt. 734) 666;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Emeka Vs. The State (2001) 32 W.R.N. 37;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

Emenike vs. P.D.P. (2012) 12 NWLR (Pt. 1315) 556;

Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

Enekwe vs. International Merchant Bank of Nigeria Ltd & Ors (2006) LPELR-1140 (SC).

Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

Enilolobo Vs. Adegbesan [2001] 2 NWLR (Pt. 698) 611;

Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

Erekanure Vs. State (1993) 5 NWLR (Pt. 294) 385;

Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Everest Eze Vs. State (1985) 12 SC 4;

Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

Eyisi Vs. State (2000) 15 NWLR (Pt. 691) 555;

Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Eze Vs. State (2013) 16 NVIILR (Pt. 1380) 392;

Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Fabunmi Vs. Agbe [1985] 1 NWLR (Pt. 2) 299;

Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

Fabura vs. Minimah (2003) 5 SCNJ 142

Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

Fatai Olayinka Vs. State (2007) 9 NWLR (Pt. 1040) 56;

Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Fatayi Sule Dakan & Ors vs. Alhaji Lasisi Asalu & Ors (2015) LPELR-26687 (SC)

Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

Fatoyinbo Vs. Williams [1956] SCNLR 274; (1955) 1 FSC 87;

Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

FBN PLC Vs. TSA Ind. Ltd (2010) 15 NWLR (Pt. 1216) 296;

Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

First Bank of Nig. Plc. Vs Maiwada (2012) 5 SC (Pt. 111) 1;

Hon. Jumare Tanimu And Hon. Lawal Muhd Rabiou (2017) JSCNLR (Vol. 9), 261 S.C.

G.K.F.I (Nig) Ltd. vs. Nitel Plc (2009) LPELR-1294 (SC)

Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

Gafai Vs. UAC Limited (1961) All NLR 814;

Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Gale & Anor. Vs. Serious Organised Crime Agency (2011) LPELR-17843 UKSC;

Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Garuba vs. Omokhodion (2011) Vol.6 (Pt. 111) MJSC 122.

Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

Garuba Vs. Omothodion & Ors. (2011) 15 NWLR (Pt. 1269) 145;

Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Gbadamosi Vs. The State (1992) 9 NWLR (Pt.266) 465;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222S.C.

Gbileve vs. Addingi (2014) 16 NWLR (Pt. 1433) 394;
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

Giro Vs. State (1996) 4 NWLR (Pt. 443) 375;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Gufwal & Ors. Vs. State (1994) 2 NWLR (Pt.327) 435;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Hamza Vs. Kure (2010) 42 NSCQR 592;
Dr. Samuel U. Isitorand Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

Ibina Vs. State (1989) 5 NWLR (Pt. 120) 238;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

Ibodo Vs. Enarofia (1980) 5 7 SC 42;
Dr. Samuel U. Isitorand Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

Ibodo Vs. Enarofia (1980) 5-7 SC 42;
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

Ibrahim Vs. Barde (1996) 9 NWLR (Pt. 474) 513;
Hon. Jumare Tanimu And Hon. Lawal Muhd Rabi (2017) JSCNLR (Vol. 9), 261 S.C.

Ibrahim Vs. R (1914) AC 559;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

IBWA Vs. Imano (NIG.) Ltd & Anor (1988) 7 S.C (Reprint) (Pt. 111) 114
Hon. Jumare Tanimu And Hon. Lawal Muhd Rabiu (2017) JSCNLR
(Vol. 9), 261 S.C.

Idemudia Vs. State (1999) 7 NWLR (Pt. 610) 202;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Idowu Okanlawon Vs. State (2015) LPELR 24838 (SC);
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Idowu Vs. The State (2000) 12 NWLR (Pt. 680) 48;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

Idowu Vs. The State 3 SNCOR 96 132-133;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

Ifeanyichukwu Vs. The State (1996) 7 NWLR (Pt. 463) 686;
**Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385
S.C.**

Igri Vs. State (2012) 5-7 SC (Pt. II) 104.
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Ijale Vs. A-G Leventis & Co Ltd (1961) 1 All NLR 762;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Ikem Vs. State (1985) 1 NWLR (Pt. 2) 358;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Ikemson Vs. State (1989) 3 NWLR (Pt. 110) 455;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

Ikemson Vs. State (1989) 3 NWLR (Pt. 110) 455;
**Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385
S.C.**

Ikemson Vs. State (1989) LPELR-1473 (SC);
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Iko Vs. The State (2001) 14 NWLR (pt. 732) 221;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

Iko Vs. The State (2001) 35 WRN 1;
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

Ikoku vs. Ekeukwu (1995) 7 NWLR (Pt. 410) 637
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

Ikpassa Vs. Bendel State (1981) 9 SC 7;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Imhandra Vs. Nigerian Army (2007) 14 NWLR (Pt. 1053) 76;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Incar Ltd. Vs. Adegboye [1985] 2 NWLR (Pt. 8) 453;
Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

Inyang Etim Akpan Vs. The State (1994) 12 SCNJ 140;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Isaac Stephen Vs. The State (1986) 12 SC 450;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Isiekwe Vs. The State (1999) 9 NWLR (Pt. 617) 43;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Iwuoha and Anor Vs. NIPOST and Anor (2003) LPELR-1569 (SC) 39-40;
Overseas Construction Company Nig. Ltd. Vs. Creek Enterprises (Nig.)

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Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.
- Iwuoha Vs. NIPOST Ltd (2003) 8 NWLR (Pt. 822) 308;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.
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Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.
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Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.
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Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.
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Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.
- Jizurumba Vs. State (1976) 3 SC 89;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.
- Jona Dawa & Anor Vs. The State (1980) 1 SC 236;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.
- Joseph Lori & Anor Vs. The State (1980) 8-11 SC 81;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.
- Josiah Ayodele Adetayo & Ors vs. Kunle Ademola & Ors (2010) LPELR-155 (SC).
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

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Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.
- Kada Vs. State (1991) 11/12 SC 1;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.
- Kajubo Vs. State (1988) 1 NWLR (Pt. 73) 721;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.
- Kalu Vs. State (1998) 12 NWLR (Pt. 583) 531;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.
- Kalu Vs. The State (1988) 4 NWLR (Pt. 90) 503;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.
- Kalu Vs. The State (1988) 4 NWLR (Pt.90) 503;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.
- Kaza Vs. State (2008) 7 NWLR (Pt. 1085) 125;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.
- Kida Vs. Ogumola. (2006) (Pt.327) FWLR 402;
Dr. Samuel U. Isitorand Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.
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Hon. Jumare Tanimu And Hon. Lawal Muhd Rabi (2017) JSCNLR (Vol. 9), 261 S.C.
- Kim Vs. The State (1991) 2 N.W.L.R. (Pt. 175) 622;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.
- Kim Vs. The State (1992) 4 NWLR (pt. 233) 17;

Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

Kim Vs. The State (1992) 4 NWLR (Pt. 233) 17;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Kingsley Vs. State (2010) 6 NWLR (Pt. 1191) 393;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Kolawwole Vs. Alberto (1989) ANLR 137;
Dr. Samuel U. Isitorand Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

Kwagshir Vs. The State (1995) 3 NWLR (Pt. 386) 651;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Kwajaffa Vs. Bank of the North Limited (2004) ALL FWLR (Pt. 215) 222;
Dr. Samuel U. Isitorand Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

Lado Vs. The State (1999) 9 NWLR (Pt. 619) 369;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Lado Vs. The State (supra);
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Lagga Vs. Sarhuna (2008) 16 NWLR (Pt. 1114) 427;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

Laoye Vs. The State (1985) 2 NWLR (Pt. 10) 832;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Longe Vs. FBN Plc (2010) 6 NWLR (Pt. 1189) 1;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Lucky Vs. The State (2016) 5 6 SC 144; (2016) LPELR 40541 (SC);
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

Madukolu Vs. Nkemdilim (1962) 2 SCNLR 341;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Madukolu Vs. Nkemdilim (1962) ANLR 581;
Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

Madukolu Vs. Nkemdilim (1962) SCNLR 341;
Hon. Jumare Tanimu And Hon. Lawal Muhd Rabi (2017) JSCNLR (Vol. 9), 261 S.C.

Maigari Vs. The State (2011) ALL FWLR (Pt. 546) 405;
Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

Maiyaki Vs. State (2008) 7 SC 128;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

Makeri Smelting Co. Ltd. Vs. Access Bank (Nig) Plc (2002) 7 NWLR (Pt. 766) 447;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Makwe Vs. Nwukor (2001) 14 NWLR (Pt. 733) 356;
Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

Maobison Inter-Link Associated Limited vs. U. T. C. Nigeria Plc (2013) LPELR-20335 (SC).
Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

Mbenu Vs. State (1988) 3 NWLR (Pt. 84) 615;

Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

Messrs Vs. Ibrahim [1974] 5 SC 55;
Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

Mikailu Vs. The State (2001) 8 NWLR (Pt. 715) 469;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Min. of Works & Transport, Adamawa State & Ors. Vs. Alhaji Isiyaku Yakubu & Anor (2013) 1 SC 98 @ 114;
Hon. Jumare Tanimu And Hon. Lawal Muhd Rabiou (2017) JSCNLR (Vol. 9), 261 S.C.

Minilodge Ltd Vs. Ngei (2009) 18 NWLR (Pt. 1173) 254;
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

Mogaji Vs. Odofin (1974) 4 SC 91;
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

Mohammad Vs. Husseini (1998) 14 NWLR (Pt. 584) 108;
Dr. Samuel U. Isitor and Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.

Monsuru Solola & Ors Vs. State, 22 NSCQR 251;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

Morenikeji Vs. Agbegbosin (2003) 8 NWLR (pt. 823) 612;
Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.

Mufutau Aremu Vs. The State (1991) 7 NWLR (Pt. 201) 1;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

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Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.
- Nigerian Army Vs. Iyela (2008) 18 NWLR (Pt. 1118) 115;
Dr. Samuel U. Isitor and Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.
- Nigerian Army Vs. Samuel (2013) 14 NWLR (pt. 1375) 466;
Hon. Jumare Tanimu And Hon. Lawal Muhd Rabi (2017) JSCNLR (Vol. 9), 261 S.C.
- Nigerian Navy Vs. Lambert (2007) 18 NWLR (Pt. 1066) 300;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.
- Nsofor Vs. The State (2002) 10 NWLR (Pt. 775) 274;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.
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Dr. Samuel U. Isitor and Mrs. Margaret Fakorade (2017) JSCNLR (Vol. 9), 47 S.C.
- Nwaigwe Vs. Okere (2008) 13 NWLR (Pt. 1105) 445;
Hon. Jumare Tanimu And Hon. Lawal Muhd Rabi (2017) JSCNLR (Vol. 9), 261 S.C.
- Nwakearu Vs. State (2013) 16 NWLR (Pt. 1380) 207;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.
- Nwangbomu Vs. State (1994) 2 NWLR (Pt. 327) 380;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.
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Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

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Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.
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Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.
- Obineche Vs. Akusobi (2010) 12 NWLR (Pt. 1208) 383;
Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.
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Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.
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Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.
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Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.
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Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.
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Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.
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Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.
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Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.

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Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.
- Oforlette Vs. State (2000) 12 NWLR (Pt. 681) 415;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.
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Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.
- Ogba Vs. State (1992) 2 NWLR (Pt. 222) 164;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.
- Ogoala Vs. State (1991) 2 NWLR (Pt. 175) 506 SC;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.
- Ogoala Vs. State (1991) 2 NWLR (Pt. 175) 509;
Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.
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Kehinde Gbadamosi And The State (2017) JSCNLR (Vol. 9), 385 S.C.
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Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.
- Ogolo Vs. Fubara & Ors (2003) 11 NWLR (Pt. 831) 231;
Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.
- Ogolo Vs. Fubura (2003) 11 NWLR (pt. 831) 231;
Corporal Nicholas Okoh And Nigerian Army (2017) JSCNLR (Vol. 9), 22 S.C.
- Ogunbayo Vs. State (2007) 8 NWLR (Pt. 1035) 157;
Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.

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Karimu Sunday And The State (2017) JSCNLR (Vol. 9), 353 S.C.
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(Vol. 9), 261 S.C.

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(Vol. 9), 261 S.C.

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Edilcon Nigeria Ltd And United Bank For Africa Plc (2017) JSCNLR (Vol. 9), 148 S.C.

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S.C.**

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(Vol. 9), 261 S.C.**

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Eteng Otu Ujang And The State (2017) JSCNLR (Vol. 9), 222 S.C.

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Emeka Oko And The State (2017) JSCNLR (Vol. 9), 187 S.C.

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Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

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Ede Oko And The State (2017) JSCNLR (Vol. 9), 89 S.C.

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Hon. Sunday Aghedo And Godwin O. Adenomo (2017) JSCNLR (Vol. 9), 294 S.C.

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Barr. Benjamin Wayo And Engr. George T.A. Nduul (2017) JSCNLR (Vol. 9), 1 S.C.

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BARR. BENJAMIN WAYO

AND

- 1. ENGR. GEORGE T.A. NDUUL**
- 2. ALL PROGRESSIVE CONGRESS (APC)**
- 3. INDEPENDENT NATIONAL
ELECTORAL COMMISSION (INEC)**

SC. 331/2016

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

FRIDAY, 9TH JUNE, 2017

BEFORE THEIR LORDSHIPS

**MARY UKAEGO PETER-ODILI
OLUKAYODE ARIWOOLA
KUMAI BAYANG AKAHHS
CHIMA CENTUS NWEZE
AMINA ADAMU AUGIE**

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

APPEAL: Notice of Appeal – Rule of professional conduct – Where a notice of appeal is not signed, stamped and sealed – Effect – Whether it is incompetent and robs the court of jurisdiction.

APPEAL: Notice of appeal – Where violates the Rules of professional conduct – Implication – Whether notice of appeal to be struck out.

LEGAL PRACTITIONERS: Rules of Professional conduct – Rule 10 (1) (2) and (3) thereof – Import – The principles in Yaki vs. Bagudu (2015) 18 NWLR (Pt.1491) 288.

PRACTICE AND PROCEDURE: Filing of process – Where a legal

practitioner files a document without the seal and stamp of that legal practitioner – The principles in Yaki vs. Bagudu (2015) 18 NWLR (Pt. 1491) 288.

STATUTE: Rules of professional conduct – Rule 10(3) thereof – Purport – Whether non compliance thereof renders such document voidable and can be remedied at any stage in the proceedings.

Issue for Determination

Whether the notice of appeal and the appellant brief should not be struck out for non-compliance with the provisions of Rule 10 (1) (2) and (3) of the Rules of Professional conduct, 2007.

Facts of the Matter

This is an interlocutory appeal brought by the appellant (who was the 1st respondent in the Court of Appeal, Makurdi) against the Order of that court granting an application to hear appeal No. CA/MK/16/2016 on the appellant's brief only, the respondents having failed to file their briefs of argument within the specified period stipulated in the Rules of the Court. The motion was moved and granted on 13th April, 2016.

The proceedings of the lower court which necessitated this appeal are contained on page 50 of the records and I reproduce them as follows:

“IN THE COURT OF APPEAL
MAKURDI JUDICIAL DIVISION
HOLDEN AT MAKURDI
ON WEDNESDAY THE 13TH DAY OF APRIL, 2016
BEFORE THEIR LORDSHIPS

HON. JUSTICE OYEBISI F. OMOLEYE
APPEAL

JUSTICE ,COURT OF

HON. JUSTICE OBANDE F. OGBUINYA

JUSTICE, COURT OF APPEAL

HON. JUSTICE CORDELIA I. JUMBO-OFO JUSTICE, COURT OF APPEAL
APPEAL NO: CA/MK/16/2016

BETWEEN
ENGR. G.T.A. NDUUL
AND
BARR. BENJAMIN WAYO & ORS

Appellant present
Kelechi Udeoyibo with him, Kenekwukwu and P.D. Adi for Appellant.
Respondents and Counsel absent

REGISTRAR: Respondents served on 23/03/2016

UDEOYIBO: Our motion dated and filed on 11/4/2016 is for the order of Court to hear the appeal on the Appellant/Appellant's Brief of Argument only, the Respondent having failed to file their Brief of Argument within the time specified under the Rules of this Court. I move in terms.

COURT: The Appellant/Applicant's application is granted as prayed. The appeal is adjourned to 28/04/2016 for hearing. Hearing Notice to issue on all the Respondents.

SGD

O. F. OMOLEYE JCA
13/04/2016
SGD

I AGREE

O. F. OGBUINYA JCA
13/04/2016
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I AGREE

C. I. JOMBO-OFO JCA
13/04/2016

SGD”

The appellant appealed against the ruling in his notice of appeal filed on 21st April, 2016 and sought for an order allowing the appeal and setting aside the ruling. However, the respondent challenged the competence of the appeal for non fixing of NBA seal.

Held: *(Unanimously striking out appeal)*

1. *The purport of Rules 10(1), (2) and (3) of Rules of Professional conduct*
On the issue concerning the competency of the notice in not affixing the Nigerian Bar Association seal or stamp by the appellant, I am afraid I cannot see the dichotomy between the appellant filing the process in his capacity as a legal practitioner and filing the same process and describing himself as Barr. Benjamin Wayo. Rule 10(1), (2) and (3) of the Rules of Professional Conduct, 2007 which became effective from 1st April, 2015 provide as follows:

“10(1) A lawyer acting in his capacity as a legal practitioner, legal officer or adviser of any governmental department Ministry or any Corporation, shall not sign or file a legal document unless there is affixed on any such document a seal and stamp approved by the Nigerian Bar Association.

(2) For the purpose of this rule “legal documents” shall include pleadings, affidavits depositions, applications, instruments, agreements, deeds, letters, memoranda, reports, legal opinions or any similar documents.

(3) If without, requirements of this rule a lawyer signs or files any documents as defined in sub-rule 2 of this rule, and in any of the capacities mentioned in sub-rule (2), the document so signed or filed shall be

deemed not to have been properly signed or filed”.
In his judgment in Yaki vs. Bagudu supra Onnoghen JSC (as he then was) explained the import of Rule 10(3) at pages 319-320 thus:

“What sub-rule (3) supra is saying is that such non-compliance renders the document so signed or filed voidable that is why it is said that the document is deemed not to have been properly signed or filed”. In other words, the offending document/instrument can be remedied at any stage in the proceedings by an application for and production and fixing of the seal It should be noted that the qualification to practice law as a legal practitioner is as provided under the Legal Practitioners Act which includes being called to Bar and enrolled at the Supreme Court of Nigeria as a legal practitioner. It is that qualification that entitles a legal practitioner to sign any legal document either for filing in Court of Law in a proceeding or otherwise”. (Pp 13 – 15 Paras I – B).

Per K. B. Akaals (JSC)

**“The appellant in this appeal did not apply to regularize the documents objected to; consequently the notice of appeal and appellant's brief have not been properly filed. The preliminary objection therefore succeeds and this appeal is struck out”.
(P15 Paras C – D).**

Per Peter Odili (JSC)

“The appellant's argument would have been debatable if the appellant had not signed the document, the notice of appeal in this way, “Barr. B.I. Wayo”. In doing so he put himself out as a lawyer acting in that capacity and therefore came within what this court had contextually interpreted the Rule 10 (3) of the said Code of

conduct rules to mean a legal practitioner acting as such with the need for his stamp and seal to make the process and in this case the Notice of Appeal as properly filed. I am in effect referring to the case of Yaki vs. Bagudu (2015) 18 NWLR (Pt. 1491) 288.

In that case, Onnoghen JSC (as he then was) stated at page 319 as follows:

**“What sub-rule (3) supra is saying is that such non compliance renders the document so signed or filed voidable that is why it is said the document is “deemed not to have been properly signed or filed”. In other words the offending document/instrument can be remedied at any stage in the proceedings by an application for and production and fixing of the seal. That is what my Lord, Ngwuta, JSC meant by saying that the situation is like filing a document out of time which can be subsequently remedied”.
(Pp 19 – 20 Paras H – E).**

2. *A notice of appeal without seal and stamp of legal practitioner and not remedied is incompetent.*

I had with humility in support of the position stated at page 343 thus:

“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 documents” which must be signed, stamped and sealed. Therefore, a notice of appeal not found with these components is an incompetent notice of appeal depriving the court of jurisdiction to determine the appeal on merit. This is within what was provided under the Legal Practitioner Act, 2004 (as amended)

- A** and Rules of Professional Conduct, Rule 10 (3)".
- B** Therefore the appellant not having done the needful by regularising the defective Notice of Appeal and the appellant's brief, the defect remained and since the processes were voidable and in view of the objection of the 1st respondent they remained defective and produced the incompetence of the appeal as being espoused by the 1st respondent. It follows that there is no way of wriggling out of the authority of *Yaki vs. Bagudu (2015) 18 NWLR (Pt. 1491) 288* in which the Supreme Court had laid down what is to be in the event of a document filed by a legal practitioner without the legal seal and stamp of that practitioner.
- D** The situation on ground clearly showing an appeal without a properly filed Notice of Appeal is incompetent and suffers the fate of having it struck out. (*Pp 20 – 21 Paras E – C*).

E Nigerian cases cited

Yaki vs. Bagudu (2015) 18 NWLR (Pt. 1491) 288.

Nigerian statutes

- F** Rules of Professional Conduct Rules 10(1) (2) and (3)

Representation

G.T. Yongo (Esq.) for Appellant.

- G** Alex Ejesieme (Esq.) for 1st Respondent
Olayode Delano (SAN) (with him Ahmed Oyegbami (Esq.) and Alex Ozougwu (Esq.) for 2nd Respondent.
Musibau Adetunbi (Esq.) (with him D. A. Suleiman (Esq.), Barbara
- H** Onwubiko (Esq.) and Chinelo Madueke (Esq.) for 3rd Respondent.

- I** **BAYANG AKAAHS, (JSC) (Delivering the Lead Judgment):** This is an interlocutory appeal brought by the appellant (who was the 1st respondent in the Court of Appeal, Makurdi) against the Order of that court granting an

A application to hear appeal No. CA/MK/16/2016 on the appellant's brief only, the respondents having failed to file their briefs of argument within the specified period stipulated in the Rules of the Court. The motion was moved and granted on 13th April, 2016.

B The proceedings of the lower court which necessitated this appeal are contained on page 50 of the records and I reproduce them as follows:

C “IN THE COURT OF APPEAL
MAKURDI JUDICIAL DIVISION
HOLDEN AT MAKURDI
ON WEDNESDAY THE 13TH DAY OF APRIL, 2016

D BEFORE THEIR LORDSHIPS

E HON. JUSTICE OYEBISI F. OMOLEYE JUSTICE, COURT OF APPEAL
HON. JUSTICE OBANDE F. OGBUINYA JUSTICE, COURT OF APPEAL
HON. JUSTICE CORDELIA I. JUMBO-OFO JUSTICE, COURT OF APPEAL

APPEAL NO: CA/MK/16/2016

F BETWEEN
ENGR. G.T.A. NDUUL
AND
BARR. BENJAMIN WAYO & ORS

G Appellant present
Kelechi Udeoyibo with him, Kenechukwu and P.D. Adi for Appellant.
Respondents and Counsel absent

H REGISTRAR: Respondents served on 23/03/2016

I UDEOYIBO: Our motion dated and filed on 11/4/2016 is for the order of Court to hear the appeal on the Appellant/Appellant's Brief of Argument only the Respondent having failed to file their Brief of Argument within the

A time specified under the Rules of this Court. I move in terms.

COURT: The Appellant/Applicant's application is granted as prayed. The appeal is adjourned to 28/04/2016 for hearing. Hearing Notice to issue on all the Respondents.

B

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O. F. OMOLEYE JCA
13/04/2016

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I AGREE

O. F. OGBUINYA JCA
13/04/2016

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I AGREE

C. I. JOMBO-OFO JCA
13/04/2016

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SGD”

F The appellant appealed against the ruling in his notice of appeal filed on 21st April, 2016 and sought for an order allowing the appeal and setting aside the ruling. The notice of appeal contained three grounds of appeal from which learned counsel representing the appellant distilled two issues for determination as follows:

G

- 1. Whether or not, it is the service of the requisite court processes on all parties to a matter that clothe the Court with the jurisdiction to entertain a matter and if it is whether the lower court was right when it assumed jurisdiction in entertaining the application of the 1st respondent and granting it when the evidence before the lower court clearly established that, the appellant was neither served with the brief of argument nor the motion of the 1st respondent**

H

I

- A** **before the lower court (see grounds 2 and 3).**
- B** **2. Whether or not the appellant was denied fair hearing, when the Court heard and granted the application of the 1st respondent without ensuring that the appellant was served, and when the said application itself was not ripe for hearing (see ground 1).**

C The 1st respondent filed a preliminary objection on the competence of the appeal which was argued in the brief filed on 10/1/2017 but deemed filed on 8/2/2017. He urged this Court to strike out the appeal as incompetent because the notice of appeal dated 20th April, 2016 and filed on the 21st April, 2016 as well as the appellant's brief filed on 7th June, 2016 failed to

D comply with the provisions of Rule 10(1)(2) and (3) of the Rules of Professional Conduct, 2007. He also contended that grounds 1, 2 and 3 of the notice of appeal are grounds of mixed law and fact for which no leave of court was obtained and therefore incompetent. Also that ground 2 did not

E arise from the decision of the Court of Appeal and so the issues distilled from the grounds are incompetent.

On the substantive appeal, learned counsel distilled a single issue for determination namely:

- F** **“Considering that the appellant was served with another copy of 1st Respondent's Brief of Argument in the open court, afforded enough time and enjoined by the Justices of the Court of Appeal to file his Respondent's Brief after denying earlier service of 1st Respondent's/Appellant's Brief of Argument at lower court, whether the appellant could still complain of denial of fair hearing and (or pursue the present interlocutory appeal (Distilled from ground 1 and 2)”.**
- G**
- H**

- I** The 2nd respondent adopted the issues formulated in the appellant's brief. The 3rd respondent did not formulate any issue for determination but he

A predicated his argument in the appeal on equity which looks at the substance and not the form.

Learned counsel invited this Court to pages 51-54 of the Record of Appeal pointing out that there is no stamp and seal of the Legal Practitioner who signed the Notice of Appeal which is the originating process as well as the Appellant's brief. He submitted that in **Yaki vs. Bagudu (2015) 18 NWLR (Pt. 1491) 288** the Supreme Court held that a legal document purportedly executed by a legal practitioner which does not carry the stamp and seal of that legal practitioner is voidable and where not remedied becomes an incompetent document. He reproduced Rule 10(1), 2 and 3 of the Rules of Professional Conduct, 2007 and submitted that the consequences of failure to comply with the mandatory provision of these Rules renders the document an incompetent one. He argued that parties by their action or inaction or acquiescence cannot confer validity on a defective process; neither can they by consent confer jurisdiction or right on the Court citing the following cases in support:- **FRN vs. Uwagbe (2009) 15 NWLR (Pt. 1163) 91; Okolo vs. UBA (2004) 1 SCNJ 113 and Odua Investment Co. Ltd vs. Talabi (1997) 7 SCNJ 600.**

Regarding the grounds of appeal, learned counsel contended that a community reading of the three grounds of appeal together with their particulars will show that they are grounds dealing with mixed law and fact since the appellant introduced issues of facts both in the grounds and particulars accompanying them and by the combined effect of section 233 (1)(2)(a) and (3) of the 1999 Constitution (as amended) the Supreme Court hears appeals as of right from the Court of Appeal where the grounds of appeal involve questions of law alone and with leave either of the Court of Appeal or Supreme Court where the grounds of appeal deal with mixed law and facts. Any ground of appeal requiring leave but filed without such leave is incompetent and does not confer jurisdiction on the Supreme Court to embark upon adjudication. The following cases were relied upon by learned counsel:- **KTP Ltd vs. G & H (Nig.) Ltd 2005) 13 NWLR (Pt. 943) 680; Ojemen vs. Momodu (1983) 1 SCNLR 188 at 205; Maigoro vs. Garba (1999) 10 NWLR (Pt. 624) 555 at 568; Akwiwu Motors Ltd vs. Sangonuga (1984) 5 SC 184 at 188.** On ground 2 he said it did not arise

- A** from the decision of the Court of Appeal. As regards the issues formulated from grounds 1, 2, and 3 of the Notice of Appeal, they are incompetent placing reliance on **Jev vs. Lortom (2014) 14 NWLR (Pt. 1428) 575 at 608-609** where it was held that if an incompetent ground is lumped with a
- B** valid ground, it will contaminate the whole issue and render it incompetent since the court cannot excise the argument in respect of the competent grounds from those of the incompetent grounds in the issue.

- In his reply brief, the appellant tried to distinguish the case of **Yaki vs. Bagudu** supra from this case as he cannot be said to be a lawyer acting in his capacity as a legal practitioner so as to be caught by the provisions of Rule 10(1)(2) and (3) of the Rules of Professional Conduct 2007 regarding the filing of a legal document, which requires affixing the Nigerian Bar
- D** Association stamp or seal.

- On the competence of the notice of appeal and the issues formulated, learned counsel for the appellant submitted they are competent because they are based on admitted and ascertained facts. He argued that lack of
- E** service of requisite court process on parties to an action is a jurisdictional issue that touches on the jurisdiction of the court to proceed with the matter which can be raised at any time without leave. Learned counsel canvassed the same arguments in respect of the first issue he submitted for
- F** determination.

- On the second, issue, learned counsel anchored his argument on section 36(1) of the Constitution and submitted that the appellant was not given fair hearing since the rules regarding audi alteram partem and nemo
- G** *judex in causa sua* must be observed to make an impartial observer to conclude that the trial has been balanced and fair to both sides to the trial or appeal. He submitted that the decision of the lower court on 13/4/2016 granting the application of the 1st respondent to hear the appeal on the
- H** appellant's brief when the appellant was not served and/or put on notice breached section 36(1) of the 1999 Constitution.

- Learned counsel submitted that without any evidence on record that the appellant was served with another copy of 1st Respondent's
- I** (Appellant's) brief in the open court, the appellant cannot be precluded

A from complaining about the denial of fair hearing.

The 2nd respondent who had also appealed in SC. 332/2016 submitted that the Court of Appeal did not have jurisdiction to grant the orders sought on the application dated 11/4/2016 and granted on 13/4/2016

B and that the 2nd respondent was denied fair hearing of the application.

Learned counsel for 3rd respondent argued that it is the substance and not the form that should be looked at in the appeal and since time is of the essence the appellant instead of appealing should have brought an application asking for extension of time within which to file his brief of argument.

C The sister appeal No. SC. 332/2016 dealt with the same issues which have been raised in this appeal and in his judgment delivered on 19/5/2017 D Galinje JSC came to the following conclusions:

1. **The three grounds of appeal are raising jurisdictional issues and therefore competent.**

E

2. **The registrar misled the lower court, when he told the court that the respondents were served with the motion whereas it was impossible to have served a process on 23/3/2016 which was filed on 11/4/2016.**

F

3. **The appellant could have if he so wished apply to set aside the order made on 13/4/2016 to hear the appeal based on the appellant's brief alone since it was made without jurisdiction.**

G

4. **Since the appellant chose to appeal the appeal must be allowed and the order set aside.**

H

These findings would have applied mutatis mutandis to this appeal but for the preliminary objection.

I On the issue concerning the competency of the notice in not affixing the Nigerian Bar Association seal or stamp by the appellant, I am afraid I

A cannot see the dichotomy between the appellant filing the process in his capacity as a legal practitioner and filing the same process and describing himself as Barr. Benjamin Wayo. Rule 10(1), (2) and (3) of the Rules of Professional Conduct, 2007 which became effective from 1st April, 2015
 B provide as follows:

C **“10(1) A lawyer acting in his capacity as a legal practitioner, legal officer or adviser of any governmental department Ministry or any Corporation, shall not sign or file a legal document unless there is affixed on any such document a seal and stamp approved by the Nigerian Bar Association.**
 D

E **(2) For the purpose of this rule “legal documents” shall include pleadings, affidavits depositions, applications, instruments, agreements, deeds, letters, memoranda, reports, legal opinions or any similar documents.**

F **(3) If without, requirements of this rule a lawyer signs or files any documents as defined in sub-rule 2 of this rule, and in any of the capacities mentioned in sub-rule (2), the document so signed or filed shall be deemed not to have been properly signed or filed”.**
 G

In his judgment in Yaki vs. Bagudu supra Onnoghen JSC (as he then was) explained the import of Rule 10(3) at pages 319-320 thus:

H ***“What sub-rule (3) supra is saying is that such non-compliance renders the document so signed or filed voidable that is why it is said that the document is deemed not to have been properly signed or filed”. In other words, the offending document/instrument can be remedied at any stage in the***
 I

A *proceedings by an application for and production and fixing*
of the seal It should be noted that the qualification to
B *practice law as a legal practitioner is as provided under the*
Legal Practitioners Act which includes being called to Bar
and enrolled at the Supreme Court of Nigeria as a legal
C *practitioner. It is that qualification that entitles a legal*
practitioner to sign any legal document either for filing in
Court of Law in a proceeding or otherwise”.

D The appellant in this appeal did not apply to regularise the documents
objected to; consequently the notice of appeal and appellant's brief have not
been properly filed. The preliminary objection therefore succeeds and this
appeal is struck out.

K. B. Akaahs
Justice, Supreme Court

E **PETER-ODILI, (JSC):** I am in total agreement with the judgment just
delivered by my learned brother, Kumai Bayang Akaahs and in support of
the reasonings, I shall make some comments.

F This is an interlocutory appeal against the ruling of the Court of
Appeal sitting in Makurdi, Benue State delivered on the 13th day of April
2016:

G **1. Matter that clothe the court with the jurisdiction to**
entertain a matter, and if it is whether the lower
H **court was right when it assumed jurisdiction in**
entertaining the application of the 1st respondent and
I **granting it when the evidence before the lower court**
clearly established that, the appellant was neither
served with the brief of argument nor the motion of
the 1st respondent before the lower court? (See
Grounds 2 & 3).

2. Whether or not the appellant was denied fair

- A** hearing, when the court heard and granted the application of the 1st respondent without ensuring that, the appellant was served, and when the said application itself was not ripe for hearing. (See Ground 1).
- B** Learned counsel for the 2nd respondent adopted its brief of argument filed on 4/1/17 and deemed filed on 8/2/17. He adopted the issues as crafted by the appellant.
- C** Musibau Adeunbi Esq. of counsel for the 3rd respondent adopted its brief of argument filed on 20/12/16 and deemed filed on 8/2/17. He identified a sole issue for the determination of the appeal which is as follows:
- D** **In the entire circumstances of this appeal, can it be lawfully and equitably contended that the honourable court below at all time material to this appeal did deprive the appellants herein the opportunity to be heard in Appeal No. CA/MK/16/2016 pending before her, such that it can be said that the ruling in issue did occasion a miscarriage of justice to the appellant herein.**
- E**
- F** It behoves the court to deal with the preliminary objection raised by the 1st respondent before anything else.

NOTICE OF PRELIMINARY OBJECTION:

- G** **TAKE NOTICE that the 1st respondent shall contend as a preliminary objection that this appeal is incompetent and ought to be struck out on the following grounds:**
- H** 1. **The Notice of Appeal being the originating process as well as the appellant Brief of Argument do not comply with Rule 10 (1) (2) and (3) of the Rules of professional Conduct, 2007 as well as the Legal Practitioners Act, 2004, Laws of the Federation of**
- I** **Nigeria.**

- A** **2. Grounds 1, 2, & 3 of the Notice and Grounds of Appeal are grounds of mixed law and fact, for which leave is required.**
- B** **3. Ground 2 of the Notice of Appeal and grounds of appeal did not arise from the decision of the Court of Appeal.**
- C** **4. Issues one and two distilled from the incompetent grounds are also incompetent and this Honourable Court lacks jurisdiction to entertain them.**

D Learned counsel for the 1st respondent/Objector contended that the appeal is incompetent and ought to be struck out for the reason that the Notice of Appeal as well as the appellant's brief of argument filed on 7th June, 2016 failed to comply with the mandatory provisions of Rule 10(1) (2) and (3) of the Rules of Professional Conduct, 2007.

E Also that grounds 1, 2, and 3 of the Notice of Appeal filed on 21st April, 2016 are grounds of mixed law and fact for which no leave of court was obtained and therefore incompetent as well as the two issues distilled therefrom.

F He stated further that Ground two of the Notice and Ground of Appeal did not arise from the decision of the Court of Appeal. He also called attention to the fact there is no stamp and seal of the Legal Practitioner who signed the Notice of Appeal and appellant's brief of argument. He cited **Yaki vs. Bayudu** (2015) 18 NWLR (Pt. 1491) 288.

G Learned counsel for the Objector further submitted that where a process as the one in issue is defective or cannot be legally acted upon by a court, the parties by their action, inaction or acquiescence cannot confer validity on same. He referred to **FRN vs. Uwagba** (2009) 15 NWLR (Pt. 11630) 91; **Okolo v UBA** (2004) 1 SCNJ 113; **Odia Investment Co. Ltd vs. Talabi** (1997) 7 SCNJ 600.

H That grounds 1, 2 and 3 of the Notice of Appeal and the two issues
I distilled therefrom are issues of mixed law and fact for which no leave was

- A** obtained either from the court below or the Supreme Court and so the notice of appeal lacks competence and the jurisdiction of the court ousted. He cited **KPT Ltd v G & H Nig Ltd** (2005) 13 NWLR (Pt. 943) 680; **Ojemeic vs. Momodu** (1983) 1 SCNLR 188 at 205; **Maigoro vs. Garba** (1999) 10 NWLR (Pt. 624) 555 at 568; **Akwiwu Motors Ltd vs. Sangonuga** (1984) 5 SC 184 at 188 etc.

- Alex Ejesieme of counsel contended that Ground 2 of the Grounds of Appeal did not arise from the decision of the court below and so the appellant cannot be heard on it. He relied on **Odom vs. PDP** (2015) 6 NWLR (Pt. 1456) 527 at 551. **Yet Pet Ind. Ltd vs. Cocoa Ind. Ltd** (2008) 13 NWLR (Pt. 1105) 486; **Ogbe vs. Asadu** (2009) 18 NWLR (Pt. 1172) 106' **Orwrio vs. Osain** (2012) 16 NWLR (Pt. 1329) 560; **Adeogwu vs. Fasogbo** (2011) 8 NWLR (Pt. 1250) 427 etc.

- Learned counsel for the appellant submitted that the matter of no service of requisite court process on parties is a jurisdictional issue and so can be raised at anytime and anyhow, without leave of court. He cited **E Elugbe vs. Omokaje** (2004) 18 NWLR (Pt. 905) 319 at 334.

- He stated on that the provisions of Order 2 Rule 6 is inapplicable to the present Appeal. That once an appeal is entered before the Supreme Court, the Court of Appeal ceases to have jurisdiction over the matter appealed against. He referred to **Ogunremi vs. Dada** (1962) 1 All NLR 663; **Ezoma vs. A.G. Bendel State** (1986) NWLR (Pt. 36) 448; **VAB Petroleum Inc vs. Momoh** (2013) LPELR-1977 SC.

- The salient part of this Preliminary Objection of the 1st respondent is that on the side of the Objector, the appeal is incompetent and ought to be struck out because the notice of appeal filed on the 21st of April, 2016 as well as the appellant's brief of argument filed on 7th June 2016 were not in compliance with the mandatory provisions of Rule 10 (1) (2) and (3) of the Rules of Professional Conduct, 2007. This being so as there is no stamp and seal of the Legal Practitioner who signed the notice of appeal, which is the originating process and the same defect on the appellant's brief of argument.

- I** The appellant counters that stand on the ground that the appellant cannot be said to be a lawyer acting in his capacity as a legal practitioner,

A legal officer or adviser of any governmental department of Ministry or any corporation. That the appellant, though a lawyer is a legislator, a member of the Federal House of Representatives of the Federal Republic of Nigeria and so ceased to act in his capacity as a legal practitioner and so the processes filed by the appellant cannot be said to be defective and caught by Rule 10 (1) (2) and (3) of the Rules of Professional Conduct, 2007. I shall quote the said Rule for guidance and it is thus:

C Rule 10(1), (2) and (3) of the Rules of Professional Conduct, 2007 provides thus:

D 1. “A lawyer acting in his capacity as a legal practitioner, legal officer or adviser of any governmental department of ministry or any corporation, shall not sign or file a legal document unless there is affixed on any such document a seal and stamp approved by the Nigeria Bar Association.

E 2. For the purpose of this rule “legal documents” shall include pleadings, affidavits, deposition, applications, instrument, agreements, deeds, letters, memoranda, reports, legal opinions or any similar documents.

F 3. If, without complying with the requirements of this rule a lawyer signs or files any legal documents as defined in sub-rule 2 of this rule, and in any of the capacities mentioned in sub-rule 2), the document so signed or filed shall be deemed not to have been properly signed or filed”.

G H The appellant's argument would have been debatable if the appellant had not signed the document, the notice of appeal in this way, **“Barr. B.I. Wayo”**. In doing so he put himself out as a lawyer acting in that capacity and therefore came within what this court had contextually interpreted the

A Rule 10 (3) of the said Code of conduct rules to mean a legal practitioner acting as such with the need for his stamp and seal to make the process and in this case the Notice of Appeal as properly filed. I am in effect referring to the case of **Yaki vs. Bagudu** (2015) 18 NWLR (Pt. 1491) 288.

B In that case, Onnoghen JSC (as he then was) stated at page 319 as follows:

C **“What sub-rule (3) supra is saying is that such non compliance renders the document so signed or filed voidable that is why it is said the document is “deemed not to have been properly signed or filed”. In other words the offending document/instrument can be remedied at any stage in the proceedings by an application for and production and fixing of the seal. That is what my Lord, Ngwuta, JSC meant by saying that the situation is like filing a document out of time which can be subsequently remedied”.**

I had with humility in support of the position stated at page 343 thus:

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 documents” which must be signed, stamped and sealed. Therefore, a notice of appeal not found with these components is an incompetent notice of appeal depriving the court of jurisdiction to determine the appeal on merit. This is within what was provided under the Legal Practitioner Act, 2004 (as amended) and Rules of Professional Conduct, Rule 10 (3)”.**

I Therefore the appellant not having done the needful by regularising the defective Notice of Appeal and the appellant's brief, the defect remained and since the processes were voidable and in view of the objection of the 1st

- A** respondent they remained defective and produced the incompetence of the appeal as being espoused by the 1st respondent. It follows that there is no way of wriggling out of the authority of **Yaki vs. Bagudu** (2015) 18 NWLR (Pt. 1491) 288 in which the Supreme Court had laid down what is to be in
- B** the event of a document filed by a legal practitioner without the legal seal and stamp of that practitioner.

The situation on ground clearly showing an appeal without a properly filed Notice of Appeal is incompetent and suffers the fate of having it struck out.

- C** From the foregoing and the better articulated lead judgment of my learned brother, Akaahs JSC I too see the merit in this Preliminary Objection which I uphold as I strike out the appeal.
- D** I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

- E** **CENTUS NWEZE, (JSC):** My Lord, Akaahs, JSC, obliged me with the draft of the leading judgment just delivered now. I abide with the consequential orders therein.

Chima Centus Nweze
Justice, Supreme Court

- F** **ADAMU AUGIE, (JSC):** I had a preview of the lead Judgment delivered by my learned brother Akaahs, JSC, and I agree with him that the objection raised by the first Respondent must be upheld. He explained the rationale for this decision, which I agree with completely.
- G**

The Appellant cannot argue that because he is a Member of the Federal House of Representatives, and has ceased to act in his capacity as a legal practitioner, the authority of **Yaki vs. Bagudu** (2015) 18 NWLR (Pt.

- H** 1491) 288, does not apply here. His argument totally lacks merit, and I also strike out his appeal.

Amina Adamu Augie
Justice, Supreme Court

I

**CORPORAL NICHOLAS OKOH
AND
NIGERIAN ARMY**

SC/487/2014

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

FRIDAY, 12TH DAY OF MAY, 2017

BEFORE THEIR LORDSHIPS

**MUSA DATTIJO MUHAMMAD
KUMAI BAYANG AKA'AHS
KUDIRAT M. O. KEKERE-EKUN
EJEMBI EKO
SIDI DAUDA BAGE**

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

APPEAL: Concurrent findings – Attitude of Supreme Court thereto.

APPEAL: Concurrent findings of fact – Where appellant challenges concurrent findings of fact on appeal – Onus thereon – How discharged.

COURT: Evaluation of evidence – Primary duty of a trial court – Whether the trial court has the primary duty of ascribing probative value to the evidence of a witness – Rationale thereof.

COURT: Findings of fact – When are the findings of fact of a court perverse – Circumstances thereof – Meaning of perversity.

COURT: Findings of fact – Where a trial court makes findings of fact – Whether there is a presumption though rebuttable that such findings are

correct.

CRIMINAL LAW: Rape – When is it committed – Relevant considerations thereof.

EVIDENCE: Proof – Where facts alleged are not denied – Whether such facts are deemed accepted and taken as established.

EVIDENCE: Where evidence is cogent, unchallenged, and uncontradicted – Whether court can rely on such evidence.

STATUTE: S. 77 of Armed Forces Act – Requirement of lack of consent as ingredient of offence of rape – Meaning of consent therein.

STATUTE: S.77 of Armed Forces Act – Requirement of consent – Whether where consent is required before an act, failure to obtain necessary consent renders the act invalid.

WORDS AND PHRASES: Carnal knowledge – Meaning

WORDS AND PHRASES: Consent – Meaning.

Issue for Determination

In view of the evidence on record, whether or not the decision of learned Justices of the Court of Appeal was perverse when they held that lack of consent which is an essential ingredient of rape was proved against the appellant and thereby caused a miscarriage of justice to the appellant?

Facts of the Matter

The appellant, at all material times, a soldier in the Nigerian Army was convicted for rape by the General Court Martial held at the 81 Division Finance Conference Hall Bonny Cantonment, Victoria Island, Lagos on 29th September,

2006. He was sentenced to 14 years imprisonment. The findings and sentence, in the Military norm, were later confirmed by the Chief of Army Staff.

The appellant's first instance appeal to the Court of Appeal was unanimously dismissed on 29th June, 2012. He has further appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *Onus on the appellant who challenges concurrent findings of fact*

This issue in its narrow perspective complains only that the concurrent findings of fact that the appellant's admitted sexual intercourse with the PW.1 without her consent, and thereby amounting to rape, was perverse. That puts the onus on the appellant to show why the concurrent findings of fact made by the courts below should be disturbed. See *Adekoya Vs. The State (2017) 1 SC (pt.11) 1*. The appellant, in the circumstance, must convince the appeal court that the findings of fact are perverse. The fossilized policy of appellate courts are that they loathe to interfere with findings of fact, more particularly, concurrent findings of facts by the trial and intermediate courts, unless the findings of fact are shown to be perverse, not supported by evidence or to have led to miscarriage of justice. (P 34 Paras F–H.)

2. *When is a decision of a court perverse?*

The sole issue formulated for the determination of this appeal rests on a single centre bolt, that is, that the finding was perverse. Now, when is a finding of fact perverse? Decisions of this Court are unanimous that the finding of fact of a court will be perverse where:

- (a) **It is speculative and runs counter to the available evidence;**
- (b) **Where the trial court took into consideration or account a matter which it ought not to have taken into account and shuts its eyes to the obvious.**

(c) **When it occasioned a miscarriage of justice”.**

See Atolagbe Vs. Shorun (1985) 1 NWLR (Pt.2) 360; Adimora Vs. Ajufo (1988) 3 NWLR (Pt.80) 1; Agbomeji Vs. Bakare (1998) 9 NWLR (Pt.564)1; Mini Lodge Ltd Vs. Ngei (2009) 18 NWLR (Pt.1173) 254 etc. (Pp 34–35 paras F–D.)

3. *There is a rebuttable presumption that the findings of fact of a court are correct*

As I proceed to consider the sole issue in this appeal I bear in mind the settled, but rebuttable, presumption that the finding of fact of the court of trial is correct. *See Bakare Vs. The State (1987) 1 NWLR (Pt.52) 579. (P 35 para D.)*

4. *The trial court has the primary duty of ascribing probative value to the evidence of a witness*

The primary duty of ascribing probative value to the evidence of a witness, after evaluation of the evidence, is that of the trial court which had the advantage of watching and hearing the witness as he/she testified. *See Kim Vs. The State (1992) 4 NWLR (pt. 233) 17; Sanusi Vs. Ameyogun (1992) 4 NWLR (pt 237) 527; Ukeje & Anor Vs. Ukeje (2014) LPELR 22724 SC. In this appeal, it is not the contention or the case of the appellant that there was no proper evaluation of the evidence before the trial court settled to preferring the evidence of the PW.1 to the evidence of the appellant on the issue of consent or the lack of it. The concurrent findings of fact on this issue of consent by the trial court and the court below, were arrived at upon proper evaluation of the evidence on it. The procedure for evaluation of evidence on any issue, before ascribing probative value to it, was laid out in *Odofin Vs. Mogaji (1978)11 SC 275 at 94 96. By this procedure the judge considers the totality of evidence of the parties on an issue. He puts the evidence on either side on an imaginary scale to see which side of the evidence outweighs the other on the imaginary scale. In coming to decision as to which evidence to**

believe or disbelieve he considers other factors, including whether the evidence was discredited by cross-examination, or whether even the other side made effort to challenge the evidence either by cross-examination, or by the presentation or adduction of a more powerful or cogent evidence to contradict the evidence against him.
(Pp 36–37 paras H–E)

Per Eko (JSC)

“The only issue for determination in this appeal is whether PW.1 gave her consent to the sexual intercourse the appellant, admittedly, had with her. On this, the prosecution must prove the physical resistance by the prosecutrix; or that the situation was such that she was not able to resist the physical assault on her or give her consent. *See R. Vs. Howard (1966) 1 WLR 13; (1966) 50 CR. APP. R 56.* There can be no consent in a situation where, even if she yielded, she did so for fear of some physical harm to her person. This will not be consent in law which had to be voluntary and free. Section 77, paragraphs (a), (b) and (c) of the Armed Forces Act are unequivocal on this. Consent obtained by force, by means of threat or intimidation, or by fear of harm, or by false or fraudulent representation as to the nature of the act is no consent in law.

Consent, in the context of Section 77 of the Armed Forces Act, is a noun. It means approval, assent, concurrent, permission, accord and acquiescence. In the same context also, consent must be previous to the act. it involves element of volition. As a voluntary agreement it means a deliberate and free act of mind. *See Afolabi & Ors. Vs. Adekunle & Ors (1983)14 SC 398. NWLR 470.* Thus, when it is induced by fraud or tricks, it is not a real consent.”

(P 39 paras C–G)

5. *Where consent is required, any act done before such consent is invalid*
See Babalola & Ors Vs. The State (1989)4 NWLR (pt 115) 264, where the 1st appellant and others obtained possession of eight (8) rolls of carpet by means of the bank drafts which they knew to be forged at the time they tendered it. As approval, permission, assent or acquiescence consent for sexual intercourse obtained by coercive force is a complete negation of the element of free volition and therefore not a real consent. Where consent must be first had and obtained before an act, it means that the act done before the necessary consent was had and obtained is invalid. See C.C.C.T.S Ltd. & Ors. Vs. Ekpo (2008) 6 NWLR (pt 1083) 362. In the same vein, under Section 77 of the Armed Forces Act, 2004, sexual intercourse without consent of the woman, or with an invalid consent is an unlawful sexual intercourse punishable as an offence of rape.
(Pp 39–40 Paras G–A)

Per Eko (JSC)

“The evidence of the PW.1, believed by the trial court and affirmed by the court below, has established her lack of consent to the sexual intercourse the appellant had with her. The court below was therefore right in holding that the appellant had sexual intercourse with the PW.1 without her consent. The PW.1's unassailable and undiscredited evidence also established paragraphs (a) and (b) of Section 77 of the Armed Forces Act 2004. That is the consent obtained by force or by means of physical harm and fear of further harm to her person.

In law, rape is committed when any man has unlawful carnal knowledge of a woman, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act of the act. See Iko Vs. The State (2001) 35 WRN 1 at 30; (2001) 14 NWLR (pt 732)

221 at 250 251.” (P 40 paras B–E)

6. *Facts not disputed nor denied are deemed accepted*

I noticed that the defence adopted a strategy of not frontally confronting the PW.1, under cross-examination, on her graphic narration of the struggles and the various acts of assault the appellant inflicted on her, including choking her, kicking her and hitting her head on the wall in order to subdue her resistance. The appellant, testifying as the DW.1, also did not join issues with the PW.1 on the specific acts of violence or force that he allegedly meted to the PW.1, as prelude to making her weak and tried to offer any resistance to the sex intercourse without her consent. He evaded the crucial aspects of the specific acts of violence that were the substance of PW.1's evidence. The law is settled that facts not disputed or challenged are deemed to have been admitted and are, therefore, taken as established: *See Ogolo Vs. Fubura (2003) 11 NWLR (pt.831) 231*. And if it is accepted that, by this implied or deemed admission the evidence of the PW.1 had not been discredited, then it follows that the trial court and the court below, in their concurrent findings of fact, relying on the evidence of PW.1, were right and, therefore, not perverse in their respective findings of fact, that the appellant had carnal knowledge of the PW.1, a woman aged 23 years then, without her consent. The evidence of PW.1, proving the lack of consent, or invalid consent, on her part was a credible evidence available to the two courts to act upon. The two courts cannot therefore, be said to have decided perversely in the circumstance. (Pp 40–41 paras I–E)

Per Eko (JSC)

“The court below (per John I, Okoro, JCA, as he then was) found on the evidence at the trial, and I agree, that the appellant had hatched a well-crafted plan to rape the PW.1. He lied, for instance, to PW.2 (PW.1's relation coming to stay with her that fateful night) that the

PW.1, was not at home. Even when PW.2 established phone contact with PW.1 the appellant and Cpl. Jonathan made sure that the gate was locked against PW.2, who on her further insistence, was scared off by Cpl. Jonathan's cocking of his gun. The PW.1, completely isolated by the predators, screamed and called Jonathan for rescue to no avail. All available facts point irresistibly to the determination of the appellant to have sexual intercourse with PW.1 with or without her consent or by force. And he did. He used force on the defenceless PW.1, overpowered her and had sexual intercourse with her.” (P 41 paras E–H)

7. *Decisions of the lower courts were not perverse*

The PW.1's evidence of the physical assault on her to neutralize her resistance establishes just one thing: the lack of her consent. The evidence, through her graphic narration, was cogent, unchallenged and uncontradicted. The law is settled: facts not disputed, contradicted or challenged are taken as established and the courts, as the two concurring courts below did, can act on such facts. I said so in *Odebunmi & Anor Vs. Oladimeji & Ors.* (2002) LPELR 15419 CA relying on *Odulaja Vs. Haddad* (1973) 11 SC 35. The uncontradicted and unchallenged evidence of the PW.1 was credible. The courts below were right, in my view, to have relied on it in finding that the PW.1 did not give her consent to the sexual intercourse the Appellant forcibly had with her.

I resolve the sole issue in favour of the respondent as the prosecutor. In view of the credible evidence on the records the decision of the learned justices of the Court of Appeal, in the appeal No. CA. 732/2009, was not perverse when they held that the PW.1 did not give her consent to the sexual intercourse the appellant had with her by sheer brute force. There has been no miscarriage of justice. None was established to warrant my interference with the said decision on the available evidence. (Pp 41–42 paras H–D.)

8. *Appeal is against concurrent finding where appellant failed to discharge onus*

This appeal is against concurrent findings of fact made by the lower court and the General Court Martial. The GCM as the court of first instance had the singular opportunity of seeing and hearing the witnesses testify, of observing their demeanour and evaluating the evidence before it.

The court below has affirmed the findings. In order to justify interference by this court, the appellant must show that the decision of the two courts are perverse, not based on evidence before the court, that the courts took extraneous matters into account or that there has been an error in law or procedure that has occasioned a miscarriage of justice. Where an appellate court has affirmed the findings of fact made by the trial court, the task of convincing this court to interfere is even more onerous. *See Ogunjumo Vs. Ademolu (1995) 4 NWLR (Pt.389) 254; Ibodo Vs. Enarofia (1980) 12 SC 195; Eholor Vs. Osayande (1992) 6 NWLR (pt. 249) 524; Yesufu Vs. Adama (2010) 5 NWLR (Pt.1188) 522. (Pp 43 – 44 paras G – B.)*

9. *The definition of carnal knowledge*

The Armed Forces Act does not define “*carnal knowledge*”. However, Black's Law Dictionary, 8th edition at page 226 defines “*carnal knowledge*” as follows:

“*Intercourse*” is defined at page 827 as:

“2. Physical contact especially involving the penetration of the vulva by the penis.”

Rape is unlawful sexual intercourse with a woman without her consent, forcibly and against her will or with her consent if the consent is obtained by force or by means of threat or intimidation of any kind, or by fear or harm or by means of false and fraudulent misrepresentation as to the nature of the act or in the case of a married woman by impersonating her husband. *See Posu Vs. The*

State (2011) 3 NWLR (Pt.1234) 393; Shuaibu Isa Vs. Kano State (2016) LPELR 40011 (SC); Lucky Vs. The State (2016) 5 6 SC 144; (2016) LPELR 40541 (SC); Iko Vs.. The State (2001) 7 SC (pt. II) 15; (2001) 14 NWLR (Pt. 732) 221. Thus, unlawful carnal knowledge constitutes rape. Lack of consent is an essential element of the offence. (P 44 paras B–F)

Per Kekere-Ekun (JSC)

“In this appeal, the fact that sexual intercourse took place between the appellant and the prosecutrix (PW1) is not in dispute. It is also not in dispute that she was an adult at the time the incident took place. The issue in contention was lack of consent. While the appellant claimed there was an amorous relationship between them and that the sexual intercourse was consensual, PW1 alleged that he forced himself on her. There was copious evidence before the General Court Martial, which it believed, that showed that what transpired on the day of the incident was carefully orchestrated to enable the appellant to forcefully have sexual intercourse with the prosecutrix without her consent.

The General Court Martial warned itself against relying solely on the evidence of the prosecutrix in this case. It rightly evaluated and ascribed probative value to the evidence of the prosecution witnesses, which corroborated the evidence of PW1 to the effect that by his actions and the surrounding circumstances, the appellant had planned to have sexual intercourse with her with or without her consent and did in fact do so forcefully and without her consent. The court also, having had the opportunity of seeing and hearing all the witnesses testify and of observing their demeanour, disbelieved the appellant's account. The trial court was justified in believing the uncontroverted evidence of PW3, the medical doctor who examined both PW1 and the appellant. He found bruises on the appellant inflicted by PW1 in the course of the struggle between them. He also

found evidence of forceful penetration of the vagina when he examined PW1. The court was also justified in accepting and believing the evidence of PW2 (a friend of PW1) as to how she was denied access into the premises on the day of the incident and told that PW1 was not at home even though they had recently spoken on the phone and PW1 had confirmed that she was at home. Her torn clothes were further corroboration of a struggle and lack of consent. The appellant was unable to convince the court below that the findings of fact were perverse. He has equally failed to do so before this court. No special circumstance has been shown to warrant the interference of this court with the concurrent findings of the two lower courts.” (Pp 44 – 45 paras F – F)

10. *Attitude of Supreme Court to concurrent findings*

The practice of this court is that where there is a concurrent finding of two lower courts, the Appeal Court hardly interferes with it except with exceptional circumstances.

In this appeal, in the absence of any exceptional circumstances, from the appellant, this court will not interfere with the decision of the lower courts.

See Amachukwu Vs. F.R.N (2009) 4 WCC; Asari Vs. State (2009) 4 WCC 199 Ebeneh Vs. State (2009) 4 WCC 58 Edwin Ezigbo Vs. The State (2012) 7 NCC Pg.426 Adwale Joseph Vs. The State (2012) 7 NCC Pg. 38. (P 46 paras B – D.)

Nigerian cases cited in this Judgment

Adekoya Vs. The State (2017) 1 SC (pt.11) 1;
Adimora Vs. Ajufo (1988) 3 NWLR (Pt.80) 1;
Adwale Joseph Vs. The State (2012) 7 NCC Pg. 38;
Afolabi & Ors. Vs. Adekunle & Ors (1983)14 SC 398;
Agbomeji Vs. Bakare (1998) 9 NWLR (Pt.564);
Amachukwu Vs. F.R.N (2009) 4 WCC;
Amaechi Vs. Inec (2007) 7 10 SC 172;
Asari Vs. State (2009) 4 WCC 199;

Atolagbe Vs. Shorun (1985) 1 NWLR (Pt.2) 360;
Babalola & Ors Vs. The State (1989)4 NWLR (pt 115) 264;
Bakare Vs. The State (1987) 1 NWLR (Pt.52) 579;
C.C.C.T.S Ltd. & Ors. Vs. Ekpo (2008) 1 -2 229; (2008) 6 NWLR (pt 1083) 362;
Ebeneh Vs. State (2009) 4 WCC 58;
Edwin Ezigbo Vs. The State (2012) 7 NCC Pg.426;
Eholor Vs. Osayande (1992) 6 NWLR (pt. 249) 524;
Ibodo Vs. Enarofia (1980) 5-7 SC 42;
Iko Vs. The State (2001) 35 WRN 1;
Kim Vs. The State (1992) 4 NWLR (pt. 233) 17;
Lucky Vs. The State (2016) 5 6 SC 144; (2016) LPELR 40541 (SC);
Minilodge Ltd Vs. Ngei (2009) 18 NWLR (Pt.1173) 254;
Mogaji Vs. Odofin (1974) 4 SC 91;
Odebunmi & Anor Vs. Oladimeji & Ors. (2002) LPELR 15419 CA;
Odulaja Vs. Haddad (1973) 11 SC 35;
Ogolo Vs. Fubura (2003) 11 NWLR (pt.831) 231;
Ogunjumo Vs. Ademolu (1995) 4 NWLR (Pt.389) 254;
Posu Vs. The State (2011) 3 NWLR (Pt.1234) 393;
Sanusi Vs. Ameyogun (1992) 4 NWLR (pt 237) 527;
Shuaibu Isa Vs. Kano State (2016) LPELR 40011 (SC);
Trustees, Apostolic Faith Mission Vs. James (1987) 3 NWLR (Pt.6) 56;
Ukeje & Anor Vs. Ukeje (2014) LPELR 22724 SC; and
Yesufu Vs. Adama (2010) 5 NWLR (Pt.1188) 522.

Foreign case cited in this Judgment

R. Vs. Howard (1966) 1 WLR 13; (1966) 50 CR. APP. R 56;

Nigerian statutes cited in this Judgment

The Armed Forces Act Section 77

Representations

Adekunle Ojo, (Esq.), for the appellant.

M.U Ibrahim, (Esq.), for the respondent.

- A EJEMBI EKO, JSC (Delivering the Lead Judgment):** The appellant, at all material times, a soldier in the Nigerian Army was convicted for rape by the General Court Martial held at the 81 Division Finance Conference Hall Bonny Cantonment, Victoria Island, Lagos on 29th September, 2006. He
- B** was sentence to 14 years imprisonment. The findings and sentence, in the Military norm, were later confirmed by the Chief of Army Staff.

The appellant's first instance appeal to the Court of Appeal (the court below) was unanimously dismissed on 29th June, 2012. He has further

C appealed to this court. The notice of appeal, filed on 17th July, 2004, has three (3) grounds of appeal raising complaints that substantially are questions of facts. From the grounds of appeal a sole issue was distilled for the determination of this appeal thus:

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E *“In view of the evidence on records, whether or not the decision of learned Justices of the Court of Appeal was perverse when they held that lack of consent which is an essential ingredient of rape was proved against the appellant and thereby caused a miscarriage of justice to the appellant”?*

- F** This issue in its narrow perspective complains only that the concurrent findings of fact that the appellant's admitted sexual intercourse with the PW.1 without her consent, and thereby amounting to rape, was perverse. That puts the onus on the appellant to show why the concurrent findings of
- G** fact made by the courts below should be disturbed. See **Adekoya Vs. The State (2017) 1 SC (pt.11) 1**. The appellant, in the circumstance, must convince the appeal court that the findings of fact are perverse. The fossilized policy of appellate courts are that they loathe to interfere with
- H** findings of fact, more particularly, concurrent findings of facts by the trial and intermediate courts, unless the findings of fact are shown to be perverse, not supported by evidence or to have led to miscarriage of justice.

I The sole issue formulated for the determination of this appeal rests on a single centre bolt, that is, that the finding was perverse. Now, when is a finding of fact perverse? Decisions of this Court are unanimous that the

A finding of fact of a court will be perverse where:

(d) **It is speculative and runs counter to the available evidence;**

B

(e) **Where the trial court took into consideration or account a matter which it ought not to have taken into account and shuts its eyes to the obvious.**

C

(f) **When it occasioned a miscarriage of justice”.**

See Atolagbe Vs. Shorun (1985) 1 NWLR (Pt.2) 360; Adimora Vs. Ajufo (1988) 3 NWLR (Pt.80) 1; Agbomeji Vs. Bakare (1998) 9 NWLR (Pt.564)1; Mini Lodge Ltd Vs. Ngei (2009) 18 NWLR (Pt.1173) 254 etc.

D

As I proceed to consider the sole issue in this appeal I bear in mind the settled, but rebuttable, presumption that the finding of fact of the court of trial is correct. *See Bakare Vs. The State (1987) 1 NWLR (Pt.52) 579;*

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Trustees, Apostolic Faith Mission Vs. James (1987) 3 NWLR (Pt.6) 56.

F

Appellant's counsel, Adekunle Ojo Esq., restates in the appellant's brief of argument, that from day one the appellant never denied the fact that he had sexual intercourse with the PW.1, the prosecutrix. The contention of the appellant, throughout, has been that he had sexual intercourse with the PW.1 with her consent. It is on this stance that the learned counsel submits for the appellant that the decision of the trial court, affirmed by the court below, that PW.1 did not consent to the sexual intercourse with the

G

appellant was perverse and this has led to miscarriage of justice. The issue of consent is a central element of the alleged rape criminalized by Section 77 of the Armed Forces Act Cap A20 LFN 2004. That is the offence the appellant was tried and convicted for. Section 77 of the Armed Forces Act

H

provides:

I

“A person subject to service law and who has unlawful carnal knowledge of a woman or girl without her consent or with her consent if obtained:

- A** **a) By force or by means of threat or intimidation of any kind; or**
- b) By fear of harm; or**
- B** **c) By means of false or fraudulent representation as to the nature of the act; or**
- d) In a case of a married woman, by personating her husband,**
- C**
- Is guilty of an offence and liable on conviction by the court-martial to imprisonment for a term not exceeding fourteen years or any punishment provided by the Act”.**
- D**

E The facts of this case, from the evidence of the PW.1` revolve round paragraph (a) and (b) of Section 77 of the Armed Forces Act. The evidence of the PW.1 is to the effect that the appellant used physical force on her, including struggling with her, felling her and choking her with his hands until she was breathless. Her evidence on this physical force to overpower her resistance or consent runs particularly from pages 41 through to 45 of the Records.

F The learned appellant's counsel submits that the prosecution must adduce cogent evidence to prove that the sexual intercourse the appellant had with the PW.1 was without her consent; and that such cogent evidence means evidence that is constraining, powerful, forcible, convincing and having power to compel assent. The learned counsel supports this submission with the decision of this Court in **Amaechi Vs. Inec (2007) 7 10 SC 172**. I agree entirely that a cogent evidence is one that is convincing, powerful and so forceful that it compels assent. The court below found and held that P.W1's evidence, on the vexed issue of lack of consent, was cogent and compelling.

G The primary duty of ascribing probative value to the evidence of a witness, after evaluation of the evidence, is that of the trial court which had the advantage of watching and hearing the witness as he/she testified. *See*

- A Kim Vs. The State (1992) 4 NWLR (pt. 233) 17; Sanusi Vs. Ameyogun (1992) 4 NWLR (pt 237) 527; Ukeje & Anor Vs. Ukeje (2014) LPELR 22724 SC.** In this appeal, it is not the contention or the case of the appellant that there was no proper evaluation of the evidence before the trial court
- B** settled to preferring the evidence of the PW.1 to the evidence of the appellant on the issue of consent or the lack of it. The concurrent findings of fact on this issue of consent by the trial court and the court below, were arrived at upon proper evaluation of the evidence on it. The procedure for
- C** evaluation of evidence on any issue, before ascribing probative value to it, was laid out in **Mogaji Vs. Odofin (1974) 4 SC 91 at 94 96.** By this procedure the judge considers the totality of evidence of the parties on an issue. He puts the evidence on either side on an imaginary scale to see
- D** which side of the evidence outweighs the other on the imaginary scale. In coming to decision as to which evidence to believe or disbelieve he considers other factors, including whether the evidence was discredited by cross-examination, or whether even the other side made effort to challenge
- E** the evidence either by cross-examination, or by the presentation or adduction of a more powerful or cogent evidence to contradict the evidence against him.

- The evidence of the PW.1, which the trial court and the court below
- F** believed in holding that the appellant had sexual intercourse with the PW.1 without her consent runs as follows: The already naked appellant knocked at PW.1's door asking for a torchlight. The particular house that night had no light. The PW.1 offered him the torchlight through her half opened door.
- G** PW.1 continues:

- H “In the process of taking the torchlight, he gripped me through the door. The door was half opened, as he gripped me, one of his hands was on my hips while the other crossed my shoulder. I tried to push him then he started struggling. At this point I was still holding my handset on my hand, but when I tried to make a call he hit me and collected the handset from me. All I could do was to scream and be calling Jonathan.***
- I**

- A - *At this point the struggle was at the passage at the door point. His two hands were on my neck trying to knock me down. I was screaming and he continued choking me. This time he was hitting me with his hands as well as his knees to*
- B *kick me. At a point I could not scream again and breath fine and this time the Jalabiya gown was torn in that same struggle. I bit him twice close to the shoulder. He slapped me. After that he removed the Jalabiya gown, cut my bra and*
- C *removed my jeans shorts I was wearing. All this was in the passage. All I could do was to call Jonathan. His two hands were still on my neck and he could not get proper hold of his balance so he then dragged me towards his room.*
- D - *[Asked whether she was still dressed] No I was naked. As he was dragging my back hair I was trying to hold the hair to my head. He then hit my head on the wall. He asked me to stop screaming. I then pleaded with him not to rape me. I was pleading because I have not done it before and secondly, I*
- E *thought he was my friend and I thought he was Oga Ore's friend too. He said you are still screaming. I pleaded with him I was trying to change him from doing or carrying out the*
- F *rape. He did not [listen to my plea]. The whole struggle continued. He said he was going to teach me the way of life. It was not easy to run out of that room because his back was on the door while my back was on the wall. He continued until I could not breathe and I dropped.*
- G *I was afraid at this point. He was beating me too. I could not struggle much because I was weak from the, chokehold. The beating continued for about five minutes. He choked me*
- H *until I dropped. He tried to have his way, but he could not it was the third time when I was weak then he was able to have his balance. He pushed me down. However, it was the third attempt that he finally succeeded and penetrated me*
- I *There was mat on the floor and the sex took place on the floor.*

- A** The cross-examination on this graphic narration was a mere trifling punch which achieved no tangible discredit of the PW.1 on the substance of her narration. It only made feeble efforts, without damage to PW.1's evidence, at finding out whether PW.1 wore pants, or was naked, and whether her
- B** jeans short nickers was torn. The PW1 remained resolute, and her evidence unscathed. On the whole on the evidence of this horrendous and vicious physical assault on PW.1 to overpower her resistance, the cross-examination of PW.1 by the defence was an abysmal failure.
- C** The only issue for determination in this appeal is whether PW.1 gave her consent to the sexual intercourse the appellant, admittedly, had with her. On this, the prosecution must prove the physical resistance by the prosecutrix; or that the situation was such that she was not able to resist the
- D** physical assault on her or give her consent. *See R. Vs. Howard (1966) 1 WLR 13; (1966) 50 CR. APP. R 56.* There can be no consent in a situation where, even if she yielded, she did so for fear of some physical harm to her person. This will not be consent in law which had to be voluntary and free.
- E** Section 77, paragraphs (a), (b) and (c) of the Armed Forces Act are unequivocal on this. Consent obtained by force, by means of threat or intimidation, or by fear of harm, or by false or fraudulent representation as to the nature of the act is no consent in law.
- F** Consent, in the context of Section 77 of the Armed Forces Act, is a noun. It means approval, assent, concurrent, permission, accord and acquiescence. In the same context also, consent must be previous to the act. it involves element of volition. As a voluntary agreement it means a
- G** deliberate and free act of mind. *See Afolabi & Ors. Vs. Adekunle & ORS (1983) All NWLR 470.* Thus, when it is induced by fraud or tricks, it is not a real consent. *See Babalola & Ors Vs. The State (1987) NWLR (pt 115) 264,* where the 1st appellant and others obtained possession of eight (8) rolls
- H** of carpet by means of the bank drafts which they knew to be forged at the time they tendered it. As approval, permission, assent or acquiescence consent for sexual intercourse obtained by coercive force is a complete negation of the element of free volition and therefore not a real consent.
- I** Where consent must be first had and obtained before an act, it means that the act done before the necessary consent was had and obtained is invalid.

- A** See **C.C.C.T.S Ltd. & Ors. Vs. Ekpo (2008) 1 -2 229; (2008) 6 NWLR (pt 1083) 362**. In the same vein, under Section 77 of the Armed Forces Act, 2004, sexual intercourse without consent of the woman, or with an invalid consent is an unlawful sexual intercourse punishable as an offence of rape.
- B** The evidence of the PW.1, believed by the trial court and affirmed by the court below, has established her lack of consent to the sexual intercourse the appellant had with her. The court below was therefore right in holding that the appellant had sexual intercourse with the PW.1 without her consent. The PW.1's unassailable and undiscredited evidence also established paragraphs (a) and (b) of Section 77 of the Armed Forces Act 2004. That is the consent obtained by force or by means of physical harm and fear of further harm to her person.
- C**
- D** In law, rape is committed when any man has unlawful carnal knowledge of a woman, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act of the act. See **Iko Vs. The State (2001) 35 WRN 1 at 30; (2001) 14 NWLR (pt 732) 221 at 250 251**.
- E** The Learned counsel for the appellant seems to have made some misleading submissions on whether the PW.1 was wearing her jeans short knickers at the material time. In one breath the learned counsel submitted that the court below was perverse in their conclusion that the jeans shorts “is khaki in nature and hard to tear except with the help of a razor or scissors”. In another breath, the learned counsel submitted that the evidence of “the appellant that the PW.1 wore a Jeans and sleeveless shirt was more plausible”. This submission was completely oblivious of the admission of the appellant, at page 129 of the Record, that the PW.1 accepted that he (the appellant) should make love to her and he “then pulled her dress and she was naked”. The only difference between the appellant and PW.1 on this, is that while the PW.1 maintained that the appellant forcefully removed her jeans shorts and she was naked, the appellant avers that he removed the Jeans shorts or her dress at her instance.
- F**
- G**
- H**
- I** I noticed that the defence adopted a strategy of not frontally confronting the PW.1, under cross-examination, on her graphic narration of

- A** the struggles and the various acts of assault the appellant inflicted on her, including choking her, kicking her and hitting her head on the wall in order to subdue her resistance. The appellant, testifying as the DW.1, also did not join issues with the PW.1 on the specific acts of violence or force that he
- B** allegedly meted to the PW.1, as prelude to making her weak and tried to offer any resistance to the sex intercourse without her consent. He evaded the crucial aspects of the specific acts of violence that were the substance of PW.1's evidence. The law is settled that facts not disputed or challenged are
- C** deemed to have been admitted and are, therefore, taken as established: *See Ogolo Vs. Fubara (2003) 11 NWLR (pt.831) 231*. And if it is accepted that, by this implied or deemed admission the evidence of the PW.1 had not been discredited, then it follows that the trial court and the court below, in
- D** their concurrent findings of fact, relying on the evidence of PW.1, were right and, therefore, not perverse in their respective findings of fact, that the appellant had carnal knowledge of the PW.1, a woman aged 23 years then, without her consent. The evidence of PW.1, proving the lack of consent, or
- E** invalid consent, on her part was a credible evidence available to the two courts to act upon. The two courts cannot therefore, be said to have decided perversely in the circumstance.

- The court below (per John I, Okoro, JCA, as he then was) found on
- F** the evidence at the trial, and I agree, that the appellant had hatched a well-crafted plan to rape the PW.1. He lied, for instance, to PW.2 (PW.1's relation coming to stay with her that fateful night) that the PW.1, was not at home. Even when PW.2 established phone contact with PW.1 the appellant and
- G** Cpl. Jonathan made sure that the gate was locked against PW.2, who on her further insistence, was scared off by Cpl. Jonathan's cocking of his gun. The PW.1, completely isolated by the predators, screamed and called Jonathan for rescue to no avail. All available facts point irresistibly to the
- H** determination of the appellant to have sexual intercourse with PW.1 with or without her consent or by force. And he did. He used force on the defenceless PW.1, overpowered her and had sexual intercourse with her.

- The PW.1's evidence of the physical assault on her to neutralize her
- I** resistance establishes just one thing: the lack of her consent. The evidence, through her graphic narration, was cogent, unchallenged and

A uncontradicted. The law is settled: facts not disputed, contradicted or challenged are taken as established and the courts, as the two concurring courts below did, can act on such facts. I said so in **Odebunmi & Anor Vs. Oladimeji & Ors. (2002) LPELR 15419 CA** relying on **Odulaja Vs.**

B Haddad (1973) 11 SC 35. The uncontradicted and unchallenged evidence of the PW.1 was credible. The courts below were right, in my view, to have relied on it in finding that the PW.1 did not give her consent to the sexual intercourse the Appellant forcibly had with her.

C I resolve the sole issue in favour of the respondent as the prosecutor. In view of the credible evidence on the records the decision of the learned justices of the Court of Appeal, in the appeal No. CA. 732/2009, was not perverse when they held that the PW.1 did not give her consent to the sexual

D intercourse the appellant had with her by sheer brute force. There has been no miscarriage of justice. None was established to warrant my interference with the said decision on the available evidence.

E The appeal is hereby dismissed. The decision of the court below affirming the conviction and sentence of the appellant by the General Court Martial, which conviction and sentence had been confirmed by the Chief of Army Staff, as Military law demands, is hereby affirmed.

F **Ejembi Eko**
Justice, Supreme Court

BAYANGAKAAHS (JSC): I read before now the judgment of my learned brother Ejembi Eko JSC dismissing the appeal. I too agree. There are two concurrent findings of fact made by the Court Martial and the court

G below that the appellant had sexual intercourse with PW1 without her consent. He admitted having intercourse with PW1, the Prosecutrix. The sentence of 14 years imprisonment for rape passed on him by the Court Martial was confirmed by the Chief of Army Staff and the Court of Appeal

H dismissed the appeal and affirmed the conviction.

I I find nothing perverse in the findings of the two courts below. Accordingly this appeal lacks merit and deserves to fail. It is hereby dismissed.

K. B. Akaahs
Justice, Supreme Court

A KEKERE-EKUN, JSC: The appellant herein, being a person subject to service law was arraigned before the General Court Martial held at 81 Division, Victoria Island, Lagos on a single count of unlawful carnal knowledge punishable under Section 77(a) of the Armed Forces Act, Cap

B 20 Laws of the Federation of Nigeria (LFN), 2004. The appellant was alleged to have had unlawful carnal knowledge of one Miss Joy Member Agugu on or about 7th August 2006 at No. 26 Cooper Road, Ikoyi Lagos. He pleaded not guilty of the charge.

C The prosecution called four witnesses, including the prosecutrix who testified as PW1. The appellant testified on his own behalf. The General Court Martial (GCM) found him guilty as charged and sentenced him to 14 years imprisonment. The Chief of Army Staff confirmed the conviction and

D sentence on 8/11/2007. His appeal to the Court of Appeal, Lagos Division was dismissed on 29/6/2012. He is still aggrieved and has thus further appealed to this court.

E The sole issue formulated by the appellant for the determination of this appeal is as follows:

F *“In view of the evidence on record whether or not the decision of the learned Justices of the Court of Appeal was perverse when they held that lack of consent which is an essential ingredient of rape was proved against the appellant and thereby caused a miscarriage of justice to the appellant.”*

G This appeal is against concurrent findings of fact made by the lower court and the General Court Martial. The GCM as the court of first instance had the singular opportunity of seeing and hearing the witnesses testify, of

H observing their demeanour and evaluating the evidence before it.

I The court below has affirmed the findings. In order to justify interference by this court, the appellant must show that the decision of the two courts are perverse, not based on evidence before the court, that the courts took extraneous matters into account or that there has been an error in law or procedure that has occasioned a miscarriage of justice. Where an

A appellate court has affirmed the findings of fact made by the trial court, the task of convincing this court to interfere is even more onerous. *See Ogunjumo Vs. Ademolu (1995) 4 NWLR (Pt.389) 254; Ibodo Vs. Enarofia (1980)12 SC 195; Eholor Vs. Osayande (1992) 6 NWLR (pt. 249) 524; Yesufu Vs. Adama (2010) 5 NWLR (Pt.1188) 522.*

B The Armed Forces Act does not define “*carnal knowledge*”. However, Black's Law Dictionary, 8th edition at page 226 defines “*carnal knowledge*” as follows:

C

“Intercourse” is defined at page 827 as:

“2. Physical contact especially involving the penetration of the vulva by the penis.”

D

Rape is unlawful sexual intercourse with a woman without her consent, forcibly and against her will or with her consent if the consent is obtained by force or by means of threat or intimidation of any kind, or by fear or harm or by means of false and fraudulent misrepresentation as to the nature of the act or in the case of a married woman by impersonating her husband. *See Posu Vs. The State (2011) 3 NWLR (Pt.1234) 393; Shuaibu Isa Vs. Kano State (2016) LPELR 40011 (SC); Lucky Vs. The State (2016) 5 6 SC 144; (2016) LPELR 40541 (SC); Iko Vs.. The State (2001) 7 SC (pt. II) 15; (2001) 14 NWLR (Pt. 732) 221.* Thus, unlawful carnal knowledge constitutes rape. Lack of consent is an essential element of the offence.

E

In this appeal, the fact that sexual intercourse took place between the appellant and the prosecutrix (PW1) is not in dispute. It is also not in dispute that she was an adult at the time the incident took place. The issue in contention was lack of consent. While the appellant claimed there was an amorous relationship between them and that the sexual intercourse was

G

consensual, PW1 alleged that he forced himself on her. There was copious evidence before the General Court Martial, which it believed, that showed that what transpired on the day of the incident was carefully orchestrated to enable the appellant to forcefully have sexual intercourse with the prosecutrix without her consent.

H

I

A The General Court Martial warned itself against relying solely on the evidence of the prosecutrix in this case. It rightly evaluated and ascribed probative value to the evidence of the prosecution witnesses, which corroborated the evidence of PW1 to the effect that by his actions and the

B surrounding circumstances, the appellant had planned to have sexual intercourse with her with or without her consent and did in fact do so forcefully and without her consent. The court also, having had the opportunity of seeing and hearing all the witnesses testify and of observing

C their demeanour, disbelieved the appellant's account. The trial court was justified in believing the uncontroverted evidence of PW3, the medical doctor who examined both PW1 and the appellant. He found bruises on the appellant inflicted by PW1 in the course of the struggle between them. He

D also found evidence of forceful penetration of the vagina when he examined PW1. The court was also justified in accepting and believing the evidence of PW2 (a friend of PW1) as to how she was denied access into the premises on the day of the incident and told that PW1 was not at home even

E though they had recently spoken on the phone and PW1 had confirmed that she was at home. Her torn clothes were further corroboration of a struggle and lack of consent. The appellant was unable to convince the court below that the findings of fact were perverse. He has equally failed to do so before

F this court. No special circumstance has been shown to warrant the interference of this court with the concurrent findings of the two lower courts.

G For these and the more elaborate reasons well edumbrated in the lead judgment of my learned brother, EJEMBI EKO, JSC, I find no merit in this appeal. It is accordingly dismissed. The judgment of the lower court is affirmed.

Appeal dismissed.

H

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

I **DAUDA BAGE (JSC):** My learned brother Ejembi Eko, JSC, availed me with a copy of judgment just delivered in draft form, I agree with the reasoning and conclusion therein. I will add a few words of my own.

A The appellant was convicted for rape by the General Court Martial and was sentenced to 14 years imprisonment. The finding and sentence of which was confirmed by the Chief of Army Staff.

B The lower Court in its judgment dated 29th June, 2012 dismissed the appeal and affirmed the judgment of the general court martial.

The practice of this court is that where there is a concurrent finding of two lower courts, the Appeal Court hardly interferes with it except with exceptional circumstances.

C In this appeal, in the absence of any exceptional circumstances, from the appellant, this court will not interfere with the decision of the lower courts.

D *See Amachukwu Vs. F.R.N (2009) 4 WCC Asari Vs. State (2009) 4 WCC 199 Ebeneh Vs. State (2009) 4 WCC 58 Edwin Ezigbo Vs. The State (2012) 7 NCC Pg.426; Adwale Joseph Vs. The State (2012) 7 NCC Pg.38.*

E For the more detailed reasoning in the lead Judgment, the judgment of the lower court is hereby affirmed by me. The sentence and conviction of the appellant is also affirmed by me.

Sidi Dauda Bage
Justice, Supreme Court

F

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**DR. SAMUEL U. ISITOR
AND
MRS. MARGARET FAKORADE**

SC. 364/2007

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

FRIDAY, 12TH MAY, 2017

BEFORE THEIR LORDSHIPS

**IBRAHIM TANKO MUHAMMAD
MARY UKAEGO PETER-ODILI
KUMAI BAYANG AKA' AHS
AMINA ADAMU AUGIE
EJEMBI EKO**

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

APPEAL: Fresh issues – When cognizable by an appellate court – General principles thereof.

APPEAL: Ground of appeal – Waiver – When appellant can validly waive a ground of appeal – Implication thereof.

APPEAL: Raising of fresh point – Conditions thereof.

COURT: Appellate Court – Jurisdiction – Whether has no Jurisdiction to delve into a matter not placed before it.

COURT: Court of Appeal – Source of power and Jurisdiction – Whether can properly adjudicate on grounds of appeal before it – Whether the Court of appeal cannot commit an error on a ground not before it.

COURT: Supreme Court – Jurisdiction – S. 233 of CFRN 1999 (as amended) – Whether does not have Jurisdiction to take appeals directly on decisions of High Courts.

EVIDENCE: Estoppel by conduct – S. 169 of Evidence Act, 2011 – Nature, purport and application.

LEGAL PRACTITIONERS: Error of Counsel – The error of Counsel should not be visited on litigant – Rationale therefore – Whether there are exceptions thereto.

LEGAL PRACTITIONERS: Mistake of Counsel – The general rule that error of Counsel cannot be visited on the litigant – Exceptions thereto – Whether failure of tactics or strategy of counsel is excluded therefrom.

*PRACTICE AND PROCEDURE: Failure to appeal – Where a party affected fails to appeal on any decision of court on law or fact – Effect – Whether he is deemed to have accepted therewith – Principles in **APGA Vs. Senator Christiana N. D. Anyanwu & Ors (2014) LPELR 20213 SC.***

WORDS AND PHRASES: Elected – Meaning.

Issue for Determination

Whether the appellant has placed sufficient materials before the court upon which the court could exercise her discretion in granting the orders sought.

Facts of the Matter

On 27th February, 2017, the motion filed on 5th October, 2016, by the appellant/applicant was argued. On 19th January, 2016, a similar motion filed on 18th November, 2014, was dismissed “having been argued before being withdrawn”. The motion filed on 18th November, 2014 and dismissed on 19th

January, 2016, and the instant motion are *ipssimaverba*. The order dismissing the said motion filed on 18th November, 2014 is contained in the respondent's Exhibit E.

The instant motion, like its 18th November, 2014 precursor, has the following prayers

- “1. An order of this honourable court granting leave and permission to the appellant to raise for the first time fresh issues as follows:**
 - a. The failure of the appellant to obtain the prior consent and approval of the respondent before entering into the subject property and developing same;**
 - b. The issue whether the respondent constitutes a person or other legal authority whose consent the appellant ought to obtain in the process of the alienation or development of the property;**
 - c. The validity of the affidavit of service which was not supported by the enrolled order of the trial court;**
 - d. Lack of jurisdiction.**
- 2. An order of this honourable court enlarging and extending the time within which the appellant will file additional grounds of appeal on mixed law and facts.**
- 3. An order of this honourable court granting leave to the appellant to file additional grounds of appeal on mixed law and facts.**
- 4. An order of this honourable court granting leave to**

the appellant to amend his original grounds of appeal as contained in the notice of appeal already filed by the inclusion of additional grounds of appeal on mixed laws and facts.

- 5. An order of this honourable court granting leave to the appellant to amend his original notice of appeal already filed by the addition of three (3) additional grounds of appeal in the following manner.**

a. GROUND ONE

The learned Justices of the Court of Appeal erred in the law in affirming the decision of the trial court without considering the matter of the authority of the respondent to grant consent to the appellant in respect of the property in dispute, thereby occasioning miscarriage of justice.

PARTICULARS OF ERROR

- i. The court below granted all the reliefs sought by the respondent which includes the declaration that; “A declaration that the defendant in entering into and continuing the erection of structures on the property of the plaintiff No. R.27, Girajabdulwahab Road, Mando Kaduna without the consent of the plaintiff constitutes trespass”.**
- ii. The respondent is not a recognized institution or authority with power to grant consent.**
- iii. The title of the subject property was neither registered in the respondent's name nor was the respondent in possession of same at any time.**
- iv. There is no record of the name of the respondent on any**

record of the subject land.

b. GROUND TWO

The court below misdirected itself in law in affirming the judgment of the trial court which was premised on declaratory claims that were not established by evidence in the trial court thereby occasioning miscarriage of justice.

PARTICULARS OF ERROR

- i. There is no evidence of the respondent's certificate of occupancy or any registered title document of respondent.**
- ii. There is no evidence or fact before the court below that the respondent is an authority or person whose consent ought to be sought as she is neither a constituted authority nor the registered title holder.**
- iii. In affirming the decision of the trial court the Court below did not consider the fact that the respondent is not an established authority for purposes of consent.**
- iv. In affirming the decision of the trial court the court below did not avert its mind to the fact the issue or question of the authority of the respondent over the subject land was not considered.**
- v. There was nothing before the court below to show that the property was registered in the respondent's name.**
- vi. The facts and evidence before the court below show that the respondent only made claims to portion of a different Plot R.26, Giraj Abdulwahab Street, and not R.27, the subject of the appeal.**

c. GROUND THREE

The learned justices of the Court of Appeal erred in law in affirming the decision of the trial court which was a nullity *ab initio* as the affidavit of service upon which the trial court justified the service of the processes of trial court on the Appellant was invalid, thereby rendering the proceedings in the trial court incompetent and the court below without jurisdiction.

PARTICULARS OF ERROR

- i. In affirming the decision of the trial court, the court below did not avert its mind to the fact that the affidavit of service upon which the trial court justified the service of the processes of the trial court on the appellant was invalid.**
- ii. The court below did not consider or determine whether mere affidavit of service without more suffices to justify actual service of the processes of the trial court effected by substituted means.**
- iii. The court below did not avert its mind to the fact that the affidavit of service in proof of the service of processes of the trial court was not supported by duly enrolled order of the trial court.**
- iv. The court below did not consider the validity or otherwise of the 'Affidavit of service' upon which the trial court justified the service.**
- v. The court below fell into error in affirming the judgment of the trial court which was given without jurisdiction, as the proceedings of the trial court was ab**

- initio a nullity as a result of invalid affidavit of service.**
- vi. It is now trite that failure of proof of service robs a court of law its jurisdiction and renders any trial thereof a nullity.**
- 6. Leave of this honourable court to raise and argue issues of mixed law and facts.**
- 7. An order granting leave to the appellant to withdraw his brief of argument dated the 5th day of January, 2008 and substitute same with the proposed brief of argument herein attached to this motion.**
- 8. An order of this honourable court deeming as properly filed and serviced the Appellant's amended notice of appeal which has been separately filed, appropriate fees having been paid.**

AND FURTHER TAKE NOTICE that the appellant will rely on the affidavit sworn to by Patrick Ojekalyaji Esq. and the following documents:

- a) The proposed amended notice and grounds of appeal.**
- b) Proposed amended appellant's brief of argument consisting of issues arising from the original and additional grounds of appeal.**

GROUND OF APPLICATION

- i) That the new grounds of appeal and the fresh issues raised impact fundamentally on the totality of this appeal, most especially as they touch on jurisdiction.**
- ii) That all the facts necessary for adjudication in respect of these new issues and grounds herein raised are already**

in compiled records of appeal before this honourable court. No new or fresh evidence will be required howsoever and whatsoever, outside the compiled record of appeal in this appeal”.

The application is supported by an affidavit, wherein, it was averred in paragraphs 4,5,6 and 8 thereof that the learned counsel to the appellant/applicant, had elected not to appeal or challenge the judgment of the trial court that dismissed the issue of the invalid service of the court process and validity of the affidavit of service.

Held: *(Unanimously dismissing the application)*

1. *Failure to appeal avail a result of failed strategy of counsel*

The learned counsel to the appellant/applicant admits in the supporting affidavit that “he had reasoned that (upon the other substantial grounds of appeal) the grounds of appeal as contained in the original notice of appeal were sufficient to secure reversal of the judgment of the trial court”. This is an admitted failed strategy. The learned counsel further admitted his failed strategy in paragraphs 6 and 7 of the supporting affidavit-

“6. *That he did not raise the issues of the failure of the appellant to obtain the said consent of the respondent and the invalidity of the affidavit of service upon which the service of the processes of the trial court was justified.*

7. *That the failure to raise the subject of the additional grounds of appeal timeously due entirely to his inadvertence and error of judgment”.*

It is crystal clear to me, from the supporting affidavit, particularly when the averment in paragraphs 5, 6, and 8 thereof are juxtaposed, that as a result of the failed tactics or strategy of the

- appellant/applicant's own counsel. (Pp 91 – 92 paras F – B)**
2. *Rationale for the rule not to visit error of counsel on litigant*
The rule: that error of counsel should not be visited on his client, the litigant, is informed by the court's desire to do substantial justice by considering the case on its merits rather than sticking to unnecessary technicality. A.G.Bendel State Vs. Aideyan (1989) 4 NWLR (pt.118) 646. And that courts leaning towards accommodating the parties' interest without allowing mere procedural irregularities, brought about by counsel, should not preclude the determination of a case on its merits: Ibodo Vs. Enarofia (1980) 5 – 7 SC 42. For this rule, like every other rule, there are exceptions. (P 72 paras F – H)
3. *Exceptions to the rule that error of counsel should not be visited on the litigant*
Only genuine mistakes or inadvertence of the counsel are remedied by the court under this rule, as can be seen from Akabi Vs. Alao (1989) ALL NLR 4242. Ineptitude or strategic blunders which are not envisaged by this rule cannot apply to foist injustice on another party: Onyemelukwe Vs. N.A.C.C (1995) 4 NWLR (pt.381) 44 at 56. When error of counsel is pleaded to remedy a situation caused by counsel, there must always be a clear distinction between mere mistakes or inadvertence of one hand, and sheer carelessness or failure of strategy or tactics on the other. While the latter does not attract the sympathy of the court; the former, dictated by the rule that equity follows the law and is always on hand to mitigate or mellow down the harshness of strict application or operation of the rules of court, does avail a party whose counsel has committed genuine mistakes or errors.(Pp 72 – 73 paras H – C)

Per Eko (JSC)

“The only conclusion available from the totality of paragraphs 4, 5,

6 and 8 of the supporting affidavit is that what the learned counsel for the appellant/applicant calls “inadvertence or error of judgment” on his part is nothing but failure of strategy or tactic, which goes to the merit of the appeals either at the court below or here. This court has made the point loud and clear in Nwafor Elike Vs. Nwankwoala (1984) ANLR 505, that the rule cannot be used to rectify strategic blunders committed by counsel in the cause of litigation, as the learned Appellant's counsel did in this case. A counsel, once properly briefed, takes full charge of the case as regards the manner of conducting the case, including the strategies thereby. It is for this reason that counsel cannot, in case of failed strategies, take shelter under the omnibus claim of inadvertence or negligence. If the strategy the counsel adopted works, he takes full credit. And if strategy fails he must also take full blame or responsibility with equanimity: Akanbi Vs. Alao (supra) at pp 440 – 401, 444. See also Kolawole Vs. Alberto (1989) ANLR 137 at 151. The own-goal rule in soccer, by way of analogy, also applies in adjudication. An own-goal is not cancelled because the player, in error of judgment, played the round ball to his own net. Accordingly, by failure of strategy the adverse party is entitled to the advantage created thereby.

Appellant/applicant's counsel has admitted in paragraphs 5, 6 and 7 of the supporting affidavit that he elected not to challenge the judgment of the trial court in the appeal of the court below. On the issue of improper service which, allegedly, deprived the trial court of its procedural jurisdiction, and the consent of the respondent, - issues which he now wants to raise in this Court in the 3 additional grounds of appeal, learned counsel elected not to appeal after the trial. He made election believing, as he is entitled to his own sound judgment of the law, that the other substantial grounds of appeal would avail him and ensure his victory at the Court of Appeal.”
(Pp 73 – 74 paras C – B)

4. *Implication where an appellant waives a ground of appeal*

This clearly is a case of waiver of a legitimate right in law. Any appellant can waive a ground of appeal or elect not to pursue his appeal on any ground of appeal. This right is recognized in law as affirmed by this Court in *Ariori Vs. Elemu* (1983) 1 SC. 13.

The appellant/applicant will not be allowed to appobate and reprobate on these 3 additional Grounds of Appeal that he elected not to attack or challenge the decision of the trial court on at the court below. He is estopped, on the principle of estoppel by conduct, from the reneging or resiling from that election. (P 74 Paras B–D)

5. *The nature and purport of S. 169 of Evidence Act, 2011*

Section 169 of the Evidence Act, 2011, on this estoppel by conduct provides *inter alia* that when one person has, either upon an existing court judgment, or by his act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceeding between him and such person or such person's representatives in interest, to deny the truth of thing. The truth of the matter is that the appellant, through his counsel, had elected not to appeal on the three issues they now want to revive. I had earlier alluded to the admission in paragraphs 4, 5, 6, 7 and 8 of the supporting affidavit to the effect that it was a deliberate election or decision of the appellant's counsel not to challenge the trial court's decision on the issues raised by the 3 Additional Grounds of Appeal that caused “the court not (to) have opportunity to consider the issues of consent and validity of the affidavit of service as contained in the proposed “Additional Grounds of Appeal”. It will now be materially contradictory on his part to complain, as he does, in the 3 Additional Grounds of Appeal that the Court of Appeal erred in law or misdirected itself in law in not considering those same issues he had tactfully dribbled them from

seeing and considering. I do not think it would be fair to criticize the learned Justices of the Court of Appeal over their decision on any issue that was not before them for the determination of the appeal. See Adeleke Vs. Asherifa (1990) 3 NWLR (Pt.136) 94. (Pp 74–75 paras C–A)

6. *Jurisdiction and power of the Court of Appeal*

The Court of Appeal, and the justices of that court, derived their jurisdiction from the Constitution. They are all set upon the law. The grounds of appeal, from which issues for determination of each appeal are derived, determine the jurisdiction of that court in a given appeal. Neither the court, nor the justices of the court, formulate the grounds of appeal from which issue for the determination of the appeal are distilled. The appeal court has no jurisdiction, albeit power, to delve into any issue in respect of which there is no appeal; Udom Vs. E. Mitcheleti & Sons (1997) 8 NWLR (pt.516) 187; Adeyemi Vs. Olakunri (1999) 14 NWLR (pt.638) 204.

The 3 Additional Grounds of Appeal do not flow directly from the decision of the court below, and they should. The proposed additional grounds of appeal seem to tell a lie about themselves if they purport to be, each, a complaint against the decision of the court below. They are clearly not. The dilemma, if not quagmire, the appellant, the appellant/applicant's counsel has found himself can only be imagined. (P 75 paras A–E).

7. *Supreme Court has no jurisdiction to take appeals from High Courts*

Let me add: this Court, by dint of Section 233 of the 1999 Constitution, as amended, can only take appeals from the decision of the Court of Appeal. It does not have jurisdiction to entertain appeals direct from the decision of the High Court.

The respondent seems to argue that the 3 additional grounds of appeal do not raise fresh issues, since those issues were canvassed at, and dismissed by, the trial court. He misses the point. They are

fresh issue because they were not issues canvassed at, and determined by, the Court of Appeal. Appeals to this Court lie from the decision of the Court of Appeal by dint of Section 233 of the Constitution. The appellant is seeking to raise and argue those issues in this court as fresh issues, the said issues having not been decided upon by the court below as they were not raised and argued at the court below.

I have read paragraph 4(v), (vi), (vii), (xi), (xii) and (xiii) of the counter affidavit. I agree, as submitted for the respondent, that the conduct of the appellant is quite undeserving of the Indulgence sought by this application. The appellant's counsel seems to be using these erroneous antics, as a filibuster, to delay the hearing and determination of the appeal that has been on cause list since 2007. (Pp 75 – 76 paras E – A)

8. *A party who failed to appeal on any decision on law or fact is deemed to have accepted same*

Clearly, what I see before this court in this application is the appellant's hope of a judicial memory loss upon which he can smuggle the extant application and in that supposed state of mind of the court get in to grant the relief the applicant imagines possible. Fortunately, our judicial wheel does not function in the way the application seems to push forward. I rely on the case of APGA Vs. Senator Christiana N.D. Anyanwu & Ors. (2014) LER SC 20/2013 where it was firmly held as follows:

“It is a settled principle of law that a decision on any point of law or fact not appealed against is deemed to have been conceded by the party against whom it was decided and it remains valid and binding on all the parties.”

(P 82 paras C – E)

9. *Appeal court has no power to delve into an issue not appealed before it*
Again this court, in Adeyemi Vs. Olakunri (1999) 14 NWLR

(Pt.638) at 204, stated:

“Where there is no appeal against a finding of the trial court by either party to the action, the appeal court would have no power to delve into the issue and pronounce on it.”

See also Udom Vs. E. Micheleti & Sons Ltd. (1998) 8 NWLR Pt. 515 at 192. (P 82 paras F–H)

10. *Court is funtus officio*

The applicant needs be reminded that, on the issue he is bent on not letting go, is such that the hands of this court are tied without a leeway of movement to do what he is asking of it. The reason being that on the said matter, the task is already performed or funtus officio and the court cannot make the same order twice as having earlier decided on the issue is no longer seised of jurisdiction to further enter into the same discourse. I place reliance on Muhammad Vs. Husseini (1998) 14 NWLR (Pt.584) 108 at 1663; Nigerian Army Vs. Iyela (2008) 18 NWLR (pt.1118) 115 at 146 per Chukwuma-Eneh JSC. (Pp 82 – 83 paras H–B)

11. *When an appellate Court will entertain fresh issues on appeal*

The application seeks to raise a fresh issue which was not raised at the trial court or the court below. It is only in exceptional circumstances that the appellate court will allow a party to raise a fresh issue on appeal where the issue or question to be raised involves substantial points of law, whether substantive or procedural, in order to avoid miscarriage of justice. *See Attorney-General of Oyo State Vs. Fairlakes Hotel Ltd (1988) 5 NWLR (Pt. 92) 1; Bankole & Or. Vs. M 5 6Y Pelu & Ors. (1991) 8 NWLR (Pt. 211) 523. Inadvertence and error of judgment on the part of counsel to raise the issue timeously is not an exceptional circumstance warranting exercising the discretion of the court on behalf of the applicant. It is on account of this and the more comprehensive reasons contained in the leading ruling of my learned brother, Eko,*

JSC that I refused granting the application. It is accordingly dismissed with N300,000.00 costs in favour of the respondent against the appellant. (P 83 paras D–H)

Per Augie (JSC)

“It is settled that the appellate courts do not allow a party to raise issues not raised at the trial court except where the fresh issue or question involves substantial points of law, substantive or procedural, which need to be allowed to prevent an obvious miscarriage of justice *See Okenwa Vs. Military Governor, Imo State (1996) 6 NWLR (Pt.455) 394 SC*, wherein this Court, per Iguh, JSC, explained as follows:

There can be no doubt that an appellate court must not allow an appellant to jettison before it, the question on which the parties have joined issues and fought their case before the trial court as to do otherwise would amount, in effect, to permitting the appellant to commence an entirely new case before the appellate court. In the same vein, an appellate court before which a new point is sought to be canvassed will, on the authorities, refuse to grant leave to do so where the fresh point raised introduces a new line of defence completely different from the issues fought by the parties in the court below... an appellant will also not be allowed to raise on appeal, a fresh point or question, which was not raised or tried or considered by the trial court, particularly where to raise such a point or question fresh or additional evidence need to be adduced. Where, however, such a fresh point or question involves a substantial point of law, substantial or procedural, and it is plain that no further evidence need to be adduced which would affect the decision of

the matter, the appellate court will allow the question to be raised and the point taken to prevent a miscarriage of justice. See Att-Gen., Oyo State Vs. Fairlakes Hotel Ltd (1988) 5 NWLR (Pt.92) 1 SC; Bankole & Ors Vs. Pelu & Ors (1991) 8 NWLR (Pt.211) 523. IN A-G., Oyo State Vs. Fairlakes Hotel Ltd.(supra), this court succinctly stated the principle guiding the appellate Courts in the exercise of their discretion to grant to a party to raise, for the first time, a point of law not raised or canvassed in the court below thus:” (Pp 84–85 Paras F–D)

12 *When permissible to raise a fresh point on appeal*

The discretion has been exercised in a variety of situations in the interest of the administration of justice. The following situations are disclosed by some of the decided cases, among many, where substantial points of law, substantive and procedural are involved. The leave has been granted to raise a new point of law:

- (1) When the point of law raised discloses ex-facie that the court has no jurisdiction.**
- (2) Where the point of law raised arose out of decision of the court of first instance and could not have been raised earlier in that court...**
- (3) Where the point of law raised involves the interpretation of documents relevant to the determination of the case before the court...**
- (4) Where all the materials necessary for the determination of the point of law raised are present in the records of the court.**

- (5) Where the court is satisfied that the evidence is such that establishes beyond doubt, that the facts, if fully investigated would have supported the new plea. (Pp 85–86 paras D–A)**

Per Augie (JSC)

“Obviously, as my learned brother, Eko, JSC, lucidly and incisively said, the appellant will bear the brunt of this artful strategy or tactics of counsel, which he labeled as *“inadvertence and error of judgment”* since it is only genuine mistake or inadvertence of the counsel that are remedied by the rule that the error of counsel should not be visited on his client *See Akanbi Vs. Alao (1989) 3 NWLR (Pt. 108) 118 SC*, wherein this court, per Craig, JSC, very aptly observed as follows:

When a party makes a choice which the law requires him to make, and that choice was acted upon by parties and court, the party, who made the choice, cannot turn round afterwards and claim that he had made a mistake. Such a mistake of law will not excuse the party. A decision not to call evidence has always been regarded as a legal strategy, not a mistake. If the strategy succeeds, then it enhances the case of the party; but if it fails, such a litigant cannot ask for leave to adduce further evidence in order to repair his damaged case. If every party, who makes a wrong choice of the nature is allowed to repair his case in this way, there will be no end to litigation. The legal maxim is interest *rei pulicae ut sit litium*.

In his contributory judgment Eso, JSC, pointedly stated as follows:

The crux of the matter, is whether or not... parties could, after losing a case on the conduct of the case by

their counsel, choose another counsel and adduce evidence, which the former counsel in his professional decision did not offer. I think it would be extending *Ibodo Vs. Enariofio* beyond reason, if every considered or assumed considered professional decision of a counsel, which has gone wrong, should qualify as ground of appeal. The rule really should be 'caveat client" if you choose a counsel, you should permit him, once seised of the case, to conduct the case in the manner of his professional ability. Indeed that is part of the independence of Bar! If there is lapse in his office, his clerk forgetting to file some papers, he forgetting the date of hearing or such like procedural errors, of course, the client should not be made to suffer *U. Ibodo Vs. Enarofia* if, however he takes a deliberate decision and loses thereby, then, it is his privilege to lose and that will not constitute a right for the client for utilization as a ground of appeal. For if it were not so, the profession will be in jeopardy."

(Pp 87–88 Paras B–C)

13. *The meaning of the word elected*

In this case, it was categorically stated in the Appellant's Affidavit in support of the Application of 5/10/2016, that the Appellant's counsel "elected" not to challenge the issue on appeal to Court below:

The word "elect" means "to decide or choose; to choose to do a particular thing" Cambridge English Dictionary. What this means is that the appellant's counsel made a deliberate choice not to raise the said issues at the Court below, which he now want to raise here. His counsel's strategy or tactics failed, and the failure of the strategy is not such an error that will sway

this Court to grant his Application. (P 88 Paras D–F)

Nigerian cases cited in this Judgment

A.G. Bendel State Vs. Aideyan (1989) 4 NWLR (Pt.118) 646;
Adeleke Vs. Aserifa (1990) 3 NWLR (Pt.136) 94;
Adeyemi Vs. Olakunri (1999) 14 NWLR (Pt.638) 204;
Akanbi Vs. Alao (1989) 3 NWLR (Pt. 108) 118 SC;
Alhaji Baba Bakin Salati Vs. Alhaji Talle Shehu (1986) ANLR 53;
Alsthom Vs. Saraki (2004) 4 SC NJ 249;
Amaefule Vs. The State (1988) 2 NWLR (Pt. 75) 165;
APGA Vs. Senator Christiana N.D. Anyanwu & Ors. (2014) LER SC 20/2013;
Ariori Vs. Elemu (1983) 1 SC. 13;
Bankole & Or. Vs. M 5 6Y Pelu & Ors. (1991) 8 NWLR (Pt. 211) 523;
Edet Vs. State (1988) 4 NWLR (Pt. 91) 722;.
Hamza Vs. Kure (2010) 42 NSCQR 592;
Ibodo Vs. Enarofia (1980) 5 7 SC 42;
Kida Vs. Ogumola. (2006) (Pt.327) FWLR 402;
Kolawwole Vs. Alberto (1989) ANLR 137;
Kwajaffa Vs. Bank of the North Limited (2004) ALL FWLR (Pt. 215) 222;
Mohammad Vs. Hussein (1998) 14 NWLR (Pt.584) 108;
Nigerian Army Vs. Iyela (2008) 18 NWLR (Pt. 1118) 115;
Nwafor Elike Vs. Nwankwoala (1984) ANLR 505;
Ogundimu Vs. Kasunmu (2006) ALL FWLR (Pt.326) 207;
Olorunyolemi Vs. Akhagbe 41 NSCQR 342;
Onyemelukwe Vs. N.A.C.C (1995) 4 NWLR (Pt.381) 44;
Oshatoba Vs. Olujitan (2000) 2 SCNJ 159; and
Udom Vs. E. Micheletti & Sons (1997) 8 NWLR (Pt.516) 187.

Nigerian statutes cited in this Judgment

1999 Constitution, as amended Section 233 (3);
Evidence Act, 2011 Section 169;
Supreme Court Act, Sections 17, 22 and 29;
Supreme Court Rules Or. 2 Rules 28(1) (2), 3(1) (2)

A

Representations

Godwin Iyoke (Esq.), with Emeka Bob Alioha, (Esq.), and Iyaji Patrick Ojeka for the appellant/applicant.

B **Tajudeen, O. Oladayo (Esq.), with M.I. Komolafe, (Esq.), Chioma Williams M.B. Yusuf (Esq.); Narudeen Murtala, (Esq.); Barnabas John, (Esq.); and Yunus Abdulsalam, (Esq.),** for the respondent.

C **EJEMBI EKO, JSC (Delivering the Lead Judgment):** On 27th February, 2017, the motion filed on 5th October, 2016, by the appellant/applicant was argued. On 19th January, 2016, a similar motion filed on 18th November, 2014, was dismissed “having been argued before being withdrawn”. The

D motion filed on 18th November, 2014 and dismissed on 19th January, 2016, and the instant motion are *ipssimaverba*. The order dismissing the said motion filed on 18th November, 2014 is contained in the respondent's Exhibit E.

E The instant motion, like its 18th November, 2014 precursor, has the following prayers:

F “1. *An order of this honourable court granting leave and permission to the appellant to raise for the first time fresh issues as follows:*

G a. *The failure of the appellant to obtain the prior consent and approval of the respondent before entering into the subject property and developing same;*

H b. *The issue whether the respondent constitutes a person or other legal authority whose consent the appellant ought to obtain in the process of the alteration or development of the property;*

I c. *The validity of the affidavit of service which was not supported by the enrolled order of the*

- A *trial court;*
- B *d. Lack of jurisdiction.*
- B 2. *An order of this honourable court enlarging and extending the time within which the appellant will file additional grounds of appeal on mixed law and facts.*
- C 3. *An order of this honourable court granting leave to the appellant to file additional grounds of appeal on mixed law and facts.*
- D 4. *An order of this honourable court granting leave to the Appellant to amend his original grounds of appeal as contained in the notice of appeal already filed by the inclusion of additional grounds of appeal on mixed laws and facts.*
- E 5. *An order of this honourable court granting leave to the appellant to amend his original notice of appeal already filed by the addition of three (3) additional grounds of appeal in the following manner.*
- F
- G a. **GROUND ONE**
The learned Justices of the Court of Appeal erred in law in affirming the decision of the trial court without considering the matter of the authority of the respondent to grant consent to the appellant in respect of the property in dispute, thereby occasioning miscarriage of justice.
- H **PARTICULARS OF ERROR**
- I i. *The court below granted all the reliefs sought by the respondent which includes the declaration that; “A declaration that the defendant in entering into and*

A *continuing the erection of structures on the property of the plaintiff No. R.27, Girajabdulwahab Road, Mando Kaduna without the consent of the plaintiff constitutes trespass”.*

B *ii. The respondent is not a recognized institution or authority with power to grant consent.*

C *iii. The title of the subject property was neither registered in the respondent's name nor was the respondent in possession of same at any time.*

D *iv. There is no record of the name of the respondent on any record of the subject land.*

GROUND TWO

E *The court below misdirected itself in law in affirming the judgment of the trial court which was premised on declaratory claims that were not established by evidence in the trial court thereby occasioning miscarriage of justice.*

F **PARTICULARS OF ERROR**

G *i. There is no evidence of the respondent's certificate of occupancy or any registered title document of respondent.*

H *ii. There is no evidence or fact before the court below that the respondent is an authority or person whose consent ought to be sought as she is neither a constituted authority nor the registered title holder.*

I *ii. In affirming the decision of the Trial Court the Court below did not consider the fact that the respondent is not an established authority for purposes of consent.*

A

iv. In affirming the decision of the trial court the court below did not avert its mind to the fact the issue or question of the authority of the respondent over the subject land was not considered.

B

v. There was nothing before the court below to show that the property was registered in the respondent's name.

C

vi. The facts and evidence before the court below show that the respondent only made claims to portion of a different Plot R.26, Giraj Abdulwahab Street, and not R.27, the subject of the appeal.

D

GROUND THREE

The learned justices of the Court of Appeal erred in law in affirming the decision of the trial court which was a nullity ab initio as the affidavit of service upon which the trial court justified the service of the processes of trial court on the Appellant was invalid, thereby rendering the proceedings in the trial court incompetent and the court below without jurisdiction.

E

F

PARTICULARS OF ERROR

G

i. In affirming the decision of the trial court, the court below did not avert its mind to the fact that the affidavit of service upon which the trial court justified the service of the processes of the trial court on the appellant was invalid.

H

ii. The court below did not consider or determine whether mere affidavit of service without more suffices to justify actual service of the processes of the trial court effected by substituted means.

I

- A **iii. *The court below did not avert its mind to the fact that the affidavit of service in proof of the service of processes of the trial court was not supported by duly enrolled order of the trial court.***
- B
- C **iv. *The court below did not consider the validity or otherwise of the 'Affidavit of service' upon which the trial court justified the service.***
- D **v. *The court below fell into error in affirming the judgment of the trial court which was given without jurisdiction, as the proceedings of the trial court was ab initio a nullity as a result of invalid affidavit of service.***
- E **vi. *It is now trite that failure of proof of service robs a court of law its jurisdiction and renders any trial thereof a nullity.***
- F **6. *Leave of this honourable court to raise and argue issues of mixed law and facts.***
- G **7. *An order granting leave to the Appellant to withdraw his brief of argument dated the 5th day of January, 2008 and substitutes same with the proposed Brief of Argument herein attached to this motion.***
- H **8. *An order of this honourable court deeming as properly filed and served the Appellant's amended notice of appeal which has been separately filed, appropriate fees having been paid.***

I **AND FURTHER TAKE NOTICE that he Appellant will rely on the affidavit sworn to by Patrick Ojekalyaji Esq. and**

- A** *which the service of the processes of the trial court was justified.*
7. *That the failure to raise the subject of the additional grounds of appeal timeously due entirely to his inadvertence and error of judgment".*
- B**

It is crystal clear to me, from the supporting affidavit, particularly when the averment in paragraphs **5, 6** and **8** thereof are juxtaposed, that as a result of the failed tactics or strategy of the appellant/applicant's own counsel:

- C**
- "The Court of Appeal did not have to consider the issues of the consent and validity of the affidavit of service as contained on the face of the extant motion and the proposed **"Additional Grounds of Appeal."***
- D**

On this obviously artful strategy or tactic of the appellant/applicant's counsel, it is submitted that the failed tactics or strategy of the counsel, should not be visited on the litigant, the appellant. The case **Ogundimu Vs. Kasunmu (2006) ALL FWLR (Pt.326) 207 at Page 218** was cited to convince us that pardonable inadvertence or negligence of counsel should not be visited on his client. **Ogundimu Vs. Kasunmu (supra)**, case had to do with when a party is out of time due to inadvertence or negligence of his counsel.

The rule: that error of counsel should not be visited on his client, the litigant, is informed by the court's desire to do substantial justice by considering the case on its merits rather than sticking to unnecessary technicality. **A.G. Bendel State V. Aideyan (1989) 4 NWLR (pt.118) 646**. And those courts leaning towards accommodating the parties' interest without allowing mere procedural irregularities, brought about by counsel, should not preclude the determination of a case on its merits: **Ibodo Vs. Enarofia (1980) 5 – 7 SC 42**. For this rule, like every other rule, there are exceptions.

Only genuine mistakes or inadvertence of the counsel are remedied by the court under this rule, as can be seen from **Akabi Vs. Alao (1989)**

- A ALL NLR 4242.** Ineptitude or strategic blunders which are not envisaged by this rule cannot apply to foist injustice on another party: **Onyemelukwe vs. N.A.C.C (1995) 4 NWLR (pt.381) 44 at 56.** When error of counsel is pleaded to remedy a situation caused by counsel, there must always be a
- B** clear distinction between mere mistakes or inadvertence of one hand, and sheer carelessness or failure of strategy or tactics on the other. While the latter does not attract the sympathy of the court; the former, dictated by the rule that equity follows the law and is always on hand to mitigate or mellow
- C** down the harshness of strict application or operation of the rules of court, does avail a party whose counsel has committed genuine mistakes or errors.

- The only conclusion available from the totality of paragraphs **4, 5, 6**
- D** and **8** of the supporting affidavit is that what the learned counsel for the appellant/applicant calls “inadvertence or error of judgment” on his part is nothing but failure of strategy or tactic, which goes to the merit of the appeals either at the court below or here. This court has made the point loud and clear in **Nwafor Elike Vs. Nwankwoala (1984) ANLR 505**, that the rule cannot be used to rectify strategic blunders committed by counsel in the cause of litigation, as the learned Appellant's counsel did in this case. A counsel, once properly briefed, takes full charge of the case, including the
- F** strategies thereby. It is for this reason that counsel cannot, in case of failed strategies, take shelter under the omnibus claim of inadvertence or negligence. If the strategy the counsel adopted works, he takes full credit. And if strategy fails he must also take full blame or responsibility with
- G** equanimity:

- Akanbi Vs. ALAO (supra) at pp 440 – 401, 444.** *See also Kolawole Vs. Alberto (1989) ANLR 137 at 151.* The own-goal rule in soccer, by way of analogy, also applies in adjudication. An own-goal is not
- H** cancelled because the player, in error of judgment, played the round ball to his own net. Accordingly, by failure of strategy the adverse party is entitled to the advantage created thereby.

- Appellant/applicant's counsel has admitted in paragraphs **5, 6 and 7**
- I** of the supporting affidavit that he elects not to challenge the judgment of the trial court in the appeal of the court below. On the issue of improper

A service which, allegedly, deprived the trial court of its procedural jurisdiction, and the consent of the respondent, - issues which he now wants to raise in this Court in the 3 additional grounds of appeal, learned counsel elected not to appeal after the trial. He made believing, as he is

B entitled to his own sound judgment of the law, that the other substantial grounds of appeal would avail him and ensure his victory at the Court of Appeal. This clearly is a case of waiver of a legitimate right in law. Any appellant can waive a ground of appeal or elect not to pursue his appeal on

C any ground of appeal. This right is recognized in law as affirmed by this Court in **Ariori Vs. Elemu (1983) 1 SC. 13.**

The appellant/applicant will not be allowed to appobate and reprobate on these 3 additional Grounds of Appeal that he elected not to

D attack or challenge the decision of the trial court on at the court below. He is estopped, on the principle of estoppel by conduct, from the renegeing or resiling from that election. Section 169 of the Evidence Act, 2011, on this estoppel by conduct provides *inter alia* that when one person has, either

E upon an existing court judgment, or by his act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceeding between him and such person or such

F person's representatives in interest, to deny the truth of thing. The truth of the matter is that the Appellant, through his counsel, had elected not to appeal on the three issues they now want to revive.

I had earlier alluded to the admission in paragraphs **4, 5, 6, 7** and **8** of the supporting affidavit to the effect that it was a deliberate election or

G decision of the appellant's counsel not to challenge the trial court's decision on the issues raised by the 3 Additional Grounds of Appeal that caused “the court not (to) have opportunity to consider the issues of consent and

H validity of the affidavit of service as contained in the proposed “Additional Grounds of Appeal”. It will now be materially contradictory on his part to complain, as he does, in the 3 Additional Grounds of Appeal erred in law or misdirected itself in law is not considering those same issues

I he had tactfully dribbled them from seeing and considering. I do not think it would be fair to criticize the learned Justices of the Court of Appeal over

A their decision on any issue that was not before them for the determination of the appeal. *See Adeleke Vs. Asherifa (1990) NWLR (Pt.136) 94.*

The Court of Appeal, and the justices of that court, derive their jurisdiction from the Constitution. They are all set upon the law. The

B grounds of appeal, from which issues for determination of each appeal are derived, determine the jurisdiction of that court in a given appeal. Neither the court, nor the Justices of the court, formulate the grounds of appeal from which issue for the determination of the appeal are distilled. The
C appeal court has no jurisdiction, albeit power, to delve into any issue in respect of which there is no appeal; **Udom Vs. E. Mitcheleti & Sons (1997) 8 NWLR (pt.515) 192; Adeyemi Vs. Olakunri (1999) 14 NWLR (pt.637) 204.**

D The 3 Additional Grounds of Appeal do not flow directly from the decision of the court below, and they should. The proposed Additional Grounds of Appeal seem to tell a lie about themselves if they purport to be, each, a complaint against the decision of the court below. They are clearly
E not. The dilemma, if not quagmire, the Appellant, the appellant/applicant's counsel has found himself can only be imagined. Let me add: this Court, by dint of Section 233 of the 1999 Constitution, as amended, can only take appeals from the decision of the Court of Appeal. It does not have
F jurisdiction to entertain appeals direct from the decision of the High Court.

The respondent seems to argue that the 3 Additional Grounds of Appeal do not raise fresh issues, since those issues were canvassed at, and dismissed by, the trial court. He misses the point. They are fresh issue

G because they were not issues canvassed at, and determined by, the Court of Appeal. Appeals to this Court lie from the decision of the Court of Appeal by dint of Section 233 of the Constitution. The appellant is seeking to raise and argue those issues in this court as fresh issues, the said issues having
H not been decided upon by the court below as they were not raised and argued at the court below.

I have read paragraph **4(v), (vi), (vii), (xi), (xii)** and **(xiii)** of the counter affidavit. I agree, as submitted for the respondent, that the conduct
I of the appellant is quite undeserving of the Indulgence sought by this application. The appellant's counsel seems to be using these erroneous, as a

A filibuster, to delay the hearing and determination of the appeal that has been on cause list since 2007.

There is no substance in this application. It is accordingly dismissed with costs assessed at 300,000.00 to the respondent against the appellant.

B **Ejembi Eko**
Justice, Supreme Court

C **I.T MUHAMMAD, (JSC):** I read in advance the Ruling delivered by my learned brother, Eko, JSC. For the reasons adumbrated in the Ruling, I, too refuse the application. I adopt all orders, costs inclusive, made in the Ruling.

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

E **MARY UKAEGO PETER-ODILI, (JSC):** I agree with the ruling just delivered by my learned brother EKO, JSC and to record my support for his reasoning I shall make some comments.

F The motion has been brought by the appellant/applicant pursuant to Sections 17, 22 and 29 of the Supreme Court Act, Order 2 Rules 28 (1) (2), 31 (1) (2); Order 8 Rules 4, 11 and 12 of the Supreme Court Rules and Section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

G I shall recast verbatim the prayers sought by the applicant hereunder, viz:

H **1. An Order of this court granting leave and permission to the appellant to raise for the first time fresh issues as follows:**

I **(a) The failure of the appellant to obtain the prior consent and approval of the respondent before entering into the subject property and developing same;**

(b) The issue whether the respondent constitutes a

A determination of the application which is as follows:

Whether the appellant has placed sufficient materials before the court upon which the court could exercise her discretion in granting the orders sought.

B

Learned counsel for the respondent, Tajudeen O. Oladoja Esq. adopted the counter affidavit of seven paragraphs of the respondent and written addresses filed on 18/10/2016. He formulated two issues for determination

C which are thus:

1. **Whether the jurisdiction of this honorable court to adjudicate on the instant application is ousted on the premise of doctrine of Res Judicta.**

D

2. **Whether the extant application does not constitute an abuse of court process.**

E

The sole issue of the application is apt for purpose and I shall utilize it.

SOLE ISSUE

F

Whether the appellant has placed sufficient materials before the court upon which the court could exercise her discretion in granting the orders sought.

G

In urging for the position of the applicant, Godswill I. Iyoke Esq. of the counsel contended that applicant had supplied sufficient materials for which the application should be granted. He cited **Alsthom Vs. Saraki**

H **(2004) 4 SC NJ 249.**

That the lapse in raising and arguing the points now sought to be brought in was due to the inadvertence of counsel which cannot be visited on the applicant as litigant and so court should be favourable disposed. He cited **Ogundinu Vs. Kasunmi (2006) (Pt.326) ALL FWLR 207.**

I

A Learned counsel for the applicant contended that the proposed grounds of appeal prima facie show good cause why the appeal should be prosecuted. He relies on Exhibits 12, the proposed amended notice and additional grounds of appeal annexed to the supporting affidavit. He stated

B that the facts and evidence before this court showed that the fact that the failure to obtain the prior consent of the respondent and the invalidity of the affidavit of service of processes of the trial court without an enrolled order of the court ordering substituted service of the processes is due to counsels' oversight. He cited **Kwajaffa Vs. Bank of the North Limited (2004) ALL FWLRS (pt. 215) 222.**

It was further submitted for the applicant, that the grant of this application will enable this court rehear the matter and see that there was no

D evidence in support of the declaratory orders granted by the trial court and that the affidavit of service of the processes of the court of trial on the appellant is invalid thus raising the question of whether those proceedings as well as the court below were with jurisdiction. He cited **Ologunolemi Vs. Akhagbe 41 NSCQR 342: Kida Vs. Ogumola (2006) (pt.327) FWLR 402.**

Also that the issue to be resolved before the exercise of the court's discretion in the appellant's favour is whether the points raised involve

F substantial issues of substantive or procedural law which need to be allowed to prevent an obvious miscarriage of Justice and whether further evidence is required to resolve the issue for determination. He referred to **Alhaji Baba Bakin Salati Vs. Alhaji Talle Shehu (1986) ANLR 53; Kwajaffa Vs. Bank of the North Limited (supra) 240: Oshatoba Vs. Olujitan (2000) 2 SCNJ 159: Hamza Vs. Kure (2010) 42 NSCQR 592 at 614.**

Learned counsel for the respondent, Tajudeen O. Oladoja, referred the court firstly, to the Record of Appeal page 48 49 where respondent as

H plaintiff against the appellant as defendant in the amended statement of claim dated 10th October, 2001, asked for declaratory reliefs and the judgment of the trial court and the affirmation by the Court of Appeal.

That there is no appeal against the decision of the court below

I dismissing prayers 3 and 5 claimed by the plaintiff/respondent and so what the appellant in effect is asking herein is to raise for the first time fresh

- A** issues and thus bring into operation the principle of *res judicata*. That the appellant/applicant had earlier made a similar move which this court dismissed on 19/1/2016, which makes the present application an abuse of court process. He referred to **APGA Vs. Senator Christiana N.D.**
- B** **Anyanwu & Ors. (2014) LER SC 20/2013; Amaefule Vs. The State (1988) 2 NWLR (Pt. 75) 165; Edet Vs. State (1988) 4 NWLR (Pt. 91) 722** etc.

- That this court is *functus officio* in view of the ruling in Exhibit E. he referred to **Mohammad Vs. Husseini (1998) 14 NWLR (Pt.584) 108 at 163; Nigerian Army Vs. Iyela (2008) 18 NWLR (Pt. 1118) 115 at 146.**

- The appellant in a nutshell is persuading this court's favourable consideration of the application on the ground that it would enable the
- D** appellant to present and direct the court's attention to all the facts necessary to do substantial Justice in this appeal. The appellant seeks to show that the invalidity of the affidavit upon which the service of processes of the court were justified, rendered the entire proceedings a nullity. He cited, in aid, the
- E** case of **Kwajaffa Vs. Bank of the North Limited (2004) ALL FWLR (Pt. 215) 222**; particularly at page 253 (paragraphs B – E) where this court admonished as follows:

- F** “This court being a court of justice is a temple of justice
- G** adhering to the symbol of a blindfolded woman with a scale on one hand and a sword on the other hand to render
- “justice” (not injustice), to all manner of people. Indeed the
- H** beauty and greatness nay the purity of justice, in all its consuming allure and essence is to ferret out from the mass of facts and law before it, relevant points in order to give
- remedy to anyone who comes for that. It is my view that the
- I** appellants cannot eat their cake and have it. I believe that it is not only the litigants in this case but millions of our country men with an abiding faith in the nature of our jurisprudence as practiced in our courts who have access to the court to seek justice, not adulterated justice, or justice shrouded in the clouds of euphemisms or where the court

**A would wring its hands and declare that the case does not
follow a regular or laid down pattern that would benefit
from justice founded on law and ethics. In my view that
issue is decided against the appellants. I believe that a law
B that is bereft of ethical contents i barren.”**

Learned counsel for the applicant further urges that the grant will enable the court to rehear the matter since it would ferret out from the mass of facts and law before it, relevant points in order to give remedy. He cited **C Olorunyolemi Vs. Akhagbe 41 NSCQR 342.**

There cannot be any faulting of the principles above highlighted but those principles cannot be applied where the facts are not supportive; that **D** seems to be the situation bedeviling the present application. Firstly, the appellant/applicant had sought to raise this same issue as in prayer 1 (b) & (c) by an application which was dismissed by this court on the 19/1/2016, as the appellant had raised and argued same at the trial court in the application **E** dated the 29th day of December, 2002, depicted in paragraph 4 (iii) and Exhibit “A” and the learned trial judge in a considered ruling of 23rd May, 2003 annexed as Exhibit 'B” to the counter affidavit dismissed the application. An excerpt of the said Ruling is hereunder quoted thus:

**F “I have earlier given an order of extension of time in this
ruling. The record of this court showed that I granted leave
for service of processes by substituted means. See the
G proceedings of 26/11/1999. Similarly when the PW1
testified on the 11/2/2002. I was satisfied as to service.
When the court was addressed by counsel on the
10/04/2002. I was also satisfied as to service. The applicant
H cannot be heard to feign ignorance of the proceedings. No
good reasons have been advanced for his being absent at
the trial.”**

**I On the whole the prayer for extension of time succeeds. All
other prayers failed. They are refused. The application is**

A dismissed.”

As a fact, it is that the said decision of trial judge was not appealed against by the appellant/applicant. Interestingly, on 22/10/2008, the appellant brought an application similar to the present one raising the issue of non-

B service of the originating process and it was struck out on the 23/11/2009, which is evinced as Exhibit “C” Not done, on the 18/11/2014, the appellant filed and had argued the issue of non-service by an application and this time the Supreme Court had the application dismissed as shown in Exhibit E.

C Clearly, what I see before this court in this application is the appellant's hope of a judicial memory loss upon which he can smuggle the extant application and in that supposed state of mind of the court get in to grant the relief the applicant imagines possible. Fortunately, our judicial

D wheel does not function in the way the application seems to push forward. I rely on the case of **APGA Vs. Senator Christiana N.D. Anyanwu & ORS. (2014) LER SC 20/2013** where it was firmly held as follows:

E **“It is a settled principle of law that a decision on any point of law or fact not appealed against is deemed to have been conceded by the party against whom it was decided and it remains valid and binding on all the parties.” Per**

F **Motonmori Olatokunbo Kekere-Ekun, JSC.**

Again this court, in **Adeyemi Vs. Olakunri (1999) 14 NWLR Pt.637 at 206**, stated:

G **“Where there is no appeal against a finding of the trial court by either party to the action, the appeal court would have no power to delve into the issue and pronounce on it.”**

H **See also Udom Vs. E. Micheleti & Sons Ltd. (1998) 8 NWLR Pt. 515 at 192.**

I The applicant needs be reminded that, on the issue he is bent on not letting go, is such that the hands of this court are tied without a leeway of

- A** movement to do what he is asking of it. The reason being that on the said matter, the task is already performed or *functus officio* and the court cannot make the same order twice as having earlier decided on the issue is no longer seised of jurisdiction to further enter into the same discourse. I
- B** place reliance on **Muhammad Vs. Hussein (1998) 14 NWLR (Pt.584) 108 at 1663; Nigerian Army Vs. Iyela (2008) 18 NWLR (pt.1118) 115 at 146 per CHUKWUMA-ENEH JSC.**

- C** From the foregoing and the better reasoning of learned brother, EJEMBI EKO JSC. I refuse this application. I abide by the consequential orders made.

Mary Ukaego Peter-Odili
Justice, Supreme Court

- D** **KUMAI BAYANG AKAAHS (JSC):** My learned brother, Eko JSC made available to me leading Ruling just delivered and I agree that the application should be refused.

- E** The application seeks to raise a fresh issue which was not raised at the trial court or the court below. It is only in exceptional circumstances that the appellate court will allow a party to raise a fresh issue on appeal where the issue or question to be raised involves substantial points of law, whether substantive or procedural, in order to avoid miscarriage of justice.
- F** *See Attorney-General of Oyo State Fairlakes Hotel Ltd. (1988) 5 NWLR (Pt. 92) 1; Bankole & Or. Vs. M 5 6Y Pelu & ORS. (1991) 8 NWLR (Pt. 211) 523.* Inadvertence and error of judgment on the part of
- G** counsel to raise the issue timeously is not an exceptional circumstance warranting exercising the discretion of the court on behalf of the applicant. It is on account of this and the more comprehensive reasons contained in the leading ruling of my learned brother, Eko, JSC that I refused granting
- H** the application. It is accordingly dismissed with N 300,000.00 costs in favour of the respondent against the appellant.

K. B. Aka'ahs
Justice, Supreme Court

- I** **AMINA ADAMU AUGIE, (JSC):** I had a preview of the leading ruling

A delivered by my learned brother EKO, JSC, and I agree with him that his application has no substance

He addressed all the issues squarely, without any equivocation, and I will only add a few comments to reiterate the points he made.

B By his application of 5/10/2016, the appellant is praying this Court for leave to raise for the first time, the following fresh issues :

C **a. (His) failure to obtain the prior consent and approval of the respondent before entering into the subject property and development same;**

D **b. The issue whether the respondent constitutes a person or other legal authority whose consent the appellant ought to obtain in the process of the alienation or development of the property;**

E **c. The validity of the affidavit of service which was not supported by the enrolled order of the trial Court; and**

F **d. Lack of jurisdiction.**

G It is settled that the appellate courts do not allow a party to raise issues not raised at the trial court except where the fresh issue or question involves substantial points of law, substantive or procedural, which need to be allowed to prevent an obvious miscarriage of justice *see Okenwa Vs. Military Governor, Imo State (1996) 2 NWLR (Pt.455) 394 SC*, wherein this Court, per Iguh, JSC, explained as follows

H There can be no doubt that an appellate court must not allow an appellant to jettison before it, the question on which the parties have joined issues and fought their case before the trial court as to do otherwise would amount, in effect, to permitting the appellant to commence an entirely new case before the appellate court. In the same vein, an appellate court before
I which a new point is sought to be canvassed will, on the authorities, refuse

A to grant leave to do so where the fresh point raised introduces a new line of defence completely different from the issues fought by the parties in the court below. an appellant will also not be allowed to raise on appeal, a fresh point or question, which was not raised or tried or considered by the

B trial court, particularly where to raise such a point or question will require fresh or additional evidence to be adduced. Where, however, such a fresh point or question involves a substantial point of law, substantial or procedural, and it is plain that no further evidence need to be adduced

C which would affect the decision of the matter, the appellate court will allow the question to be raised and the point taken to prevent a miscarriage of justice. *See Att-General, Oyo State Vs. Fairlakes Hotel Ltd. (1988) 5 NWLR (Pt.92) 1 SC; Bankole & Ors Vs. Pelu & Ors (1991) 8 NWLR*

D (Pt.211) 523; in *A-G., Oyo State Vs. Fairlakes Hotel Ltd. (supra)* this court succinctly stated the principle guiding the appellate Courts in the exercise of their discretion to grant to a party to raise, for the first time, a point of law not raised or canvassed in the court below thus:

E “The discretion has been exercised in a variety of situations in the interest of the administration of justice. The following situations are disclosed by some of the decided cases, among many, where substantial points of law, substantive and procedural are involved. The leave has been

F granted to raise a new point of law:

- (1) When the point of law raised discloses ex-facie that the court has no jurisdiction.**
- G**
- (2) Where the point of law raised arose out of decision of the court of first instance and could not have been raised earlier in that court...**
- H**
- (3) Where the point of law raised involves the interpretation of documents relevant to the determination of the case before the court...**
- I**
- (4) Where all the materials necessary for the**

- A** **determination of the point of law raised are present in the records of the court.**
- (5) Where the court is satisfied that the evidence is such that establishes beyond doubt, that the facts, if fully investigated would have supported the new plea'.**
- B**

In this case, the appellant's application is a bit more complicated because it was conceded in paragraph 7 of the supporting affidavit “that the failure to raise the subject of the additional grounds of appeal timeously was due entirely” of the appellant's counsel's “inadvertence and error of judgment”. The deponent also averred in paragraphs 4, 5, 6 and 8 of the supporting affidavit that the counsel:

- D**
- 4. Subsequently, filed an application to set aside the judgment on the ground of the lack of actual service of the processes of court on the appellant which application was refused by the trial court where upon he appealed the entire judgment, without appealing the decision of the trial court to the effect that the failure of the appellant to obtain the consent of the respondent constitutes trespass.**
- E**
- F**
- 5. Notwithstanding the invalid affidavit of service he (the counsel) elected to challenge the judgment of the Court on substantial grounds as he had reasoned that the grounds of appeal as contained in the original notice of appeal were sufficient to secure a reversal of the judgment the trial Court'**
- G**
- H**
- 6. He (the counsel) did not raise the issues of the failure of appellant to obtain the said consent of the respondent and the invalidity of the affidavit of service upon which the service of the processes of the trial court was justified.**
- I**
- 8. In view of the limited scope of the original notice of appeal, the Court of Appeal did not have the**

- A** **opportunity to consider the issues of consent and validity of Affidavit of service as contained on the face of the extant motion and the attached proposed “additional Grounds of Appeal” and “proposed**
- B** **amended brief of argument”.**

Obviously, as my learned brother, Eko, JSC, lucidly and incisively said, the appellant will bear the brunt of this artful strategy or tactics of counsel, which he labeled as “*inadvertence and error of judgment*” since it is only genuine mistake or inadvertence of the counsel that are remedied by the rule that the error of counsel should not be visited on his client *see Akanbi Vs. Alao (1989) 3 NWLR (Pt. 108) 118 SC*, wherein this court, per Craig, JSC, very aptly observed as follows

D “When a party makes a choice which the law requires him to make, and that choice was acted upon by parties and court, the party, who made the choice, cannot turn round afterwards and claim that he had made a mistake. Such a mistake of law will not excuse the party. A decision not to call evidence has always been regarded as a legal strategy, not a mistake. If the strategy succeeds, then it enhances the case of the party; but if it fails, such a litigant cannot ask for leave to adduce further evidence in order to repair his damaged case. If every party, who makes a wrong choice of the nature is allowed to repair his case in this way, there will be no end to litigation. The legal maxim is interest *rei publicae ut sit litium*”.

In his contributory judgment ESO, JSC, pointedly stated as follow:

G **“The crux of the matter, is whether or not... parties could, after losing a case on the conduct of the case by their counsel, choose another counsel and adduce evidence, which the former counsel in his professional decision did not offer. I think it would be extending *Ibodo Vs. Enariofio* beyond reason, if every considered or assumed considered professional decision of a counsel, which has gone wrong, should qualify as ground of appeal. The rule really should be ‘*caveat client*’ if you**

**A choose a counsel, you should permit him, once seised of
the case, to conduct the case in the manner of his
professional ability. Indeed that is part of the
independence of Bar! If there is lapse in his office, his
B clerk forgetting to file some papers, he forgetting the date
of hearing or such like procedural errors, of course, the
client should not be made to suffer U. Ibodo Vs. Enarofia
if, however he takes a deliberate decision and loses
C thereby, then, it is his privilege to lose and that will not
constitute a right for the client for utilization as a ground
of appeal. For if it were not so, the profession will be in
jeopardy”.**

D

In this case, it was categorically stated in the appellant's affidavit in support of the application of 5/10/2016, that the appellant's counsel “*elected*” not to challenge the issue on appeal to Court below.

E

The word “*elect*” means “to decide or choose; to choose to do a particular thing” Cambridge English Dictionary. What this means is that the appellant's counsel made a deliberate choice not to raise the said issues at the Court below, which he now want to raise here. His counsel's strategy or tactics failed, and the failure of the strategy is not such an error that will

F

sway this Court to grant his application.

The end result is that I also dismiss this application and I also award costs assessed at N300,000.00 in favour of the appellant.

G

**Amina Adamu Augie
Justice, Supreme Court**

H

I

**EDE OKO
AND
THE STATE**

SC. 68/2014

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

FRIDAY, 5TH DAY OF MAY, 2017

BEFORE THEIR LORDSHIPS

**MARY UKAEGO PETER-ODILI
OLUKAYODE ARIWOOLA
KUMAI BAYANG AKAHHS
AMINA ADAMU AUGIE
SIDIDAUDABAGE**

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

*COURT: Jurisdiction – Issues of law and jurisdiction can be raised at any stage – Where a statute has prescribed a particular mode of raising thereof – Whether an exception to the general rule – Principles in **Adejobi Vs. State (2011) 12 NWLR (Pt....) 351.***

*COURT: No case submission – Credibility of witnesses not to be determined at this stage – Whether if the evidence of prosecution witnesses is believed there is something requiring the accused to explain – Principles in **Adaku Vs. FRN (2009) 4 NCC 350.***

*COURT: No case submission – Whether at this stage the trial court should not determine if there is sufficient evidence to justify conviction of the accused. – The need to determine whether there is a prima facie case sufficient to call upon the accuse to explain – The principle in **Abogede Vs. The State (1996) 5 NWLR (pt. 118) 270.***

COURT: Plea – Where it was not recorded that “charge was read and explained to the accused to the satisfaction of the court – Whether failure will not nullify the trial of the accused.

CRIMINAL LAW AND PROCEDURE: Arraignment – Valid arraignment – Elements thereof.

*CRIMINAL LAW AND PROCEDURE: Arraignment – Valid arraignment – Meaning – Conditions thereof – Principles in **Chikaodi Madu Vs. The State (2012) NCC 553.***

*CRIMINAL LAW AND PROCEDURE: Irregular procedure – Where an accused acquiesced to an irregular procedure at the trial – Whether he cannot properly complain on appeal – The principle in **Egbedi Vs. State.***

CRIMINAL LAW AND PROCEDURE: Plea – Where the plea of each accused was not recorded separately and directly as pleaded – Whether failure will not be fatal to their plea.

CRIMINAL LAW AND PROCEDURE: No case submission – Purport – Principles thereof.

*PRACTICE AND PROCEDURE: Failure to comply with procedure – Distinction between failure that affected substantial justice and failure that did not – The principles in **Anthony Okoro Vs. State (2012) 7 N.C.C. 184.***

*PRACTICE AND PROCEDURE: Issues of law and jurisdiction – Can be raised at any stage – Need to avoid springing surprise or taking the adverse party unawares – Principles in **Jov. Vs. Dom (1999) 9 NWLR (Pt. 620) 538.***

WORDS AND PHRASES: Prima facie – Meaning.

Issues for Determination

- “1. Whether the trial court has jurisdiction to try the appellant when the consent or direction of High Court Judge of Cross River State was not obtained as required by Section 309 (2) (b) of the Criminal Procedure Law, Cap. C17, Laws of Cross River State of Nigeria, 2004 (the CPL) before the information was filed?**
- 2. Whether the purported arraignment and taking of the plea of the appellant was valid in law (Ground 5).**
- 3. Whether the written address and the reply on the no case submission did not breach the appellant's right to fair hearing and thereby consequently rendering the entire trial a nullity (Ground 6).**
- 4. Whether the decision of the Court below “to be very brief and to restrict itself” in reviewing the argument does not amount to a denial of the right to fair hearing of the appellant, and thus rendering the judgment of the court below arrived at in such circumstances liable to be set aside? (Ground 3).**
- 5. Whether, having regard to the entire circumstances of this case, the court below was correct in affirming the ruling of the trial court and thereby calling upon the appellant to enter his defence? (Ground 12 and 4).”**

Facts of the Matter

This is an appeal against the ruling of the Court of Appeal, Calabar Judicial Division, delivered on the 19th day of November, 2013, in Appeal No. CA/C/76C/2012. The Court of Appeal affirmed the ruling of the High Court of

Cross River State sitting at Ogoja.

The appellant, Ede Oko along with 13 other accused persons, were arraigned before Justice E.E Ita of Cross River High Court, charged with conspiracy, unlawful assembly, malicious damage and stealing contrary to Section 20(6), 70, 541 and 390 (9) of the Laws of Cross River State of Nigeria 2004 respectively.

The appellant and the other 13 accused persons denied both counts. At the trial, the prosecution called a total of five (5) witnesses while a no-case submission was made on behalf of the appellants. After hearing and evaluation of the testimonies of the five witnesses, the learned trial judge over-ruled the no-case submission and requested the appellants to enter their defence.

Dissatisfied with the ruling, the appellant appealed to the Court of Appeal. The Court affirmed the ruling of the High Court and dismissed the appeal.

This appeal is against that ruling. From the information in the charge, the facts of the case against the appellant are that they, on the 10th May, 2010, at Oloko-Agwape village in Yala Local Government Area, conspired to and unlawfully assembled, caused malicious damage and stole a motor-cycle, twelve (12) goats, two (2) bicycles and bush meat, property of OganodeAwokoIpuole.

Held: *(Unanimously dismissing the appeal)*

1. *Failure to seek consent of judge did not viciate the trial*

However, failure from the respondent to seek for consent of the judge cannot be said to have rendered the trial a nullity and liable to be struck out.

In Anthony Okoro Vs. State (2012) 7 NCC page 184. This court held that:

“There is a distinction between a matter of procedure that affects substantial justice in the trial of a case and a matter of procedure which in no way affects the justice of the trial of a case.”

***See also Idemudia Vs. State (1999) 7 NWLR (Pt. 610) 202.
(P 115 paras B – E)***

Per Bage (JSC)

“Litigants should expect no technical but substantial justice from this court. We have said several times that we are not a workshop for technical justice. Over and over again, we have reiterated the need to do substantial justice and avoid delving into the error of technicalities, see for example the case of 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 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. See *Makeri Smelting Co. Ltd. Vs. Access Bank (Nig) Plc (2002) 7 NWLR (Pt. 766) 447 at 476-477 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.*”

See also *Ajakaiye Vs. Idehia (1993) 8 NWLR (Pt. 364) 504, *ARTA 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 SC. 1.*”***

In the case at hand, the respondent's failure to seek the consent of the judge does not in any way affect the justice of the trial. Therefore, the appellants cannot rely on the provision of Section

309 (2) (b) above. See also Egbedi Vs. The State (1981) 11-12 SC. 98 and Ajayi Vs. Zaria N.A No. 2(1964) NNLR 61.”
(Pp 115 – 116 paras E – D)

2. *An accused who acquiesced to import procedure at the trial cannot complain on appeal*

In **Egbedi Vs. State** above, this court held that:

“It is settled law that an accused person who acquiesced to an irregular procedure that did not lead to miscarriage of Justice cannot complain of the procedure on appeal.”

In this case the proper procedure as provided under Section 309 (3) has not been followed. The Section provides thus:

“(3) If an information preferred otherwise than in accordance with the provisions of sub section (2) of this Section has been filed by the registrar the information shall be liable to be quashed provided that:

(a)

(b) Where a person is convicted on any information or any count of an information, that information, or count shall not be quashed under this section in any proceedings on appeal, unless application is made at the trial that it should be so quashed.”(Pp 116 – 117 paras D – A.)

3. *Issues of law and jurisdiction can be raised at any stage except as provided by statute.*

In **Adejobi Vs. State (2011) 12 NWLR (Pt.....) 351** this court held that:

“A question of law and jurisdiction can be raised at anytime in the proceedings, but it is not a free for all procedure. Where a statute under which an issue or matter is to be raised has provided a procedure for raising such issue or matter, that procedure and no other, must be followed. In the instant case, the procedure that must be followed to quash the information or count was as provided under Section 340 (2) (b) of the Criminal Procedure Law, Cap 39 Laws of Oyo State, 2000. Failure to apply to quash it at the trial court rendered both the grounds of appeal on that point and the issue raised thereon incompetent.

Indeed the Court of Appeal has no jurisdiction to quash any information or count unless there has been an application to quash it at the trial.” (P 117 paras A–E)

4. *Issues of law and jurisdiction should not be raised to spring surprise to the other party.*

However, in *Jov Vs. Dom* (1999) 9 NWLR (Pt. 620) 538 at 541, this court held that a question of law and jurisdiction can be raised at any time in the proceedings, but it is not on a free for all procedure. Per Belgore JSC at p. 547 paras. C.E has this to say:

“This is so in order to avail the other side every opportunity to advert to that issue. But to contend that issue of law or the constitution can be raised at anytime and so nothing more than to raise it in argument is like laying a disrupting ambush for the opponent. This is not the spirit of our practice of adjudication of holding the even balance. Proper application must be made so that the other side will know clearly what he has to meet. In the present appeal, the appellant introduced ground 5 on lack of jurisdiction by trial court, a matter not raised in the appellate High Court and in the Court of Appeal. It came like a bird out of the whirlwind, why was this not raised at

the High Court or at the Court of Appeal.”
(Pp 117–188 paras F–A.)

5. *The purpose and conditions of a valid arraignment.*

The object of arraignment in terms of Section 215 of the Criminal Procedure Law is to ensure that justice is done to the accused by ensuring that he understands the charge against him so as to enable him to make his defence.

In ChikaodiMadu Vs. The State (2012) NCC at 553, this court on the essential requirement of valid arraignment enumerated conditions for valid arraignment:

- “(a) The accused must be placed before the court unfettered unless the court shall see cause otherwise to order.***
- (b) The charge or information shall be read over and explained to the accused to the satisfaction of the court by the registrar or other officer of the court; and***
- (c) The accused shall then be called upon to plead instantly thereto unless of course, there exist any valid reason to do otherwise such as objection to want to service where the accused is entitled by law to service of a copy of the information and the court is satisfied that he has in-fact not been duly served therewith.”***

See also Olabode Vs. State (2009) 4 NCC 199, Ogunye Vs. State (1999) 5 NWLR (Pt. 604) 518 Monsuru Solola & Ors Vs. State, 22 NSCQR 251 at pp. 289-290. (Pp 120–121 paras E–C.)

Per Bage (JSC)

“From the foregoing, this court is satisfied that what transpired at page 62 of the record in this case is in conformity with the provision of the law above. The appellant has not furnished this court with any evidence or fact to prove his claim.

The charge having been read over and explained to both accused persons in English language and each of them pleaded not guilty thereto, I find it difficult to conceive how the arraignment of the accused persons can be faulted. Without doubt, it would have been preferable for the learned trial judge to have recorded the plea of each of the accused persons separately in the direct speech. However, failure to do this cannot be fatal to their plea so long as the charge was read over and over and explained to them, whether jointly or separately, and they both understood the same and each of them individually entered his plea thereto. It would not matter, whether the court's record which described the event was written in direct or reported speech. *See Udeh Vs. State (1999) 7 NWLR (Pt. 609). Anthony Okoro Vs. The State (supra). National Revenue Mobilization Allocation and Fiscal Commission Vs. Johnson (supra).*” (Pp 121–122 paras H–D)

6. *The law does not say that the court must record that the charge was read and explained to the accused to the satisfaction of the court. The authorities do not say that it must be recorded that the charge was read and explained to the accused to the satisfaction of the court (as claimed by the appellant) before proceeding to record his plea thereto. Without doubt, it is good practice for the trial court to record that “the charge was read and fully explained to the accused to the satisfaction of the court” but I do not think the failure to record will render the trial a nullity. See Eyisi Vs. State (2000) 15 NWLR (Pt. 691) 555. (P 122 paras D–F)*

7. *There is nothing wrong in the practice of written address.*

On the issue of filing and adopting written address as permitted by the trial judge in which the appellant claimed to have contravened Section 36 (1) (3) & (4) of the Constitution of the Federal Republic of Nigeria. This court found no merit in the claim. As a matter of fact, adoption of written address is a practice of this court and other lower courts.

Rules of different courts have made provisions for filing and adoption of written address. In this case, order 33 rules 1-6 of the High Court (Civil Procedure) Rules of Cross River State and Order 30 Rules 13, 14, 15 and 16 of the same law stipulates the time within which each party shall file its written address. Once the written address is adopted, it is taken as read. (P 122 paras F–H)

8. *Where at the close of the evidenced of the prosecution no evidence to establish the ingredients of the offence the court shall discharge the accused in a no case submission.*

The law is settled that if at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the defendant sufficient to require him to make a defence, the court shall, as to that particular charge discharge him.

In Ajuluchukwu Vs. The State (2012) 7 WCC 281, the Court of Appeal on when a no-case submission will be upheld, stated thus:

“Where there has not been any evidence to establish the essential ingredients of the alleged offence, or the evidence of the prosecution has become manifestly unreliable after cross-examination, that it cannot reasonably be basis for conviction, the respondents should be discharged without being called upon for defence.” (P 124 paras C–F)

9. *The trial court does not need to consider the sufficiency of evidence at the stage of no case application*

PW2 in giving his testimony, after corroborating what PW1 had earlier said, stated that he had a grinding machine, cushion chairs, box and 12 goats which were all missing. See pages 69-70.

Looking at the testimonies of PW1 and PW2 above, (which was not discredited during cross-examination) I am left with no doubt that the prosecution has established a prima facie case against the accused persons.

In Abogede Vs. The State (1996) 5 NWLR (Pt. 118) page 270 at 280, the Supreme Court held that:

“When a court is giving consideration to a submission of no case, it is not necessary at that stage of the trial for the learned trial judge to determine if the evidence is sufficient to justify conviction. The trial court only has to be satisfied that there is a prima facie case requiring at least some explanation from the accused person.”

See also R. Vs. Ogucha (1959) 4 FSC pg 64.
(P 126 paras A–E)

10. *The court does not have to determine credibility of witnesses but whether determines if the evidence of witness is believed whether there is something which requires the accused to explain.*

In Shatta Vs. FRN (2009) 3 NCC 527, the Court of Appeal held that:

“Without going into the credibility of the witnesses called by the prosecution, but based on the evidence presented before the trial court, it is my view that the court does not have to believe the evidence adduced by the prosecution at this stage but the issue to be determine is that if the case for the prosecution is believed is there anything for the appellant to explain.” *(P 126 paras F–H)*

11. *The meaning of prima facie case.*
In Aduku Vs. FRN (2009) 4 NCC 350. On the meaning of prima facie case the Court of appeal has this to say:

“What is meant by Prima Facie case? It only means that there is a ground for proceedings..... but a prima facie case is not the same as proof which comes later when the court has to find whether the accused is finally guilty or not..... and the evidence discloses a prima facie case when it is such that un-contradicted and if believed it will be sufficient to prove the case against the accused.”

See on this Dr. Olu Onagoruwa Vs. The State (1993) 7 NWLR (Pt. 303) 49 at 80-83. (Pp 126–127 paras H–C)

Per Bage (JSC)

There are several decisions of this court warning against the discharge of accused persons after a submission of no case to answer particularly when it is clear from the evidence adduced that the facts disclose some explanation which the accused has to make in view of what the prosecution has so far established from the evidence.

In The Queen Vs. Ogucha (1959) 4 FSC 64 Abbott F.J. stated that:

“It is the judge's duty however, when a submission of no case to answer is made to discharge an accused where the evidence adduced by the prosecution does not disclose the necessary minimum evidence establishing the facts of the crime charged. In doing so, the judge does not write judgment.

It is not the judge's job, at that stage, to weigh and evaluate evidence or decide who is telling the truth or who is lying

and is not to conclude that the prosecution is unreliable”.

The learned trial judge in his ruling at page 97 of the record stated that:

“Count 1 is one of conspiracy. The evidence of PW1 and PW2 is that the accused persons gathered at the village square and from there moved on to damage the houses of PW2. A court can infer conspiracy from the fact of doing things together upon that inference I can convict the accused persons, so they owe me an explanation which I call upon them now to offer”. (Pp 127–128 paras C–A)

This well respected view of the learned trial judge was also affirmed by the court below where the court in its judgment dismissed the appeal and affirmed the ruling of the trial High Court.

The law is settled that the Supreme Court, this noble court, will not interfere with concurrent findings of facts made by the trial court and the Court of Appeal unless such findings are perverse, or are not supported by the evidence; or are reached as a result of a wrong approach to the evidence; or as a result of a wrong application of any principle of substantive law or procedure.

See Arabambi Vs. Advance Beverages Ind. Ltd (2005) 19 NWLR (Pt. 959) 1 per ONNOGHEN, JSC (as he then was) at P46, C-E).

It is my conclusion in the circumstances that since the appellant has not been able to show these findings to be perverse; this court cannot interfere with the decisions of both courts below.”
(P 129 paras C–F)

Per Peter-Odili (JSC)

“Before the arraignment of the accused/appellant on 30th June, 2011, the question arose on the jurisdiction of the court regards being

taken to the fact that the charge was earlier on before the Magistrate Court Yahe. After hearing addresses of counsel on whether or not the High Court per Ita J. had jurisdiction, the learned trial Judge ruled that he had and that the prosecution would be continued in the said High Court. That is the High Court assumed jurisdiction and the plea was taken. However the issue on whether the prior consent or direction of the High Court was obtained before the information was preferred was not brought up. This therefore impels one to agree with the learned counsel for the respondent that to now bring up the matter of a lack of jurisdiction of the High Court on account of the failure to obtain the said consent at this point and time is like the appellant splitting the jurisdictional question piece meal and in different courts. That is, what I see happening and in my humble view a party cannot be allowed to partition his cause of action in bits and pieces. A cause of action cannot be tackled in a fragmented procedure and as in this case in a manner to support a change of course of the case of the party as he goes along. A situation such as could arise, would create a never ending litigation which goes against the general Principle that there must be an end to litigation and parties know their stand one way or the other.”
(Pp 136–137 paras I–E)

12. *Parties should be consistent in pursuing their appeals.*

I call in aid the case of Ejifodomi Vs. Okonkwo (1982) 12 NSCC 422 per Aniagolu JSC, which details I shall give hereunder-

In that case before the District court of Kano State, the argument was raised that the court had no jurisdiction to hear the case because the premises in dispute were residential and cannot be categorized as business premises.

The District Judge ruled that he had jurisdiction because the premises were business premises. The defendant appealed and the High Court Kano allowed the appeal. The plaintiffs appealed to the Court of Appeal which allowed the appeal and set aside the judgment of the Kano State High Court. On appeal to the Supreme Court, the appellant sought to substitute and argue two new points of law on jurisdiction and title. The Supreme Court refused and the

dictum or part thereof, the court's decision anchored by Aniagolu JSC is set hereunder, viz:

“In the instant appeal, the general issue before the District Court was one of jurisdiction. A challenge to the jurisdiction of a court could be based on varied and diverse points, for example (a) that the judge was not properly appointed; (b) that the matter in issue is outside the limits of the territorial jurisdiction of the court; (c) that the claim is above the justiciable power of the adjudicating court; (d) that the period allowed the court to embark upon the hearing of the case has expired etc. Each issue there, is a matter of jurisdiction but quite different, one from another.

The specific point in this appeal on which the objection to the jurisdiction of the court was based and challenged by the defence, was that the premises was a Residential premises, the adjudication in respect of which, by reason of the provisions of the Rent Control Law, 1977 (section 12), came under the exclusive jurisdiction of the Rent Tribunal; to which argument the plaintiff countered with the assertion that the premises was Business premises, coming under the jurisdiction of the District Court. Issue was joined on this contention. It remained the issue throughout before the District Court; the High Court, and the Federal Court of Appeal. It was a specific point within the general issue of jurisdiction. Parties have fought their case, right up to this court on that point.

Having regard to all the foregoing, I cannot see that this court should allow the appellant to jettison before this court, the issue on which the parties fought their case all the way to the appeal court- an issue on which she lost all

the way. To do so would amount, in effect, to allowing her to commence an entirely new case before this court. There must, in the public interest, be an end to litigation (interest republicae ut sit finis litium) and it is my view that to allow this new issue, under section 39 of the Land Use Act, to be raised at this stage, is not to further, but to hinder, that public interest”.

Clearly, this partition or fragmentation of the jurisdictional question is one to which the appellant is estopped from embracing. It is all the more foreclosed as counsel had the time and opportunity of raising the issue of the lack of consent in the trial court and failed to do so. He lost his chance which he cannot call up as the fancy takes him. *See Ijale Vs. A-G Leventis & Co Ltd (1961) 1 All NLR 762 at 769-770. (Pp 137–138 paras E–C)*

13. *What constitutes valid arraignment of an accused.*

In this issue, the appellant questions the validity of the arraignment of the accused/appellant on the ground that the record did not show who read the charge to the appellant and also that the Record did not show that the charge was explained to the appellant and as mandatorily required by law.

In this regard, a resort to the provisions of Section 36(b) (a) of the CFRN and section 209 CPL which have prescribed what is required for a valid arraignment of an accused person. This court, and I dare say other courts, have followed a path in its interpretation of those provisions which are:

- a. **The accused must be present in court unfettered unless there is a compelling reason to the contrary.**
- b. **The charge must be read over to the accused in the language that he understands.**

- c. The charge should be explained to the accused to the satisfaction of the court.**
- d. In the course of the explanation technical language must be avoided.**
- e. After requirements (a) – (d) above have been satisfied the accused will then be called upon to plead instantly to the charge.**

**I placed reliance on the case of Erakanwe Vs. State (1993) 5 NWLR (Pt. 294) 385; Kajubo Vs. State (1988) 1 NWLR (Pt. 73) 721; Kalu Vs. State (1998) 13 NWLR (Pt. 583) 531 at 607-608.
(Pp 139–140 paras I–G.)**

Per Peter-Odili (JSC)

“The appellant states that exact words of the appellant ought to have been recorded and the court also states who read out the charge and the explanation of what is contained in the charge put across to the appellant before compliance with section 209 CPL would be said to have been met.

What the appellant is seeking is a rigid and inflexible approach in the application of the law before full compliance would be said to have been carried out. That is neither the intendment of the legislature nor within the spirit of the law itself which in my view and in keeping with interpretations already made thereto is that a substantial compliance showing that what is expected has been done is all the law asks of the court of trial.

From the record, it is apparent that the charge was read and explained to each and every of the 14 accused persons of which appellant was one, each of them understood the charge and each

pleaded “not guilty”. The provisions of sections 209 CPL have been complied with as there is nothing on the record to indicate that appellant did not know the nature of the offence he was called upon to defend. A narrow and strict interpretation of the provisions and application of section 209 CPL would not serve the interest of justice but would defeat the course of justice. There is no need to put down all the minute details of what took place at the plea taking, such as the language of explanation and who made the explanation and the issue of the satisfaction of the judge that accused was explained to and he understood. It is sufficient that substantial compliance was in effect. See James Edun & Ors Vs. IGP (1966) 1 All NLR 17; Idemudia Vs. State (1999) 7 NWLR (Pt. 610) 202; Peter Vs. State (1997) 12 NWLR (Pt. 531) 1; Aladu Vs. State (1998) 8 NWLR (Pt. 563) 618.

The arraignment was well conducted as borne out on the record and it satisfied the requirements of section 209 of CPL.”
(*P 141 paras A–G*)

14. *Proper approach of court in handling issues of no case submission.*
The court below was correct in its handling of the matter as he had to keep within strict limits in order not to veer into the unchartered territory in the trial since the substantive matter had not been concluded and even the defence of the appellant was not before the court. A warning along those lines has been put in place in the case of Odojin Bello Vs. State (1967) NMLR 2 at 3 per Ademola CJN. See also Dabo Vs. State (1977) 5 SC 122; Ogoja Vs. COP (1975) 11 SC 74.

Indeed the less said after this point, the better as the matter at the trial court is still in a way on going. (*P 144 paras B–G*)

15. *The purport of a no case submission.*
All that the trial court and the appellate courts are concerned with is whether there is prima facie evidence of the commission of an offence which requires an explanation from the accused (appellant).

See The Queen Vs. Ogucha (1959) 4 FSC 64 where it was held that at the close of the case for the prosecution, the trial court should consider, not whether the evidence against the accused is sufficient to justify a conviction, but whether it has made out a prima facie case requiring at least some explanation from the accused. The complaint about lack of fair hearing cannot be entertained now. See also Ajidagbe Vs. I.G.P. (1958) SC NLR 60; Tongo Vs. C.O.P (2007) 12 NWLR (Pt. 1049) 525. (Pp 145 – 146 paras G – A)

Nigerian Cases cited in this Judgment

Abacha Vs. State (2002) 11 NWLR (Pt. 779) 437 SC;
Abogede Vs. The State (1996) 5 NWLR (Pt. 118);
Adejobi Vs. State (2011) 12 NWLR (Pt.....) 351;
Aduku Vs. FRN (2009) 4 NCC 350;
Ajakaiye Vs. Idehia (1993) 8 NWLR (Pt. 364) 504;
Ajayi Vs. Zaria N.A NO. 2(1964) NNLR 61;
Ajidagba Vs. Inspector General of Police (1958) SCNLR 60;
Ajidagbe Vs. I.G.P. (1958) SC NLR 60;
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Aladu Vs. State (1998) 8 NWLR (Pt. 563) 618;
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Anthony Okoro Vs. State (2012) 7 NCC, 184;
Arabambi Vs. Advance Beverages Ind. Ltd (2005) 19 NWLR (Pt. 959);
ARTA Ind. Ltd Vs. NBCI (1997) 1 NWLR (Pt. 483) 574;
Benson Agbule Vs. Warri Refinery & Petrochemical Co. Ltd (2012) LPELR-20625 (SC) 13;
Benson Vs. Nigeria AGIP Co. Ltd. (1982) 5 SC. 1;
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James Edun & Ors Vs. IGP (1966) 1 All NLR 17;
Jov Vs. Dom (1999) 9 NWLR (Pt. 620) 538 at 541;
Kajubo Vs. State (1988) 1 NWLR (Pt. 73) 721;
Kalu Vs. State (1998) 12 NWLR (Pt. 583) 531;
Longe Vs. FBN Plc (2010) 6 NWLR (Pt. 1189) 1;
Madukolu Vs. Nkemdilim (1962) 2 SCNLR 341;
Makeri Smelting Co. Ltd. Vs. Access Bank (Nig) Plc (2002) 7 NWLR (Pt. 766) 447;
Mikailu Vs. The State (2001) 8 NWLR (Pt. 715) 469;
Monsuru Solola & Ors Vs. State, 22 NSCQR 251;
National Revenue Mobilization Allocation and Fiscal Commission (N.R.M.A.F.C) Vs. Johnson (2007) 49 W.R.N Pages 169-170;
Obodo Vs. Olomu (1987) 3 NWLR (Pt. 5911);
Odofin Bello Vs. State (1967) NMLR 2;
Ogoja Vs. COP (1975) 11 SC 74;
Ogolo Vs. Fubara & Ors (2003) 11 NWLR (Pt. 831) 231;
Oguno Vs. State (2013) 15 NWLR (Pt. 1376) 1;;
Ogunye Vs. State (1999) 5 NWLR (Pt. 604) 518;
Ogunye Vs. State (1999) 5 NWLR (Pt. 604) 548;
Okolie Vs. The State (2012) 1 NWLR (Pt. 1281) 385;
Olabode Vs. State (2009) 4 NCC 199;
Ovunwo Vs Woko (2011) 17 NWLR (Pt. 1277) 522;
Peter Vs. State (1997) 12 NWLR (Pt. 531) 1;
R. Vs. Ekanem 13 WACA 108 at 109;
R. Vs. Ogucha (1959) 4 FSC pg 64;

Rent Control Law, 1977 (Section 12);
Sapo & Anor. Vs. Sunmou (2010) 11 NWLR (Pt. 1205) 374;
Shatta Vs. FRN (2009) 3 NCC 527;
The Queen Vs. Ogucha (1959) 4 FSC 64;
Tongo Vs. C.O.P (2007) 12 NWLR (Pt. 1049) 525;
Tongo Vs. C.O.P 12 NWLR (Pt. 1049) 525 SC;
Ubanatu Vs. COP (2000) 2 NWLR (Pt. 643) 115;
Udeh Vs. State (1999) 7 NWLR (Pt. 609);
Wahabi Adejobi & Anor. Vs. State (2011) 12 NWLR (Pt. 1261)) 347; and
Western Steel Workers Union of Nigeria (1986) 3 NWLR (Pt. 30) 617.

Nigerian Statutes cited in this Judgment

Laws of Cross River State of Nigeria 2004 Section 20(6), 70, 541 and 390 (9)
Criminal Procedure Law of Cross River State, 2004 Section 209;
Criminal Procedure Law, Cap. C17, Laws of Cross River State of Nigeria, 2004
Section 309 45(2) (b);
Criminal Procedure Law, Cap. C17 Section 309 (2) (b);
Criminal Procedure Law, Cap. C17, Vol. 3, Laws of Cross River
State, 2004 Section 309 (3) (b);
Criminal Procedure Law Section 309;
Criminal Procedure Law, Cap 39 Laws of Oyo State, 2000 Section
340 (2) (b);
Constitution of the Federal Republic of Nigeria 1999 Section 36 (1) (3) & (4);
36(6)(a)
Constitution of the Federal Republic of Nigeria 1999 Section 36 (6) (a);
1999 CFRN: 36(6) (1), (3) & (4);

Representations

Fred Onuobia with **Solomon Ezike**, for the appellant.

Godwin Omoaka with **Abu Omakoji Friday, Arnold Ushiadi** and **Solomon Babajide**, for the respondent.

A S. D. BAGE (Delivering the Lead Judgment): This is an appeal against the ruling of the Court of Appeal, Calabar Judicial Division, delivered on the 19th day of November, 2013, in Appeal No. CA/C/76C/2012. The Court of Appeal affirmed the ruling of the High Court of Cross River State sitting at Ogoja.

B The appellant, Ede Oko along with 13 other accused persons, were arraigned before Justice E.E Ita of Cross River High Court, charged with conspiracy, unlawful assembly, malicious damage and stealing contrary to **C** Section 20(6), 70, 541 and 390 (9) of the Criminal Code Laws of Cross River State of Nigeria 2004 respectively.

The appellant and the other 13 accused persons denied both counts. At the trial, the prosecution called a total of five (5) witnesses while a no-case submission was made on behalf of the appellants. **D** After hearing and evaluation of the testimonies of the five witnesses, the learned trial judge over-ruled the no-case submission and requested the appellants to enter his defence.

E Dissatisfied with the ruling, the appellant appealed to the Court of Appeal. The Court affirmed the ruling of the High Court and dismissed the appeal.

F This appeal is against that ruling. From the information in the charge, the facts of the case against the appellant are that they, on the 10th May, 2010, at Oloko-Agwape village in Yala Local Government Area, conspired to and unlawfully assembled, caused malicious damage and stole a motor-cycle, twelve (12) goats, two (2) bicycles and bush meat, property **G** of OganodeAwokoIpuole.

The appellant on the 30th April, 2015, filed his brief of argument and formulated five issues for determination in his appeal.

H “1. *Whether the trial court has jurisdiction to try the appellant when the consent or direction of High Court Judge of Cross River State was not obtained as required by Section 309 (2) (b) of the Criminal Procedure Law, Cap. C17, Laws of Cross River State of Nigeria, 2004 (the CPL) before the information was*

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- A *filed?*
2. *Whether the purported arraignment and taking of the plea of the appellant was valid in law (Ground 5).*
- B
3. *Whether the written address and the reply on the no case submission did not breach the appellant's right to fair hearing and thereby consequently rendering the entire trial a nullity (Ground 6).*
- C
4. *Whether the decision of the Court below “to be very brief and to restrict itself” in reviewing the argument does not amount to a denial of the right to fair hearing of the appellant, and thus rendering the judgment of the court below arrived at in such circumstances liable to be set aside? (Ground 3).*
- D
5. *Whether, having regard to the entire circumstances of this case, the court below was correct in affirming the ruling of the trial court and thereby calling upon the appellant to enter his defence? (Ground 12 and 4).”*
- E
- F

However, the respondent in his brief of argument filed on the 8th January, 2016, formulated the following issues for determination.

- G “1. *Whether the failure to obtain the direction or consent of a Judge to prefer the information in this case can be raised for the first time in this court regard being had to the provision of Section 309 (3) (b) of the Criminal Procedure Law, Cap. C17, Vol. 3, Laws of Cross River State, 2004 (Jurisdiction issue).*
- H
- I 2. *Was the appellant's arraignment in compliance with the provisions of Section 309 of the Criminal*

- A ***Procedure Law (Arraignment issue) (Ground 5).***
3. ***Considering the facts, did the learned trial judge infringe on the appellant's right to a fair hearing as to validate a nullification of the proceedings? (fair hearing issue) (Grounds 3 and 6).***
- B
4. ***Were the learned Justices of the Court below right in dismissing the no case submission and affirming the decision of the learned trial Judge on the ground that a prima facie case has been made out against the appellant? (Dismissal of case submission issue) (Ground 1, 2 and 4)."***
- C
- D

E Looking at the two sets of issues above, it shows clearly that learned counsel for the parties appeared to be **ad idem** on the issues. They ask the same questions. I shall accordingly rely on the appellant's issues in considering this appeal.

F At the hearing of the appeal, learned counsel for the appellant adopted his brief and urged this court to allow the appeal, while learned counsel for the respondent adopted the respondent's brief and urged this court to dismiss the appeal and affirm the concurrent ruling of both courts below.

G **ISSUE I**

H ***Whether the trial court has jurisdiction to try the appellant when the consent or direction of a High Court Judge of Cross River State was not obtained as required by Section 309 (2) (b) of the Criminal Procedure Law, Cap. C17, Laws of Cross River State of Nigeria, 2004, before the information was filed?"***

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- A** Learned counsel to the appellant argued that, this is an issue of jurisdiction and as such, the leave of the court is not required before same can be raised. He relied on decision of the court in **Benson Agbule Vs. Warri Refinery & Petrochemical Co. Ltd. (2012) LPELR 20625 (SC) at p. 13.**
- B** He further argued that, the trial was not initiated by due process of law as the condition precedent to the exercise of the jurisdiction of the trial court was not fulfilled. He cited Section 309 (2) (b) of CPL.
- He submitted that, it is apparent from the record that no such consent or direction was obtained before the respondent filed the information against the appellant. At least, no such consent or direction of the High Court of Cross River State forms part of the record.
- C**
- He argued that, it is trite that the content of the record of proceedings of a court are binding on the court and the parties, and on appellate court, which is always bound by the record and the record only.
- D**
- He urged the court to hold that failure of the respondent to obtain consent of a judge of High Court of Cross River State before filing the information against the appellant robbed the trial court of the jurisdiction to try the appellant. Finally, he submitted that the information is liable to be quashed and this court should quash same and strike out this action for want of jurisdiction.
- E**
- F** On the other hand, learned counsel for the respondent submitted that, the above arguments canvassed by the appellant are misleading, although he admitted that the issue of jurisdiction can be raised at any time during the course of proceedings, he submitted that it is not free for all procedure, particularly where there is a procedure to be followed in raising the objection.
- G**
- He also argued that this issue is a non starter, even though the appellant was represented by counsel throughout the trial, this issue was not raised, he cannot now raise it. It is dead on arrival.
- H**
- He further submitted that the appellant cannot, as he seeks to do, split in piecemeal, his objection to the jurisdiction of the lower court. The jurisdiction argument must be made as a whole, not in bits and pieces. He finally submitted that the appellant is precluded from contending non-compliance with Section 309 (2) (b) of the CPL as a basis for invalidating
- I**

A the proceedings. Had the appellant counsel exercised reasonable diligence, he would have made this argument as addition in his challenge to the jurisdiction of the court. But he did not, and cannot now do so. He urges the court to reject the appellant's submission and hold that the trial
B was validly undertaken before the trial court.

Looking at the above arguments from both counsel, there are two issues to be considered by this court, whether failure to seek the consent of the trial judge in arraigning the appellant is fatal and can render the trial to
C be struck out for want of jurisdiction and whether this issue can be raised on appeal for the first time in this court.

Section 309 (3) provides that:

D “(3) If an information preferred otherwise than in accordance with the provisions of sub-section (2) of this section has been filed by the registrar the information shall be liable to be quashed.”

E **Provided that:**

(a)

F **(b) Where a person is convicted on any information or on any count of an information, that information or count shall not be quashed under this section in any proceedings on appeal, unless application is made at the trial that it should be so quashed.”**

G It is pertinent to state that, the trial judge before arraignment of the appellant ordered prosecution to file certified true copy of all the proceedings that took place at the Magistrate's court together with the
H exhibit to enable him determine whether or not he can assume jurisdiction see page 38 of the record. Sequel to that, on the 9th June, 2011, the trial Judge ruled that:

I **“At the stage where the matter was struck out I do not see any injustice that will occasion the accused person if the**

A charges are pursued in this court.”

This court is satisfied that the trial judge, based on the above facts, had impliedly consented and given his directives in respect to the procedure provided under Section 309 (2) (b) above.

However, failure from the respondent to seek for consent of the judge cannot be said to have rendered the trial a nullity and liable to be struck out.

C In **Anthony Okoro Vs. State (2012) 7 NCC** page 184. This court held that:

D *“There is a distinction between a matter of procedure that affects substantial justice in the trial of a case and a matter of procedure which in no way affects the justice of the trial of a case.”*

E *See also Idemudia Vs. State(1999) 7 NWLR (Pt. 610) 202.* Litigants should expect no technical but substantial justice from this court. We have said several times that we are not a workshop for technical justice. Over and over again, we have reiterated the need to do substantial justice and avoid delving into the error of technicalities, see for example the case of **F 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 PETER-ODILI, JCA (as he then was) opined as follows:

G *“..... 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 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*

A *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.”*

B *See also Ajakaiye Vs. Idehia (1993) 8 NWLR (Pt. 364) 504, ARTA 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 SC. 1.”*

C In the case at hand, the respondent's failure to seek the consent of the judge does not in any way affect the justice of the trial. Therefore, the appellant cannot rely on the provision of Section 309 (2) (b) above. *See also Egbedi Vs. The State (1981) 11-12 SC. 98 and Ajayi Vs. Zaria N.A NO. 2(1964) NNLR 61.*

In *Egbedi Vs. State* above, this court held that:

E *“It is settled law that an accused person who acquiesced to an irregular procedure that did not lead to miscarriage of Justice cannot complain of the procedure on appeal.”*

F In this case the proper procedure as provided under Section 309 (3) has not been followed. The Section provides thus:

G *“(3) If an information preferred otherwise than in accordance with the provisions of sub section (2) of this Section has been filed by the registrar the information shall be liable to be quashed provided that:*

H *(c)*

I *(d) Where a person is convicted on any information or any count of an information, that information, or count shall not be quashed under this section in any proceedings on appeal, unless application is made at the trial*

A *that it should be so quashed.”*

In **Adejobi Vs. State (2011) 12 NWLR (Pt.....)** 351 this court held that:

B

“A question of law and jurisdiction can be raised at anytime in the proceedings, but it is not a free for all procedure. Where a statute under which an issue or matter is to be raised has provided a procedure for raising such issue or matter, that procedure and no other, must be followed. In the instant case, the procedure that must be followed to quash the information or count was as provided under Section 340 (2) (b) of the Criminal Procedure Law, Cap 39 Laws of Oyo State, 2000. Failure to apply to quash it at the trial court rendered both the grounds of appeal on that point and the issue raised thereon incompetent.

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D

E

Indeed the Court of Appeal has no jurisdiction to quash any information or count unless there has been an application to quash it at the trial.”

F

However, in **Jov Vs. Dom (1999) 9 NWLR (Pt. 620) 538 at 541**, this court held that a question of law and jurisdiction can be raised at any time in the proceedings, but it is not on a free for all procedure. Per Belgore JSC at p.

G 547 paras. C.E has this to say:

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“This is so in order to avail the other side every opportunity to advert to that issue. But to contend that issue of law or the constitution can be raised at anytime and so nothing more than to raise it in argument is like laying a disrupting ambush for the opponent. This is not the spirit of our practice of adjudication of holding the even balance. Proper application must be made so that the other side will know clearly what he has to meet. In the present appeal, the appellant introduced

I

A *ground 5 on lack of jurisdiction by trial court, a matter not raised in the appellate High Court and in the Court of Appeal. It came like a bird out of the whirlwind, why was this not raised at the High Court or at the Court of Appeal.”*

B

As stated earlier. I am satisfied that, failure of the respondent to seek consent of Justice Ita E.E. does not invalidate the trial. This issue is hereby resolved in favour of the respondent.

C ISSUES 2, 3, and 4 will be taken together.

ISSUE 2

D *Whether the purported arraignment and taking of the plea of the appellant was valid in law.*

ISSUE 3

E

Whether the written address and the reply on the no case submission did not breach the appellant's right to fair hearing and hereby consequently rendering the entire trial a nullity.

F

ISSUE 4

G *Whether the decision of the court below to be very brief and to restrict itself in reviewing the arguments canvassed in the appellant's brief of argument does not amount to a denial of the right of fair hearing of the appellant, and thus rendering the judgment of the court below arrived at in such circumstances liable to be set aside.”*

H

I Learned counsel for the appellant, submitted that a cursory look at the record will reveal that the trial of the appellant did not commence with the arraignment of the accused. He argued, this is in breach of the settled

A principle of the procedure for arraignment in criminal matters. He submitted that the trial did not comply with the provisions of Section 36 (6) (a) of the Constitution of the Federal Republic of Nigeria 1999. He urged the court to discharge and acquit the appellant.

B On the third Issue, learned counsel submitted that the entire proceedings leading to the overruling the appellant's "No case submission" at the trial court is violated by the manner in which the no case submission was rendered by the appellant's and respondent's counsel. The learned trial judge by permitting both counsel to the appellant and respondent to file the written address and reply, breached the constitutionally entrenched provision relating to appellant's right to fair hearing.

C He also argued that it behoves on the court below to give a full and comprehensive consideration of all the issues and argument and canvassed in the appellant's brief of argument and pronounce on them. Failure to do so, as the court below had done in the instant appeal, is tantamount to not hearing the appeal at all. This failure, he argued no doubt breached the appellant's right to fair hearing and resulted to a miscarriage of justice. He cited **Longe Vs. FBN Plc (2010) 6 NWLR (Pt. 1189) 1 at p. 20** para H-P 21.

D Learned counsel submitted that had the court below fully reviewed the arguments and issues canvassed in the appellant's brief of argument, there is no doubt that it would have come to a different conclusion. He urged this court to resolve the issue raised herein in favour of the appellant and set aside the ruling of the court below.

E In his response, learned counsel for the respondent on issue of arraignment contended that, the arraignment of the appellant complied substantially with the provisions of Section 209 of the CPL and this suffices to validate the arraignment. He cited **Erekanure Vs. State (1993) 5 NWLR (Pt. 294) 385** and **James Edun & Ors Vs. I.G.P. (1966) 1 All NLR 17**. He submitted that as the record indicated, the proceedings were conducted in the English language, a language which from available evidence on the record, the appellant understands perfectly. He finally submitted that the arraignment of the appellant is proper, valid and complies with Section 209 of the CPL.

A The learned counsel argued that there can be no merit in the appellant's complaint that the trial was not conducted in public, simply, because the written address was adopted and not read in open Court, as a matter of fact, adoption of written address is so deeply entrenched in the practice and procedure of our superior Courts, he cited **Obodo Vs. Olomu (1987) 3 NWLR (Pt. 5911)**.

B He further argued that it was the appellant who first filed a written address, apparently without an express order of Justice Ita, he appeared to have done so of his own accord.

C He submitted that appellant cannot turn-around to complain about the alleged irregularity. If anything, he has acquiesced in, or waived his right to complain. He urge the court to reject the appellant's contention that he was not accorded a fair hearing in the consideration of this case by both the trial High court and the Court below. The proceedings were entirely fair.

Determination of the issues;

E The object of arraignment in terms of Section 215 of the Criminal Procedure Law is to ensure that justice is done to the accused by ensuring that he understands the charge against him so as to enable him to make his defence.

F In **ChikaodiMadu Vs. The State (2012) NCC at 553**, this court on the essential requirement of valid arraignment enumerated conditions for valid arraignment:

G *“(a) The accused must be placed before the court unfettered unless the court shall see cause otherwise to order.*

H *(b) The charge or information shall be read over and explained to the accused to the satisfaction of the court by the registrar or other officer of the court; and*

I *(c) The accused shall then be called upon to plead instantly thereto unless of course, there exist any*

A *valid reason to do otherwise such as objection to want to service where the accused is entitled by law to service of a copy of the information and the court is satisfied that he has in-fact not been duly served therewith.”*

B

See also Olabode Vs. State (2009) 4 NCC 199, Ogunye Vs. State (1999) 5 NWLR (Pt. 604) 518 Monsuru Solola & Ors Vs. State, 22 NSCQR 251 at pp. 289-290.

C

Looking at pages 62-63 of the record, this is what transpired in the trial court when the appellant was arraigned.

D *“J I Ushie for the State
J I Ofen & C Odey for the accused plea*

E *Count 1 read to accused person in English Language.
Each of the 14 accused persons says he/she understands the charge and pleads not guilty.*

F *Count 2 read to the accused persons in English Language.
Each of the 14 accused persons says he/she understands the charge and pleads not guilty.*

G *Count 3 read to accused persons in English Language.
Each of the 14 accused persons says he/she understands the charge all pleads not guilty.*

H *Count 4 read to accused persons in English Language.
Each of the 14 accused persons says he/she understands the charge and plead not guilty.”*

I From the foregoing, this court is satisfied that what transpired at page 62 of the record in this case is in conformity with the provision of the law above. The appellant has not furnished this court with any evidence or fact to prove

A his claim.

The charge having been read over and explained to both accused persons in English language and each of them pleaded not guilty thereto, I find it difficult to conceive how the arraignment of the accused persons can

B be faulted. Without doubt, it would have been preferable for the learned trial judge to have recorded the plea of each of the accused persons separately in the direct speech. However, failure to do this cannot be fatal to their plea so long as the charge was read over and over and explained to

C them, whether jointly or separately, and they both understood the same and each of them individually entered his plea thereto. It would not matter, whether the court's record which described the event was written in direct or reported speech. *See Udeh Vs. State (1999) 7 NWLR (Pt. 609).*

D **Anthony Okoro Vs. The State (supra). National Revenue Mobilization Allocation and Fiscal Commission Vs. Johnson (Supra).**

The authorities do not say that it must be recorded that the charge was read and explained to the accused to the satisfaction of the court (as claimed by the appellant) before proceeding to record his plea thereto. Without doubt, it is good practice for the trial court to record that “the charge was read and fully explained to the accused to the satisfaction of the court” but I do not think the failure to record will render the trial nullity.

F *See Eyisi Vs. State (2000) 15 NWLR (Pt. 691) 555.*

On the issue of filing and adopting written address as permitted by the trial judge in which the appellant claimed to have contravened Section 36(1)(3) & (4) of the Constitution of the Federal Republic of Nigeria. This

G court found no merit in the claim. As a matter of fact, adoption of written address is a practice of this court and other lower courts.

Rules of different courts have made provisions for filing and adoption of written address. In this case, order 33 rules 1-6 of the High

H Court (Civil Procedure) Rules of Cross River State and Order 30 Rules 13, 14, 15 and 16 of the same law stipulates the time within which each party shall file its written address. Once the written address is adopted, it is taken as read.

I This court will not waste time in resolving this issue against the appellant.

A On the basis of the above, issue 2, 3 and 4 are hereby resolved in favour of the respondent.

ISSUE 5

B

“Whether having regard to the entire circumstances of this case, the court below was correct in affirming the ruling of the trial court and thereby calling upon the appellant to enter his defence.

C

The learned counsel for the appellant argued that, the law is settled that before an accused person can be called upon to enter his defence, the prosecution must have established a prima facie case against the accused. Where the prosecution failed to establish a prima facie case against the accused, such an accused would not be called upon to enter his defence. He cited UbanatuVs. COP (2000) 2 NWLR (Pt. 643) 115 at 128 G. He further argued that where a prima facie case was not made out against an accused, a submission of no case to answer made by such an accused person ought to be upheld by a trial court and such accused person be discharged and acquitted.”

D

E

F

G He submitted that, evidence of PW1 and PW2 which was relied upon by the trial court to hold that there was conspiracy is unreliable. No reasonable tribunal could have safely convicted the appellant on such unreliable evidence on the crucial issue of the actual commission of the offence. He finally urged this court to resolve this issue in favour of the appellant.

H

I On the contrary, learned counsel for the respondent contended that an in-depth evaluation of the evidence adduced by the prosecution at the trial does not support the appellant's contention. He argued that the primary consideration at the stage of a no case to answer submission is not whether the evidence laid by the prosecution would sustain a conviction but whether, on the strength of the evidence, the prosecution has established a

A prima facie case against the defendant.

He holds that evidence disclosed a '**prima facie case**' when it is such that if un-contradicted and if believed, will be sufficient to prove the case against the respondent.

B He finally submitted that the court below rightly affirmed the findings of fact made by the trial court. He urged this court to find that the appellant has been properly called to defend the charges against him, his no case submission was rightly dismissed by the court below.

C The law is settled that if at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the defendant sufficient to require him to make a defence, the court shall, as to that particular charge discharge him.

D In **Ajuluchukwu Vs. The State (2012) 7 WCC 281**, the Court of Appeal on when a no-case submission will be upheld, stated thus:

E *“Where there has not been any evidence to establish the essential ingredients of the alleged offence, or the evidence of the prosecution has become manifestly unreliable after cross-examination, that it cannot reasonably be basis for conviction, the respondents should be discharged without being called upon for defence.”*

F

In the case at hand, the prosecution called a total of five witnesses out of which PW1 and PW2 were eye witnesses.

G PW1 in giving his testimony stated, as contained in pages 63-64 of the record, thus:

H *“On 10/5/2010 at about 7:20am, I left Echumoga village to Echumofana to write my Senior School Certificate Examination. I saw a large crowd including the accused persons. They carried sticks and cutlass I saw the accused singing war songs and breaking my father's buildings.*

I

- A** *3rd accused person was holding a gun.*
- B** *4th accused person was holding my younger brother Awoko Joseph by his hand. I asked 4th accused why he was holding my brother and he said if I did not keep quite he will kill me. He asked me whether my wife did not pass to me the message he, 4th accused, sent through her. 3rd accused pointed the gun he was holding at me and said if I did not keep quite he will shoot me. He shot unto the air to show me he was serious. I was afraid and ran away to Yegu village and informed my elder brother, Fidelis Awoko, about what was happening in our compound. Fidelis and I left to the Police station, Area Command, Ogoja where we laid a complain. A Police man (Agara) accompanied us to Oloko Ogwobe village where the incident took place. When we got to OlokoOgwobe we met the crowd at Adamode's compound. 8th accused person told the Police that they were more than those we met there. That the Police should go and bring truck to accommodate all of them.*
- C**
- D**
- E**
- F** *Accused persons destroyed three zinc houses and four huts in my father' compound. They used sticks to hit and destroy the building. They used their hands and cutlass to cut the huts.*
- G**
- H** *I was leaving at Echumoga until trouble started between my father and Oloko people. The people wrote a petition against my father and we were invited to the Local Government Council Office. It was because of that problem that I and my brothers left Oloko. I went to leave at Echumoga.*
- I** *Apart from the building, they damage a motorcycle, two bicycles and many other things I cannot remember the value*

A *of the properties damaged. My elder brother would know that.”*

B PW2 in giving his testimony, after corroborating what PW1 had earlier said, stated that he had a grinding machine, cushion chairs, box and 12 goats which were all missing. See pages 69-70.

C Looking at the testimonies of PW1 and PW2 above, (which was not discredited during cross-examination) I am left with no doubt that the prosecution has established a prima facie case against the accused persons.

In **Abogede Vs. The State (1996) 5 NWLR (Pt. 118) page 270 at 280**, the Supreme Court held that:

D *“When a court is giving consideration to a submission of no case, it is not necessary at that stage of the trial for the learned trial judge to determine if the evidence is sufficient to justify conviction. The trial court only has to be satisfied that there*
E *is a prima facie case requiring at least some explanation from the accused person.”*

See also **R. Vs. Ogucha (1959) 4 FSC pg 64.**

F In **Shatta Vs. FRN (2009) 3 NCC 527**, the Court of Appeal held that:

G *“Without going into the credibility of the witnesses called by the prosecution, but based on the evidence presented before the trial court, it is my view that the court does not have to believe the evidence adduced by the prosecution at this stage but the issue to be determine is that if the case for the prosecution is believed is there anything for the appellant to*
H *explain.”*

In **Aduku Vs. FRN (2009) 4 NCC 350**. On the meaning of prima facie case the Court of appeal has this to say:

I

- A ***“What is meant by Prima Facie case? It only means that there is a ground for proceedings..... but a prima facie case is not the same as proof which comes later when the court has to find whether the accused is finally guilty or not..... and***
- B ***the evidence discloses a prima facie case when it is such that un-contradicted and if believed it will be sufficient to prove the case against the accused.”***

- C ***See on this Dr. Olu Onagoruwa Vs. The State (1993) 7 NWLR (Pt. 303) 49 at 80-83.***

D There are several decisions of this court warning against the discharge of accused persons after a submission of no case to answer particularly when it is clear from the evidence adduced that the facts disclose some explanation which the accused has to make in view of what the prosecution has so far established from the evidence.

- E In ***The Queen Vs. Ogucha (1959) 4 FSC 64*** Abbott F.J. stated that:
- F ***“It is the judge's duty however, when a submission of no case to answer is made to discharge an accused where the evidence adduced by the prosecution does not disclose the necessary minimum evidence establishing the facts of the crime charged. In doing so, the judge does not write judgment.***

- G ***It is not the judge's job, at that stage, to weigh and evaluate evidence or decide who is telling the truth or who is lying and is not to conclude that the prosecution is unreliable”.***

The learned trial judge in his ruling at page 97 of the record stated that:

- H ***“Count 1 is one of conspiracy. The evidence of PW1 and PW2 is that the accused persons gathered at the village square and from there moved on to damage the houses of PW2. A court can infer conspiracy from the fact of doing things together upon that inference I can convict the accused***
- I

A *persons, so they owe me an explanation which I call upon them now to offer”.*

B On the 2nd count of unlawful assembly, the trial judge found in his ruling at pages 97-98 that:

C *“These pieces of evidence show that people, including the accused persons gathered with sticks and cutlasses and moved up to the gate of PW2. They started breaking the house of PW2. It is only left for me to decide whether they conducted themselves in such a manner as to cause persons in the neighbourhood to fear on reasonable ground that the persons so assembled will turn tumultuously disturb the peace or that they will provoke other persons tumultuously to disturb peace. There is prima facie evidence from the above evidence in support of this charge and I call upon the accused persons to offer their explanations.”*

D Learned trial judge found, however, on the third count in his ruling at page 98 that:

E *“Count 3 is for malicious damage to property PW1 & 2 said they saw the accused persons destroying the property of PW2. Counsel for the accused persons fell into error in his address when he went into how the property was damaged. Whether by breaking down or by fire. This is not the stage for that. Section 451 of the Criminal code law under which the charge is laid does not make such distinction. There is prima facie evidence put in by the prosecution that accused persons can be convicted, if believed. Accused persons are called upon to offer this defence.”*

F On the last count, ie stealing the trial court found that:

- A** This appeal is against the judgment of the Court of Appeal, Calabar Division or court below delivered on the 19th November, 2013, Coram Mohammed Lawal Garba JCA, C.C. Nweze JCA (as he then was) and Onyekachi A. Otisi JCA affirming the Ruling of E.E. Ita J. of the Cross River State High Court, Ogoja Division delivered on 5th March 2012 in which the accused/appellant's no case submission was dismissed.

BACKGROUND FACTS

- C** The appellant and thirteen (13) other persons (the co-accused) were charged for the offences of conspiracy contrary to section 520(6), unlawful assembly contrary to Section 70, Malicious Damage contrary to Section 451 and stealing contrary to Section 390(9) of the Criminal Code, Cap C16, Vol. 3, Laws of Cross River State of Nigeria, 2004. The information which was not dated can be found at pages 2-3 of the Record. **There is nothing on the Record to show that the information was preferred by the direction or consent of a Judge of the High Court of Cross River State as required by Section 309(2) (b) of the Criminal Procedure Law, Cap C17 Laws of Cross River State of Nigeria, 2004 (the "CPL")**

- E** The appellant and the co-accused persons were arraigned on June, 30, 2011 before the trial Court for the offences mentioned in paragraph 2.1 hereof. The appellant was arraigned as the 11th accused.

- F** The brief facts of the case as can be gleaned from the counts of the information are that on May, 2010, at Oloko-Agwape Village in Yala Local Government Area of Cross River State, the appellant with the co-accused persons allegedly conspired to and unlawfully assembled, caused malicious damage to three (3) zinc houses and four (4) huts, property of Ogamode Awoko Ipuole and stole a Daylong Motorcycle, twelve (12) goats, two (2) bicycles and bush meat, property of Ogamode Awoko Ipuole.

H At the Trial Court

- I** The matter first came up before the trial court on March 11, 2011, but the arraignment of the appellant did not take place on the said date. The matter suffered four (4) further adjournments before the appellant was finally arraigned. The appellant attended court on the said dates. On June 30,

A 2011, when the appellant was arraigned along with the co-accused person, the record shows as follows:

“PLEA:

B Count 1 read to the accused person in English Language.
Each of the 14 accused persons says he/she understands the charge and pleads not guilty.

C Count 2 read to the accused persons in English Language.
Each of the 14 accused persons says he/she understands the charge and pleads not guilty.

D Count 3 read to the accused persons in English Language.

Count 4 read to the accused persons in English Language.

E Each of the 14 accused persons says he/she understands the charge and pleads not guilty.

The respondent called five witnesses who testified as PW1, PW2, PW3, PW4, and PW5. The respondent's witnesses also tendered several items and documents which were admitted by the trial court and marked as

F Exhibit “1 to 25”. The respondent thereafter closed its case.

When the case came up on February 7, 2012 at the trial court, the following transpired:

G **“Odey: We have filed a written no case submission.
Odey: Adopts the written submission as his address to the court.**

H Prosecution to file reply within 14 days.

Seven days to file rejoinder, if need be.

I Adjourned to 1/3/2012 for Ruling.”

- A** The written “No Cases Submission” filed by counsel to the appellant can be found at page 40-51 of the Record while the reply filed by the respondent can be found at pages 52-55 of the record. **There is no indication on the Record that the respondent adopted its Reply or that the Written “No Case Submission” and the Reply were read in the open court.** On March 5, 2012, the trial court delivered the Ruling overruling the “No Case Submission” and consequently called upon the appellant to enter his defence.

C

At the Court Below

The appellant was dissatisfied with the Ruling of the trial court and thus, filed his Notice of Appeal dated March 8, 2012, of seven grounds.

- D** The appellant's brief of argument dated May 30, 2012 and filed on May 31, 2012 can be found at pages 140-161 of the Record. The respondent's Brief of Argument dated and filed on April 15, 2013 was deemed properly filed and served on September 17, 2013.

- E** At the Court below, the appellant contended that no prima facie case was made out against him. The appellant argued that where, in a criminal case, such as this, the respondent failed to establish a prima facie case against him, the trial court was duty-bound to discharge and acquit him. On its part, the respondent argued that a prima facie case was made out against the appellant and that the trial court was right to have called upon the appellant to enter his defence.

- F** The fuller details of the facts are captured in the lead judgment and there is no need to go into them.

- G** Learned counsel for the appellant, Fred Onuobia Esq. on the 9th day of the February, 2017 adopted his brief of argument filed on 30/4/2015 and a reply brief of 12/2/2016. In the brief, learned counsel distilled five issues for determination, viz:

- H**
- I** **(1) *Whether the trial court has jurisdiction to try the appellant when the consent or direction of a High Court Judge of Cross River State was not obtained as required by Section 309 (2)(b) of the Criminal***

- A** *Procedure Law, Cap. C17, Laws of Cross River State of Nigeria, 2004 (the “CPL”) before the information was filed?*
- B** (2) *Whether the purported arraignment and taking the plea of the appellant was valid in law? (Ground 5).*
- C** (3) *Whether the Written Address and the Reply on the “No Case Submission” did not breach the appellant's right to fair hearing and thereby consequently rendering the entire trial a nullity? (Ground 6).*
- D** (4) *Whether the decision of the Court below “to be very brief and to restrict itself” in reviewing the arguments canvassed in the appellant's brief of argument does not amount to a denial of the right to fair hearing of the appellant, and thus rendering the judgment of the Court below arrived at in such circumstance liable to be set aside? (Ground 3).*
- E** (5) *Whether, having regard to the entire circumstances of this case, the Court below was correct in affirming the Ruling of the Trial Court and thereby calling upon the appellant to enter his defence? (Grounds 1, 2 and 4).*
- F**
- G** Godwin Omoaka Esq. for the respondent adopted his brief of argument filed on the 8/1/2016 and deemed filed on 16/3/2016 and raised four issues for determination including the first issue on jurisdiction.
- H** 1. *Whether the failure to obtain the direction or consent of a Judge to prefer the information in this case can be raised for the first time in this court regard being had to the provision of Section 309(3) (b) of the Criminal Procedure Law, Cap. C.17, vol. 3, Laws of Cross River State, 2004. (Jurisdiction Issue)*
- I**

- A 2. *Was the appellant's arraignment in compliance with the provisions of section 209 of the Criminal Procedure Law? (Arraignment issue) Ground 6.*
- B 3. *Considering the facts, did the learned trial Judge infringe on the appellant's right to fair hearing as to validate a nullification of the proceedings? (Fair Hearing Issue) Ground 3 and 6.*
- C 4. *Were the learned Justices of the court below right in dismissing the no case submission and affirming the decision of the learned trial Judge on the ground that a prima facie case has been made out against the appellant? (Dismissal of no case submission issue) Ground 1, 2 and 4.*
- D
- E I shall utilize the issues as crafted by the respondent for ease of reference.

ISSUE 1

- F *Whether the failure to obtain the direction or consent of a Judge to prefer the information in this case can be raised for the first time in this court regard being had to the provision of section 309(3) (b) of the Criminal Procedure Law, Cap.C.17,*
- G *Vol. 3, Laws of Cross River State, 2004.*

H Fred Onuobia Esq. of counsel for the appellant contended that the issue under discourse being of jurisdiction, leave of court is not required before it can be raised by the appellant. He cited **Benson Agbule Vs. Warri Refinery & Petrochemical Co. Ltd(2012) LPELR- 20625 (SC) 13; Alhaji Tsoho Dan Amale Vs. Sokoto Local Government (2012) LPELR 7842 (SC) P.23.**

I That it is well settled that certain conditions must co-exist before a court of law would be seised of the jurisdiction and be competent to

A entertain an action in court, be it **criminal or civil**. He referred to **Madukolu Vs. Nkemdilim (1962) 2 SCNLR 341; Western Steel Workers Union of Nigeria (1986) 3 NWLR (Pt. 30) 617.**

That there is nothing on the record to show that the requisite consent
B and/or direction of the court in the framing of the information had robbed the court of jurisdiction to entertain the action. That is that the failure is fatal to the proceedings. He cited **Ogolo Vs. Fubara & Ors (2003) 11 NWLR (Pt. 831) 231 at 264; Sapo & Anor. Vs. Sunmou (2010) 11 NWLR (Pt. 1205) 374 at 395; Garuba Vs. Omothodion & Ors. (2011) 15 NWLR (Pt. 1269) 145 at 180.**

In answer, learned counsel for the respondent, Godwin Omoaka Esq. submitted that the Criminal Procedure Law has expressly provided the
D procedure to be followed in the raising of an objection such as the one the appellant is making. He cited section 309 (3) of the CPL.

That because the appellant had not raised the objection prior to preferring of the information, he is stopped from doing so now at this stage.
E He relied on **Wahabi Adejobi & Anor. Vs. State (2011) 12 NWLR (Pt. 1261) 347; Gafai Vs. UAC Limited (1961) All NLR 814 etc.**

It was also submitted for the respondent that the appellant at the trial court had raised a general point on jurisdiction which that court considered
F and overruled and the appellant did not take it up at the appellate lower court and so cannot now bring up the issue of jurisdiction from a new point not taken up at any of the two courts below. That to allow what the appellant is seeking is to open a new vista in the litigation and produce the
G result of a wending litigation.

The appellant urges this court to quash the information as the respondent had failed to obtain the consent and/or direction of a judge of the High Court of Cross River State before filing the information against the
H appellant. This appellant contends robbed the court of trial of jurisdiction to entertain the charge. Also appellant posits the issue being that of jurisdiction can be raised at any stage and time. While it is not in dispute that jurisdiction as an issue can be raised at any time or state of proceedings
I including the appeal stage such as here at the Apex Court but this matter regarding whether or not the consent of the judge was obtained before

- A** of the court regards being taken to the fact that the charge was earlier on before the magistrate court Yahe. After hearing addresses of counsel on whether or not the High Court per Ita J had jurisdiction, the learned trial Judge ruled that he had and that the prosecution would be continued in the
- B** said High Court. That is the High Court assumed jurisdiction and the plea was taken. However the issue on whether the prior consent or direction of the High Court was obtained before the information was preferred was not brought up. This therefore impels one to agree with the learned counsel for
- C** the respondent that to now bring up the matter of a lack of jurisdiction of the High Court on account of the failure to obtain the said consent at this point and time is like the appellant splitting the jurisdictional question piece meal and in different courts. That is, what I see happening and in my humble
- D** view a party cannot be allowed to partition his cause of action in bits and pieces. A cause of action cannot be tackled in a fragmented procedure and as in this case in a manner to support a change of course of the case of the party as he goes along. A situation such as could arise, would create a never
- E** ending litigation which goes against the general Principle that there must be an end to litigation and parties know their stand one way or the other. I call in aid the case of **Ejifodomi Vs. Okonkwo (1982) 12 NSCC 422** per Aniagolu JSC, which details I shall give hereunder-
- F** In that case before the District court of Kano State, the argument was raised that the court had no jurisdiction to hear the case because the premises in dispute were residential and cannot be categorized as business premises.
- G** The District Judge ruled that he had jurisdiction because the premises were business premises. The defendant appealed and the High Court Kano allowed the appeal. The plaintiffs appealed to the Court of Appeal which allowed the appeal and set aside the judgment of the Kano
- H** State High Court. On appeal to the Supreme Court, the appellant sought to substitute and argue two new points of law on jurisdiction and title. The Supreme Court refused and the dictum or part thereof, of the court's decision anchored by Aniagolu JSC is set hereunder, viz:
- I**

A *“In the instant appeal, the general issue before the District Court was one of jurisdiction. A challenge to the jurisdiction of a court could be based on varied and diverse points, for example (a) that the judge was not properly appointed; (b)*

B *that the matter in issue is outside the limits of the territorial jurisdiction of the court; (c) that the claim is above the justiciable power of the adjudicating court; (d) that the period allowed the court to embark upon the hearing of the case has expired etc. Each issue there, is a matter of*

C *jurisdiction but quite different, one from another.*

D *The specific point in this appeal on which the objection to the jurisdiction of the court was based and challenged by the defence, was that the premises was a Residential premises, the adjudication in respect of which, by reason of the provisions of the Rent Control Law, 1977 (Section 12), came*

E *under the exclusive jurisdiction of the Rent Tribunal; to which argument the plaintiff countered with the assertion that the premises was Business premises, coming under the jurisdiction of the District Court. Issue was joined on this*

F *contention. It remained the issue throughout before the District Court; the High Court, and the Federal Court of Appeal. It was a specific point within the general issue of*

G *jurisdiction. Parties have fought their case, right up to this court on that point.*

H *Having regard to all the foregoing, I cannot see that this court should allow the appellant to jettison before this court, the issue on which the parties fought their case all the way to the appeal court- an issue on which she lost all the way. To do so would amount, in effect, to allowing her to commence*

I *an entirely new case before this court. There must, in the public interest, be an end to litigation (interest republicae ut sit finis litium) and it is my view that to allow this new issue,*

A *under Section 39 of the Land Use Act, to be raised at this stage, is not to further, but to hinder, that public interest”.*

Clearly, this partition or fragmentation of the jurisdictional question is one to which the appellant is estopped from embracing. It is all the more foreclosed as counsel had the time and opportunity of raising the issue of the lack of consent in the trial court and failed to do so. He lost his chance which he cannot call up as the fancy takes him. *See Ijale Vs. A-G Leventis & Co Ltd (1961) 1 All NLR 762 at 769-770.*

This issue is resolved against the appellant.

ISSUE 2

D Was the appellant's arraignment in compliance with the provisions of section 209 of the Criminal Procedure Law of Cross River State.

Learned counsel for the appellant submitted that the trial of an accused commences with the arraignment and in this instance seeing that commencement of the trial court did not comply with section 36(6) (a) of the 1999 Constitution (as amended) and Section 209 of the Criminal Procedure Law of Cross River State, 2004. That in this case the record did not show who read the charge to the appellant, how that charge was explained to the appellant and the exact words in pleading recorded. These, learned counsel contended, were fundamental defects which vitiated the arraignment warranting a vitiation of the trial. He cited **Okolie Vs. The State (2012) 1 NWLR (Pt. 1281) 385 at 398; Edibo Vs. The State (2007) 13 NWLR (Pt. 1051) 306 at 326; Ogunye Vs. State (1999) 5 NWLR (Pt. 604) 548 at 565.**

For the respondent, learned counsel said the arraignment of the appellant was substantially compliant with the law as borne out by the record. He cited:

James Edun & Ors Vs. IGP (1966) 1 All NLR 17; Idemudia Vs. State (1999) 7 NWLR (Pt. 610) 202; Peter Vs. State (1997) 12 NWLR (Pt. 531) 1; Kalu Vs. State (1998) 12 NWLR (Pt. 583) 531 etc.

I In this issue, the appellant questions the validity of the arraignment of the accused/appellant on the ground that the record did not show who

A read the charge to the appellant and also that the Record did not show that the charge was explained to the appellant and as mandatorily required by law.

B In this regard, a resort to the provisions of Section 36(b) (a) of the CFRN and section 209 CPL which have prescribed what is required for a valid arraignment of an accused person is necessary. This court, and I dare say other courts, have followed a path in its interpretation of those provisions which are:

- C**
- a. The accused must be present in court unfettered unless there is a compelling reason to the contrary.**
- D**
- b. The charge must be read over to the accused in the language that he understands.**
 - c. The charge should be explained to the accused to the satisfaction of the court.**
- E**
- d. In the course of the explanation technical language must be avoided.**
- F**
- e. After requirements (a) (d) above have been satisfied the accused will then be called upon to plead instantly to the charge.**

G I placed reliance on the case of **Erakanwe Vs. State (1993) 5 NWLR (Pt. 294) 385; Kajubo Vs. State (1988) 1 NWLR (Pt. 73) 721; Kalu Vs. State (1998) 13 NWLR (Pt. 583) 531 at 607-608.**

In this case at hand, it was thus recorded:

H **“PLEA”**
Count 1 read to the accused person in English Language.
Each of the 14 accused persons says he/she understands the

I **charge and pleads not guilty”.**

A The appellant states that exact words of the appellant ought to have been recorded and the court also states who read out the charge and the explanation of what is contained in the charge put across to the appellant before compliance with section 209 CPL would be said to have been met.

B What the appellant is seeking is a rigid and inflexible approach in the application of the law before full compliance would be said to have been carried out. That is neither the intendment of the legislature nor within the spirit of the law itself which in my view and in keeping with interpretations already made thereto is that a substantial compliance showing that what is expected has been done is all the law asks of the court of trial.

C From the record, it is apparent that the charge was read and explained to each and everyone of the 14 accused persons of which appellant was one, each of them understood the charge and each pleaded “not guilty”. The provisions of sections 209 CPL have been complied with as there is nothing on the record to indicate that appellant did not know the nature of the offence he was called upon to defend. A narrow and strict interpretation of the provisions and application of section 209 CPL would not serve the interest of justice but would defeat the course of justice. There is no need to put down all the minute details of what took place at the plea taking, such as the language of explanation and who made the explanation and the issue of the satisfaction of the judge that accused was explained to and he understood. It is sufficient that substantial compliance was in effect. *See James Edun & Ors Vs. IGP (1966) 1 All NLR 17; Idemudia Vs. State (1999) 7 NWLR (Pt. 610) 202; Peter Vs. State (1997) 12 NWLR (Pt. 531) 1; Aladu Vs. State (1998) 8 NWLR (Pt. 563) 618.*

D The arraignment was well conducted as borne out on the record and it satisfied the requirements of section 209 of CPL. This issue is resolved against the appellants.

E

H ISSUES 3 & 4

I **Considering the facts, did the learned trial Judge infringe on the appellant's right to fair hearing as to validate a nullification of the proceedings.**

A **Were the learned Justices of the court below right in dismissing the no case submission and affirming the decision of the learned trial Judge on the ground that a prima facie case has been made out against the appellant.**

B

It was the contention of the learned counsel for the appearance proceedings leading to the overruling of the appellant's "No Case Submission" at the trial court is vitiated by the manner in which that "No Case Submission" was rendered by counsel on either side. That the trial judge allowing both counsel to file the written address and reply breached the right to fair hearing of the appellant since those addresses were not read in open court. He referred to section 36(6) (1), (3) & (4) of the 1999 CFRN: **In Re: Lawal (2013) LPELR- 1998 (SC); Mika'ilu Vs. The State (2001) 8 NWLR (Pt. 715) 469 at 848.**

D

Mr. Onuobia of counsel further submitted that the court below's failure to give a full and comprehensive consideration of the issues and arguments canvassed in the appellant's brief of argument and pronounce on them breached appellant's right to fair hearing and resulted in a miscarriage of justice. He cited **Longe Vs. FBN Plc(2010) 6 NWLR (Pt. 1189) 1 at 20; Ovonwo Vs. Woko (2011) 17 NWLR (Pt. 1277) 522 at 546-547.**

E

F

Learned counsel for the respondent, Godwin Omoaka Esq. submitted that the adoption of written addresses is good enough compliance with the principle for fair hearing as stated in **Obodo Vs. Olomu (1987) 3 NWLR (Pt. 59) 111.**

G

For the respondent it was argued that it is well settled that it is undesirable for a judge to deliver a lengthy ruling on a no case submission and so the lower court was right in limiting its comments only on the needful. He referred to **Odofin Bello Vs. State (1967) NMLR 2 at 3;**

H

Ogoja Vs. COP(1975) 11 SC 74.

I

That on the dismissal of a no case submission the consideration at the stage is not whether the evidence laid by the prosecution would sustain the conviction but whether on the strength of the evidence the prosecution has established a prima facie case against the defence.

A For the respondent, it was stated that what the appellant seeks to be
done at this stage is not so permitted as it would lead the court into entering
an unchartered arena when the defendant had not proffered his evidence
which would jeopardize the entire proceeding. He cited **Duru Vs. Nwosu**
B **(1989) 1 NWLR (Pt. 113) 24 at 41; Ajidagba Vs. IGP (1958) 3 FSC 5** etc.

Learned counsel for the appellant contends that merely adopting the
written address and not having it read in open court breached the appellant's
right of fair hearing. This argument cannot be sustained as in adopting the
C address by learned counsel for the appellant in open court, the appellant is
presumed to be seised of the contents of what was adopted and he cannot
now turn around to say he was not heard and his constitutional right to fair
D hearing breached. Again, to be said, if there was an irregularity in that
procedure, the appellant had opportunity to raise objection thereto,
therefore, he cannot now complain at this appeal stage having gone along
the procedure which he had no problem with then and which he now says is
irregular. See **Oguno Vs. State (2013) 15 NWLR (Pt. 1376) 1 at 24;**
E **Durwode Vs. State (2000) 15 NWLR (Pt. 691) 467 at 488.**

The appellant also quarrels with the brevity with which the judgment
of the Court of Appeal was rendered and the learned M.L. Garba JCA stated
his reasons for doing so in these words:

F
G
H
I
*“It may be observed that I have been very brief and restrictive
in my review of the submissions by learned counsel as
contained in their respective briefs of argument. I am
mindful of the fact that this appeal is interlocutory in the
sense that the charges against the appellants before the High
Court have not been determined on the merit since the guilt or
otherwise of the appellants for the offence they were charged
with is not been determined in the decision appealed against.
Just like the law has cautioned trial courts before when
submissions of a no case to answer were made at the close of
the prosecution evidence in criminal trials not to embark on
the (sic) detailed forensic examination assessment or
evaluation of the one sided evidence adduced before it at that*

- A** *stage, this court is also required by law not to encroach on the undecided substantive issues in a case before a court in the determination of an interlocutory appeal from the case.”*
- B** The court below was correct in its handling of the matter as he had to keep within strict limits in order not to veer into the unchartered territory in the trial since the substantive matter had not been concluded and even the defence of the appellant was not before the court. A warning along those
- C** lines has been put in place in the *case of Odofin Bello Vs. State (1967) NMLR 2 at 3* per Ademola CJN, thus:

- D** *“After the prosecution had closed its case, the submissions were made to the learned trial Judge that prima facie case had not been made out to put the accused persons on their defence. In a Ruling of inordinate length, the learned Judge ruled against these submissions and called upon the accused*
- E** *persons for their defence. Whilst it is not the aim of this court to discourage a Judge from discussing matters of interest in his judgment, we would like to warn against any ruling of inordinate length in a submission of no case to answer, as too*
- F** *much might be said, as was done in this case which at the end of the case might fetter the Judges (sic) discretion.... It is wiser to be brief and make no observations on the facts. See R. Vs. Ekanem 13 WACA 108 at 109”, See also Dabo Vs. State (1977) 5 SC 122; Ogoja Vs. COP (1975) 11 SC 74.*
- G**

Indeed the less said after this point, the better as the matter at the trial court is still in a way on going.

- H** From the foregoing and the better reasoning in the lead judgment, this appeal lacks merit and is hereby dismissed.

I abide by the consequential orders made.

I

Mary Ukaego Peter-odili
Justice, Supreme Court

A OLUARIWOOLA, JSC: I had the privilege of reading in draft the leading judgment just delivered by my learned brother, **Sidi Bage, JSC**. I agree entirely with the reasoning therein and the conclusion arrived thereat, that the appeal lacks merit and ought to be dismissed. The appeal is hereby

B dismissed by me.

Appeal dismissed.

Olu Ariwoola
Justice, Supreme Court

C BAGANG AKA'AHs, JSC: This is an appeal against a no case submission which was overruled by the learned trial Judge and affirmed by the Court of Appeal, Calabar Division in appeal No. CA/C/76C/2012.

D The appellant and Oko Ogar Adama were the 11th and 7th accused respectively, who were arraigned with 12 other accused persons before the Cross River State High Court Ogoja in Charge No. HJ/2C/200 on a four count charge of Conspiracy, Unlawful Assembly, Malicious Damage and **E** Stealing. Each of the accused pleaded not guilty to the charge. The prosecution called five witnesses and tendered some exhibits before closing its case. Thereafter, learned counsel for the accused made a no-case submission which was overruled by the learned trial Judge. The appellants **F** then appealed to the Court of Appeal but their appeals were dismissed. They separately appealed to this Court.

I have read the draft of the judgment of my learned brother, Bage JSC. I entirely agree with him that it is premature at this stage to consider **G** the credibility of witnesses called by the prosecution. All that the trial court and the appellate courts are concerned with is whether there is prima facie evidence of the commission of an offence which requires an explanation from the accused (appellant). *See The Queen Vs. Ogucha (1959) 4 FSC 64* **H** where it was held that at the close of the case for the prosecution, the trial court should consider, not whether the evidence against the accused is sufficient to justify a conviction, but whether it has made out a prima facie case requiring at least some explanation from the accused. The complaint **I** about lack of fair hearing cannot be entertained now. *See also Ajidagbe Vs. I.G.P. (1958) SC NLR 60; Tongo Vs. C.O.P (2007) 12 NWLR (Pt.*

A 1049) 525.

The appeal lacks merit and should be dismissed. I hereby dismiss same and remit the case to the Cross River State High Court Ogoja presided over by Justice E.E. Ita for defence. The case should be expeditiously dealt

B with.

K. B. AKA' AHS
Justice, Supreme Court

C ADAMU AUGIE, JSC: I have had a preview of the lead Judgment delivered by my learned brother Bage, JSC, and I agree with him that the Appeal lacks merit.

D He dealt with the issues at stake in this Appeal, and I will only comment on the issue of no-case submission, and what that entails.

E The Appellant and thirteen other Accused Persons were initially charged before the Yahe Chief Magistrate Court of Cross River State. The case was moved from the Chief Magistrate Court to High Court, Ogoja, wherein they pleaded not guilty to the charge of conspiracy, unlawful assembly, malicious damage and stealing against them.

F The Prosecution called five witnesses. At the close of its case, the Appellant and the other Accused Persons opted to make a no-case submission, wherein they urged the High Court, Ogoja [trial Court] to hold that a *prima facie* case had not been made out against them.

By making the no-case submission at the trial Court, they were, in effect, telling the trial Court one of two things or both, and that is:

G

i. That there has been, throughout the trial, no legally admissible evidence linking them with the commission of the offence charged; and/or

H

ii. That the evidence as adduced by the Prosecution has been so discredited by cross-examination that no reasonable Court can safely convict on it.

I

What a court usually considers where a no-case submission is made, is

- A whether the Prosecution has made out a *prima facie* case requiring, at least, some explanation from an Accused *see* **Tongo Vs. C.O.P 12 NWLR (Pt. 1049) 525 SC**. A *prima facie* case in a criminal trial is one that has proceeded up to where it will support findings if evidence to the contrary is
- B disregarded, and *prima facie* evidence means evidence, which on the face of it, is sufficient to sustain the charge against the Accused *see* **Abacha Vs. State(2002) 11 NWLR (Pt. 779) 437 SC**; and **Ajidagba Vs. Inspector General of Police(1958) SCNLR 60**, where this Court quoted with approval the definition in the Indian case of **Star Sigh Vs. Jitendranathsen (1931) I.L.R. 59**, as follows:
- C

- D *What is meant by prima facie (case)? It only means that there is ground for proceeding - - But a prima facie case is not the same as proof, which comes later, when the Court has to find whether the Accused is guilty or not guilty, and the evidence discloses a prima facie case when it is such that if*
- E *uncontradicted and if believed it will be sufficient to prove the case against the Accused.*

- F In this case, it is clear from the details set out by my learned brother that the Prosecution established a *prima case* against the Appellant.

It is for this and the other reasons in the lead Judgment that I also dismiss this Appeal and affirm the decision of the Court below.

- G **Amina Adamu Augie**
Justice, Supreme Court

H

I

**EDILCON NIGERIA LTD
AND
UNITED BANK FOR AFRICA PLC**

SC. 122/2001

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

FRIDAY, 5TH MAY, 2017

BEFORE THEIR LORDSHIPS

**OLABODE RHODES-VIVOUR
CLARA BATA OGUNBIYI
CHIMA CENTUS NWEZE
AMIRU SANUSI
PAUL ADAMU GALINJE**

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

APPEAL: Affirming a judgment on other grounds – Need to file a respondent's notice – Whether the Court of Appeal can also affirm a judgment on other grounds by virtue of its rules – Conditions thereof – Or. 51 Rule 20(4) Court of Appeal Rules 1981.

CONTRACT: Agreement by parties – Where parties have voluntarily entered into an agreement – Whether there are bound thereby – Exceptions thereto – Relevant considerations thereof.

CONTRACT: Execution of agreement – Where a party impliedly adopted an agreement by his subsequent conducts – Whether the parties will be bound by the terms of the agreement.

COURT: Grant of reliefs – A court may grant less than the claims and not more – Relevant principles that guide court in the award of claims.

COURT: Power to award claims – Duty on court thereto – Whether not a charitable institution.

EVIDENCE: Evaluation thereof – Unsigned document – Trial court erroneously ascribing same thereto – Whether the document can be used to hold that an event occurred.

JUDGMENT AND ORDERS: Where a court makes a decision – Whether valid and subsisting until set aside.

PRACTICE AND PROCEDURE: Evaluation of facts and evidence – Whether an appellate court can embark in exceptional circumstances – Relevant principles thereof.

PRACTICE AND PROCEDURE: Award of interest – Relevant situations thereof – Guiding principles.

PRACTICE AND PROCEDURE: Documents in court – Whether court can look at documents in court files and utilize them to support proved facts.

*PRACTICE AND PROCEDURE: Powers of Supreme Court to rehear an application which has been set aside – Conditions thereof – Whether the principle in **Amoo Vs. Alabi (2003) 12 NWLR (Pt. 835) 537** no longer represents the position of the law.*

PRACTICE AND PROCEDURE: Setting aside judgment – Where the judgment of the Supreme Court is reached per incuriam – Proper procedure thereof – Or. 2 Rule 29(1) Supreme Court Rules 1985.

*PRACTICE AND PROCEDURE: Supreme Court – Power to rehear a dismissed application – Where the Supreme Court dismissed an application – Whether it has power to rehear it if the order dismissing the application is set aside – The principles in **PDP Vs. Asadu (2016) 17 NWLR (Pt. 1541) 215**.*

PRACTICE AND PROCEDURE: Written or documentary evidence – Whether cannot be supplanted by oral evidence – Relevant considerations thereof.

Issues for Determination

- 1. Whether the lower court was right when it relied on Exhibit 16A on a different ground from that advanced by the learned trial judge without a respondent's notice to that affect.*
- 2. Whether the Court of Appeal was right when it held that the appellant was bound by Exhibit 17A.*

Facts of the Matter

The appeal herein is against the decision of the Court of Appeal, Jos Division, delivered on the 13th April, 2000. The appellant in this appeal, who was the plaintiff at the High Court of Plateau State, claimed against the respondent the following reliefs:

- 1. The entire sum of N240,641.74 due to the plaintiff, being balance credit in favour of the plaintiff, after the overdraft is deducted from the amount credited and 21% compound interest.**
- 2. The plaintiff also claims the sum of N150,000, being damages for conversion of the plaintiff's aforesaid amount, being money had and received but the defendant converted same to its personal use.**
- 3. That the plaintiff also claims the sum of N55,000.00, being damages for deformation (sic) as the defendant has instructed the sale of the entire properties mortgaged by the plaintiff.**

- 4. Perpetual injunction restraining the defendant its servants, agents or privies from selling the following properties:**
- (a) Yakubu Gowon way, Anglo Jos, Plateau State.**
 - (b) No. 1 Madaki Street Bukuru, Plateau State.**
 - (c) Plot No. BL569, Bisichi Jantar Sabon Gidan Danyaya, Barkin Ladi Local Government Area.**

The respondent as defendant at the trial court denied the appellant's claims and set up a counter claim as follows:

- (a) N1,418,076.10 DR. being loan and interest.**
- (b) Interest at Bank rate of 34% from 1/10/93 until judgment and thereafter at 34% until full payment.**

At the end of the trial, Ahinche J., in a reserved and considered judgment delivered on the 15th December 1995, dismissed the appellant's claims and entered judgment for the defendant on its counterclaim, but granted 21% post judgment interest until the judgment sum is fully and totally paid.

Appellant's appeal to the Court of Appeal, Jos Division, was dismissed in a reserved and considered judgment delivered on the 13th April, 2000. This development has prompted this further appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. No evidence that ruling has been set aside or quashed.

This ruling was delivered on the 15th day of January, 2007. The notice of appeal before this court was filed on the basis of this ruling. There is no evidence before this court that it's ruling of 15th day of January, 2007 that extended the time for the appellant to file this notice of appeal has been set aside and quashed. The Law is settled beyond any argument that a judgment or ruling of a Court of Law, no matter how incorrectly arrived at is valid, binding and subsisting until it is set aside by the same court through a judicial review or by appellate proceedings.

See Obineche Vs. Akusobi (2010) 12 NWLR (Pt. 1208) 383 at 405 paragraphs D. (P 168 paras F–I)

2. *A party can apply to set aside judgment of the Supreme Court where reached per incuriam*

By Order 2 Rule 29(1) of the rules of this court, a party who feels that the decision of this court is reached per incuriam or without jurisdiction is at liberty to apply that the decision so reached be set aside.

As a general rule every court of record has inherent jurisdiction, on application and in appropriate cases and circumstances, to set aside its judgment and decision. This jurisdiction may be exercised where for instance, the judgment or decision sought to be set aside is null and void *ab initio* or there was a fundamental defect in the proceedings which vitiates and renders same incompetent and invalid.

See Alhaji Taofeek Alao Vs. ACB Ltd. (2000)2 SCNQR 1067; Salami Omokewu & Ors. Vs. Abraham Olabanji & Anor. (1996) 3 NWLR (Pt. 435) 126; Skenconsult (Nig.) Ltd. Vs. Ukey (supra). Where it is found that the court's decision was void *ab initio* or there was a fundamental defect in the proceedings which vitiates and renders same invalid, the court may *ex-debito* justitiae set aside its decision or judgment and may make necessary consequential orders that the justice of each individual case demands.

(Pp 168–169 Paras I–D)

3. *Judgment of a court remains extant until set aside by a court of competent jurisdiction.*

Learned senior counsel for the respondent has no power to declare the decision of any court incompetent. I therefore hold that the ruling of this Court delivered on the 15th January 2007, remains valid until it is set aside by a competent court.

See PDP Vs. Asadu (2016) 17 NWLR (Pt. 1541) 215 at 224 Paras B-C where this Court per Ogunbiyi JSC held:

“I just wish to say briefly that without an application to set aside the dismissal order made by this court on the 11/4/16, the applicant cannot by Law access the exercise of any discretion from the court. In other words, the application filed on 19th April, 2016 is tantamount to putting the cart before the horse. An order of court will remain extant always until set aside. The applicant in this case has failed to invoke the jurisdiction of this court to entertain his application. He cannot be obliged as a matter of course.”(P 169 Paras D–H)

4. *Power of the Supreme Court to rehear an application which had been dismissed.*

It is equally the Law that once an application is dismissed by this Court, an identical application can only be heard by this Court if the order of dismissal of the application is set aside. This is the decision that was handed down by this Court in PDP Vs. Asadu (Supra) at page 222-223 paras H-B, where my brother Rhodes-Vivour JSC said:

“After an application which can only be granted at the discretion of the court is dismissed, that ought to be the end of the matter, but this being the top court, an applicant should file an application seeking an order of court setting aside the order of dismissal. Such an application calls on this court to exercise its discretion in the applicant's favour, and under the inherent jurisdiction of this court. This is so because the order of this court dismissing an identical application on 11/4/2016 still subsists.”

The Supreme Court is the apex Court in this Country and its decisions are final in all respects. It has wide discretionary power to consider identical applications that have been dismissed by it.

However, this can only be done if the applicant is able to convince the court to exercise its discretion in his favour by setting aside its order of dismissal. It is only after that is done that the application seeking for the same order can be heard. The case of Amoo Vs. Alabi no longer represents the position of the Law. Be that as it may, since the ruling of this court delivered on the 15th of January, 2007 is still extant, the present appeal cannot be incompetent. For all I have said, the preliminary objection is without merit and it is hereby overruled.(Pp 169–170 Paras H–E)

5. *The Court of Appeal can affirm a judgment on other grounds by virtue of its rules not necessarily on account of a respondent's notice.*
With respect to the learned senior counsel for the appellant, I do not think that the lower court made a new case for the respondent. Exhibit 16A, even though unsigned and had no evidential value, is a document that was before the lower court. Even though a respondent in appeal who wishes to contend that the decision of the court should be affirmed on grounds other than those relied on by the trial court could do so by way of respondent's notice, the lower court by its rules is not excluded from affirming or varying a decision of a trial court on grounds other than those relied upon by the trial court, provided that the decision is taken on the basis of the evidence before the trial court. See Order 51 Rule 20(4) and (5) of the Court of Appeal Rules 1981, which was the applicable Rules when this appeal was heard and judgment delivered. Although the lower court found like it did, that the trial court was in error when it ascribed some weight to unsigned exhibit 16A, it was however right when it used the said exhibit to hold that the meeting that gave rise to that exhibit indeed took place.(P 173 Paras B–E)

6. *An incompetent exhibit can be used as evidence of the occurrence of an event.*
Clearly, an incompetent Exhibit 16A is an evidence that there was a meeting, just as an incompetent proceeding or decision of a court is

an evidence of the fact that the court sat and conducted proceeding that is incompetent. The Justices that took part in the proceedings and the lawyers that appeared for the parties will be part of the established facts of what happened. So it is with Exhibit 16A that was admitted in evidence at the trial court and same was in the lower court's file. This Court has held in a number of cases that the courts have absolute power to look at the documents in their files and utilize them to support established facts. See Agbaisi Vs. Ebikorefe (1997)4 NWLR (Pt. 502) 630; Uzodinma Vs. Izunaso (No.102) (2011) 17 NWLR (Pt. 1275)28 at 90 paragraphs B-C, G and T Invest Ltd v. Witt & Bush Ltd.

The content of Exhibit 16A shows clearly that the appellant was represented by Alhaji Isa Haruna and its Engineer Mr. Uche Onjuka and a Quantity Surveyor, respectively, and this is consistent with the evidence of DW1, Stanley Ejoma at page 62 lines 17-19 of the record of this appeal.(P 174 paras A–E)

7. Written evidence cannot be supplanted by oral evidence.

This piece of evidence having the backing of Exhibit 16A, cannot be supplanted by oral evidence of PW1 who claimed that the appellant was not represented at the meeting. See Chief S. O. Agbareh & 1 Or. Vs. Mr. Anthony Mimra (2008) 2 NWLR (Pt. 1071) 378 at 410-411 paras F-B.

I therefore agree with Mr. G. Ofodile Okafor, Learned Senior Counsel for the respondent that the judgment of the lower court is not perverse as contended by the learned appellant's counsel, since same is based on facts, evidence and the relevant Laws applicable to the case. I am therefore not prepared to disturb the concurrent findings of the two lower courts on this score. This issue is resolved against the appellant and in favour of the respondent.

(Pp 174–175 paras F–A)

8. *Appellant is bound by the terms of an agreement he impliedly adopted as if he had executed it.*

The passages quoted from Exhibits 19, 20 and 21 above clearly show that the appellant impliedly adopted the agreement contained in the exhibit by its subsequent conduct in dealing with the respondent. Where that happens as in this case, the parties will be bound by the terms of the agreement as if they executed it. See McDonald Vs. John Twiname Ltd (1953)2 QB. 304 at 314.

This is a clear manifestation that the appellant participated in the meetings that gave rise to Exhibits 16A, 17A and 18, and endorsed the agreement to sell the pipes and share the proceeds in accordance with the formula agreed upon. The lower court was therefore right when it held that the appellant is bound by the contents of Exhibit 17A which was duly signed by the chairman of the meeting. This is so, because, it is the law that where parties have entered into agreement voluntarily and there is nothing to show that such agreement was obtained by fraud, mistake, deception or misrepresentation, they are bound by the terms of the agreement. See A.G. Rivers State Vs. A.G. Akwa-Ibom State (2011) 8 NWLR (Pt. 1248)31 at 81. (P 177 Paras B–F)

The trial court had no reason to give judgment to the appellant, having regard to the overwhelming evidence against it, which showed that of the total sum of N780,523.57 that was paid into its account as agreed, 45% accruing to it was used to reduce its indebtedness to the respondent which stood at N1,418,178.10 as at 27/9/93.

On the basis of the parties submission, I agree with Learned Senior Counsel for the respondent that this issue ought to be and it is accordingly resolved against the appellant. (P 179 paras B–C)

9. *Court is not a charitable organization and never to award what is not claimed.*

At paragraph 26 of the said amended statement of defense and counter-claim, the cross appellant claimed 10% post judgment

interest and not 34% as claimed in the cross appellant's brief of argument. I failed to see where the cross appellant counter claimed 34% post judgment interest, as presented by parties in their briefs of argument. With the admission by parties that the counter claim was 10%, it clearly appears that there was no agreement between the parties as to the quantum of post judgment interest. A court has no power to make an order or grant a relief which has not been asked for by any of the parties. A court of Law may award less, but not more than what the parties have claimed. A fortiori, the court should never award that which was never claimed or pleaded by either party. In *A.G. Federation Vs. AIC Ltd (2000) 10 NWLR (Pt. 675) 293 at 305* it was clearly held as follows:

“It should always be born in mind that a court of Law is not a charitable institution. Its duty in civil cases is to render into everyone according to his proven claim. This is based on the fundamental principle of adjudication that a defendant must be given opportunity to answer the claim against him and if need be to resist it.”

See Ekpenyong Vs. Nyong (1967)2 SC. 71; Obajinmi Vs. A.G. Western Nigeria (1967) A.N.L.R. 33.(Pp 180–181 paras G–D)

10. *Principles that guide the court in the award of post judgment interest. The trial court granted a post judgment interest which was neither claimed nor authorized. Interest may be awarded in a case in two distinct circumstances:*

“(a) As of right as agreed by the parties or under a mercantile custom or under a principle of equity, much as a breach of Fiduciary relationship, and

- (b) Where there is a power conferred by statute to do, in exercise of the court's discretion.”**

See Ekwunife Vs. Wayne (W.A.) Ltd (1989)5 NWLR ((Pt. 122) 422.

Post judgment interest in the instant case is provided for under Order 40 Rule 7 of the Plateau State High Court (Civil Procedure) Rules 1987 and it is pegged at 10% of the total sum awarded to a claimant. In absence of any agreement, the trial court had no jurisdiction to award more than what is statutorily provided for. The lower court was therefore right when it set aside the post judgment interest as it was awarded in error and without justification. (P 181 paras D–I)

Per Knweze (JSC)

“It has long been established that an appellate court, generally speaking, should not interfere with findings of fact of trial courts. The reason is simple. The latter courts, that is, trial courts, had the unique opportunity of seeing and hearing the witnesses give evidence. They not only see the witnesses, they, equally, observe all their habits and mannerisms. These include their demeanour and idiosyncrasies.

As a corollary to these peculiar advantages, the Law anticipates that they should utilize all their judicial competence: competence or skill rooted or anchored on law and commonsense to evaluate the evidence by eliminating the chaff from the grain of probative evidence. Proper conclusions which a reasonable court ought to arrive at, expectedly or ideally, should eventuate from that rigorous exercise.

That is why the law takes the view that a failure in this regard would

warrant the interference of the appellate Court, Adeye and Ors Vs. Adesanya and Ors [2001] 6 NWLR (Pt. 708) 1; Olatunde Vs. Abidogun [2001] 18 NWLR (Pt. 746) 712; Adeleke Vs. Iyanda [2001] 13 NWLR (Pt. 729) 1; Udo Vs. CRSNC [2001] 14 NWLR (Pt. 732) 116; Enilolobo Vs. Adegbesan [2001] 2 NWLR (Pt. 698) 611.

This, then, is the foundation for the number of exceptions to this general rule against non-interference. For example, one major exception to the said general rule is that, where such findings are in fact inferences from findings properly made, the appellate court is in as good a position as the trial court to come to a decision, Ebba Vs. Ogodo [1984] 1 SCNLR 372; [1984] 4 SC 84, 98-100; Fabunmi Vs. Agbe [1985] 1 NWLR (Pt. 2) 299, 314; Fatoyinbo Vs. Williams [1956] SCNLR 274; (1955) 1 FSC 87; Ukatta Vs. Ndinaeze [1997] 4 NWLR (Pt. 499) 251, 263.

This explains the prescription that an appellate court will also interfere with findings of fact where such findings are perverse, that is, persistent in error, different from what is reasonable or required, against weight of evidence; put differently, where the trial Judge took into account, matters which he ought not to have taken into account or where he shut his eyes to the obvious, Atolagbe Vs. Shorun [1985] LPELR-592 (SC) 31; C-D. Such a perverse finding is a finding of facts which is, merely, speculative and is not based on any evidence before the court. It is an unreasonable and unacceptable finding because it is wrong and completely outside the evidence before the trial judge, Iwuoha and Anor Vs. NIPOST and Anor (2003) LPELR-1569 (SC) 39-40; Overseas Construction Company Nig, Ltd. Vs. Creek Enterprises (Nig.) Ltd. [1985] 3 NWLR (Pt. 13) 407.

In all, then, a decision is said to be perverse: (a) When it runs counter to the evidence; or (b) where it has been shown that the trial court

took into account matters which it ought not to have taken into account or shut its eyes to the obvious; or (c) When it has occasioned a miscarriage of justice, Messrs Vs. Ibrahim [1975] 5 SC 55; Incar Nig. Ltd. Vs. Adegboye [1985] 2 NWLR (Pt. 8) 453; Atolagbe Vs. Shorun (1985) 4 SC (Pt. 1) 250, 282.” (Pp 184–185 Paras C–F)

Nigerian cases cited in this Judgment

A.G. Federation Vs. AIC Ltd (2000) 10 NWLR (Pt. 675) 293;
A.G. Rivers State Vs. A.G. Akwa-Ibom State (2011) 8 NWLR (Pt. 1248) 31;
Adegoke Vs. Adibi (1992) 5 NWLR (Pt. 242) 410;
Adeleke Vs. Iyanda [2001] 12 NWLR (Pt. 729) 1;
Adeniji Vs. Adeniji (1972) 1 All NLR (Pt. 1) 298;
Adeye and Ors Vs. Adesanya and Ors [2001] 6 NWLR (Pt. 708) 1;
Agbasi Vs. Ebikorefe (1991) 4 NWLR (Pt. 502) 630;
Alhaji Taofeek Alao Vs. ACB Ltd. (2000) 2 SCNQR 1067;
Amoo Vs. Alabi (2003) 12 NWLR (Pt. 835) 537;
Atolagbe Vs. Shorun (1985) 4 SC (Pt. 1) 250;
Atolagbe Vs. Shorun [1985] LPELR-592 (SC) 31;
Buhari Vs. INEC (2008) 19 NWLR (Pt. 1120) 246;
Chief S. O. Agbareh & 1 Or. Vs. Mr. Anthony Mimra (2008) 2 NWLR (Pt. 1071) 378;
Dingyadi Vs. INEC (2011) 18 NWLR (Pt. 1224) 154;
Ebba Vs. Ogodo [1984] 1 SCNLR 372; [1984] 4 SC 84;
Ekpenyong Vs. Nyong (1967) 2 SC. 71;
Ekwunife Vs. Wayne (W/Africa) Ltd [1989] 5 NWLR (Pt 122) 422;
Enilolobo Vs. Adegbesan [2001] 2 NWLR (Pt. 698) 611;
Fabunmi Vs. Agbe [1985] 1 NWLR (Pt. 2) 299;
Fatoyinbo Vs. Williams [1956] SCNLR 274; (1955) 1 FSC 87;
FBN PLC Vs. TSA Ind. Ltd (2010) 15 NWLR (Pt. 1216) 296;
Incar Ltd. Vs. Adegboye [1985] 2 NWLR (Pt. 8) 453;
Iwuoha and Anor Vs. NIPOST and Anor (2003) LPELR-1569 (SC) 39-40;
Overseas Construction Company Nig. Ltd. Vs. Creek Enterprises (Nig.) Ltd. [1985] 3 NWLR (Pt. 13) 407;
J. C. Ltd. Vs. C.M. and Partners Ltd (2002) 9 10 SC 153, 163;

Madukolu Vs. Nkemdilim (1962) ANLR 581;
Makwe Vs. Nwukor (2001) 14 NWLR (Pt. 733) 356;
Messrs Vs. Ibrahim [1974] 5 SC 55;
Obajinmi Vs. A.G. Western Nigeria (1967) A.N.L.R. 33;
Obineche Vs. Akusobi (2010) 12 NWLR (Pt. 1208) 383;
Olatunde Vs. Abidogun [2001] 18 NWLR (Pt. 746) 712;
Olusanya Vs. Ousanya (1983) 1 SCNLR 134, (1983) 3 SC. 41;
Osayomi Vs. Governor Ekiti State (2014) All FWLR (Pt. 751) 1598;
Osolu Vs. Osolu (2003) 11 NWLR (pt. 832) 608;
PDP Vs. Asadu (2016) 17 NWLR (Pt. 1541) 215;
PW.T. (Nig.) Ltd Vs. J.B.O Int'L (2011) All FWLR (Pt. 564) 34;
Salami Ohiokewu & Ors. Vs. Abraham Olabanji & Anor. (1996) 3 NWLR (Pt. 435) 126;
Saraki Vs. Kotoye (1992) 9 NWLR (Pt. 246) 156;
Skenconsult Nig. Ltd Vs. Ukey (1981) 1 SC. 6;
T. Invest Ltd Vs. Witt & Bush Ltd;
UBA PLC Vs. Jargaba (2007) 11 NWLR (Pt. 1045) 247;
Udo Vs. CRSNC [2001] 14 NWLR (Pt. 732) 116;
Ukachukwu Vs. UBA (2004) 10 NWLR (Pt. 881) 294;
Ukatta Vs. Ndinaeze [1997] 4 NWLR (Pt. 499) 251, 263; and
Uzodinma Vs. Izunaso (No. 2) (2011) 17 NWLR (Pt. 1225) 30.

Foreign cases cited in this Judgment

McDonald Vs. John Twiname Ltd (1953) 2 QB. 304.
Macfoy Vs. UAC (1962) 1 AC 152

Nigerian Statutes cited in this Judgment

Plateau State High Court (Civil Procedure) Rules 1987 Order 40, Rule 7.

Representation

Solomon E. Umoh (SAN), with Chidimma Dioji (Miss), Felix Abiodun (Esq.), and Solomon E. Umoh (SAN) & Co. for the appellant.

G. Ofodile Okafor (SAN), with Philemon Tunyang (Esq.), D.A. Dalong

A (Esq.), Joy Onyekwuluje and Ngozi Ofodile-Okafor for the respondents.
ADAMU GALINJE, JSC: The appeal herein is against the decision of the Court of Appeal, Jos Division, delivered on the 13th April, 2000. The appellant in this appeal, who was the plaintiff at the High Court of Plateau State, claimed against the respondent the following reliefs:

- C** “1. **The entire sum of N240,641.74 due to the plaintiff, being balance credit in favour of the plaintiff, after the overdraft is deducted from the amount credited and 21% compound interest.**
- D** 2. **The plaintiff also claims the sum of N150,000, being damages for conversion of the plaintiff's aforesaid amount, being money had and received but the defendant converted same to its personal use.**
- E** 3. **That the plaintiff also claims the sum of N55,000.00, being damages for deformation (sic) as the defendant has instructed the sale of the entire properties mortgaged by the plaintiff.**
- F** 4. **Perpetual injunction restraining the defendant its servants, agents or privies from selling the following properties:**
- G** (a) **Yakubu Gowon way, Anglo Jos, Plateau State.**
 (b) **No. 1 Madaki Street Bukuru, Plateau State.**
 (c) **Plot No. BL569, Bisichi Jantar Sabon Gidan Danyaya, Barkin Ladi Local Government Area.”**
- H**

The respondent as defendant at the trial court denied the appellant's claims and set up a counter claim as follows:

I

A

- (a) N1,418,076.10 DR. being loan and interest.**
- (b) Interest at Bank rate of 34% from 1/10/93 until judgment and thereafter at 34% until full payment.**

B

At the end of the trial, Ahinche J., in a reserved and considered judgment delivered on the 15th December 1995, dismissed the appellant's claims and entered judgment for the defendant on its counterclaim, but granted 21% post judgment interest until the judgment sum is fully and totally paid.

C

Appellant's appeal to the Court of Appeal, Jos Division, was dismissed in a reserved and considered judgment delivered on the 13th April, 2000. With the leave of this court donated on the 15th January 2007, the appellant filed its notice of appeal on the 24th of January 2007 containing four grounds of appeal.

D

Parties filed and exchanged briefs of argument. The appellant at page 4 of the appellant's brief of argument settled by Solomon E. Umoh SAN, dated and filed on the 12th of May 2008, formulated three issues for determination of this appeal as follows:

E

- F** **“1. Whether the Court of Appeal was right when it relied on Exhibit 16A on a different ground from that advanced by the learned trial Judge, without a Respondent's Notice to that effect.**
- G** **2. Whether the Court of Appeal was right when it held that the Appellant was bound by Exhibit 17A, even though the Appellant was not a party to the said document.**
- H** **3. Whether the Court of Appeal was right when it upheld the decision of the trial Court in dismissing the appellant's claims and entering judgment in favour of the respondent.”**
- I**

A Issue 1 is distilled from ground 1, issue 2 from grounds 2, 3 and 4 while issue 3 is distilled from the 5th ground of appeal.

Chief G. O. Okafor, Learned senior counsel for the respondent issued a preliminary objection to the competence of this appeal which he

B filed on the 7/08/2005 in the following terms:

C **“The appellant's appeal in SC. 122/2001 is incompetent as this honourable court on the 15/1/2007 had become functus officio and had no jurisdiction to grant leave to appeal having dismissed earlier application on the 6/6/2005 on the merit.”**

D Learned senior counsel argued the preliminary objection at pages 7 -11 of the Respondent's brief of argument dated and filed on the 7/8/2015 and went on to formulate three issues for determination of this appeal as follows:

E

“1. Whether the lower court was right when it relied on Exhibit 16A on a different ground from that advanced by the learned trial judge without a respondent's notice to that effect.

F

2. Whether the Court of Appeal was right when it held that the appellant was bound by Exhibit 17A.

G

3. Whether the Court of Appeal was right when it upheld the decision of the trial court in dismissing the appellant's claims and entering judgment in favour of the respondent.

H Issue 1 is distilled from ground 1, issue 2 is distilled from grounds 2, 3 and 4, while issue 3 is distilled from the 5th ground of appeal.

Learned counsel for the appellant filed a reply brief on the 3/6/2016.

I The learned silk, on behalf of the respondent filed a cross appeal on the 7th July, 2000. I will consider this cross appeal after I have considered

A and determined the appeal before this court. I want to take the liberty to consider the preliminary objection first before going into the appeal.

The fact that gave rise to this preliminary objection are articulated in the affidavit in support of the notice of preliminary objection. The relevant **B** paragraphs of the said affidavit are hereunder reproduced for clarity as follows:

C 4. **That the Court of Appeal, Jos Division on 13th April, 2000 delivered judgment in Appeal No. CA/J/24/1997.**

D 5. **That being dissatisfied with the judgment, the appellant filed a notice and grounds of appeal dated 10/7/2000 but filed on 13/7/2000. That the notice of appeal aforesaid is at pages 181 to 189 of the record. That the appeal was entered in this honourable**
E **court as SC. 122/2001.**

F 6. **That as 21/4/2004, the respondent herein filed a motion on notice to strike out the Appeal No. SC.122/2001 for being incompetent. That copy of the motion without the affidavit is annexed hereto as Exhibit 1.**

G 7. **That upon being served with Exhibit 1 hereto, the appellant by a motion on notice filed on 14/7/2004 applied for leave to appeal out of time. That a copy of the motion on notice dated 12/7/2004 but filed on**
H **14/7/2004 is annexed hereto as Exhibit 2.**

I 8. **That on 6th day of June, 2005, this honourable court dismissed the application for leave to appeal that copy of the ruling of this Court is annexed hereto as**

- A**
- Exhibit 3.**
- 9. That the Appellant on 19/7/2006, filed yet another motion on notice for similar relief as in Exhibit 2. That copy of the motion without the affidavit is annexed hereto as Exhibit 5.**
- B**
- 10. That on the 15/1/2007, this appeal was again listed when there was no valid appeal before the court. That exhibit 5 was never served on our chambers. That I was informed by Zik Obi Esq in our chambers on the 26/6/2015 at 4pm and I verily believed him that on the 15/1/2007, he was in court to represent the Respondent. That exhibit 5 was served on him in court by Counsel to the appellant. That despite his protestation for time to react to the motion, this honourable court granted the relief sought.**
- C**
- D**
- E**
- 11. That the ruling of this honourable court dated 15/1/2007 is annexed hereto as Exhibit 6.**
- F**
- 12. That pursuant to exhibit 6, the appellant filed a notice of appeal dated 23/1/2007. Copy annexed hereto as Exhibit 7.**
- G**
- 13. That on 15/1/2007, this honourable court, having dismissed the application, had no jurisdiction to consider Exhibit 5 herein having become functus officio.**
- H**
- 14. That I verily believe that there is no valid appeal before this honourable court.**
- I**
- 15. That this appeal should be struck out for being**

A incompetent.”

It is on the basis of the facts deposed to in the paragraphs of the affidavit reproduced herein above, learned senior counsel submitted that once a motion on notice for leave to appeal has been dismissed on the merit, the

B court has become *functus officio* and the motion cannot be re-introduced or refiled, as it is a final decision. Learned senior counsel made reference to the decision of this court in **Amoo Vs. Alabi (2003) 12 NWLR (Pt. 835) 537 at 553 paragraphs G-H** where it was held:

C

“An order refusing an extension of time within which to appeal is not a decision on the merit. As such it does not constitute in Law a bar to further application.”

D

and submitted that this statement cannot be correct for all situations in that in the case of **Amoo Vs. Alabi**, the applicant came to this court on appeal against the dismissal of his application at the Court of Appeal. According

E to the learned counsel, the statement was an orbiter, and that an applicant can only go back to the same court in an application of this nature, if the previous application was only struck out. It is his view that one cannot put something on nothing and expect it to stand. In aid learned counsel cited

F Macfoy Vs. UAC (1962) 1 AC152 at 160.

Still in argument learned counsel submitted that this court has no jurisdiction to hear this appeal as same is incompetent since the court was **functus officio** at the time it granted extension of time to seek leave to

G appeal, leave to appeal and extension of time to appeal. In aid several authorities were cited which include **FBN PLC Vs. TSA Ind. Ltd (2010) 15 NWLR (Pt. 1216) 296; Dingyadi Vs. INEC (2011) 18 NWLR (Pt. 1224) 154 at 186 paragraph D-H; Buhari Vs. INEC (2008) 19 NWLR**

H (Pt. 1120) 246 at 375-376, Ukachukwu Vs. UBA (2004) 10 NWLR (Pt. 881) 294 at 306 paragraph E; Madukolu Vs. Nkemdilim (1962) ANLR 581; Skenconsult Nig. Ltd Vs. Ukey (1981) 1 SC. 6 at 8.

I In reply to the submission of the learned senior counsel for the respondent/objector, Mr. Umoh, learned senior counsel for the appellant,

- A** submitted that an order dismissing an application for extension of time within which to appeal is not a decision on the merit. In aid, learned senior counsel cited **Amoo Vs. Alabi (Supra); Saraki Vs. Kotoye (1992)9 NWLR (Pt. 246) 156; Osayomi Vs. Governor Ekiti State (2014) All FWLR (Pt. 751) 1598 paragraphs F-G, PW.T. (Nig.) Ltd Vs. J.B.O Int'L (2011) All FWLR (Pt.564) 34.**

C In a further argument, learned senior counsel submitted that the circumstances that led to the dismissal of the appellant's motion dated 12/7/2004 clearly makes the order of dismissal in Law a mere striking out, as such this court cannot be said to be **functus officio** on a motion that was merely struck out, irrespective of the fact that it was an order of dismissal that was pronounced.

D According to the learned senior counsel, this court has the requisite jurisdiction to entertain the Appellant's appeal on the merit.

Finally learned counsel urged this court to dismiss the preliminary objection.

E The ruling of this court in respect of the motion on notice filed on the 19th July, 2006 is reproduced hereunder as follows:

F **“Application is granted as prayed. Notice of Appeal filed on 13/7/2000 is struck out. Applicant is granted 14 days within which to file the Notice of Appeal, his application to appeal having been granted.”**

G This ruling was delivered on the 15th day of January, 2007. The notice of appeal before this court was filed on the basis of this ruling. There is no evidence before this court that it's ruling of 15th day of January, 2007 that extended the time for the Appellant to file this notice of appeal has been set aside and quashed. The law is settled beyond any argument that a judgment or ruling of a Court of Law, no matter how incorrectly arrived at is valid, binding and subsisting until it is set aside by the same court through a judicial review or by appellate proceedings.

I *See* **Obineche Vs. Akusobi (2010) 12 NWLR (Pt. 1208) 383 at 405 paragraphs D.** By order 2 rule 29(1) of the rules of this court, a party who

A feels that the decision of this court is reached per incuriam or without jurisdiction is at liberty to apply that the decision so reached be set aside.

As a general rule every court of record has inherent jurisdiction, on application and in appropriate cases and circumstances, to set aside its

B judgment and decision. This jurisdiction may be exercised where for instance, the judgment or decision sought to be set aside is null and void *ab initio* or there was a fundamental defect in the proceedings which vitiates and renders same incompetent and invalid.

C *See Alhaji Taofeek Alao Vs. ACB Ltd. (2000)2 SCNQR 1067; Salami Ohiokewu & Ors. Vs. Abraham Olabanji & Anor. (1996) 3 NWLR (Pt. 435) 126; Skenconsult (Nig.) Ltd. Vs. Ukey (supra).* Where it is found that the court's decision was void *ab initio* or there was a

D fundamental defect in the proceedings which vitiates and renders same invalid, the court may *ex-debito justitiae* set aside its decision or judgment and may make necessary consequential orders that the justice of each individual case demands. Learned senior counsel for the respondent has no

E power to declare the decision of any court incompetent. I therefore hold that the ruling of this Court delivered on the 15th January 2007, remains valid until it is set aside by a competent court.

See PDP Vs. Asadu (2016) 17 NWLR (Pt. 1541) 215 at 224 Paras

F **B-C where this Court per Ogunbiyi JSC held:-**

G *“I just wish to say briefly that without an application to set aside the dismissal order made by this court on the 11/4/16, the applicant cannot by Law access the exercise of any discretion from the court. In other words, the application filed on 19th April, 2016 is tantamount to putting the cart before the horse. An order of court remains extant always until set aside. The applicant in this case has failed to invoke the jurisdiction of this court to entertain his application. He cannot be obliged as a matter of course.”*

I It is equally the Law that once an application is dismissed by this court, an identical application can only be heard by this court if the order of dismissal

A of the application is set aside. This is the decision that was handed down by this court in **PDPVs. Asadu (Supra)** at page 222-223 paras H-B, where my brother Rhodes-Vivour JSC said:

B *“After an application which can only be granted at the discretion of the court is dismissed, that ought to be end of the matter, but this being the top court an applicant should file an application seeking an order of Court setting aside the order of dismissal. Such an application calls on this Court to exercise its discretion in the applicant's favour, and under the inherent jurisdiction of this Court, this is so because the order of this Court dismissing an identical application on 1/4/2016 still subsists.”*

The Supreme Court is the apex Court in this Country and its decisions are final in all respects. It has wide discretionary power to consider identical applications that have been dismissed by it. However, this can only be done if the applicant is able to convince the court to exercise its discretion in his favour by setting aside its order of dismissal. It is only after that is done that the application seeking for the same order can be heard. The case of **Amoo Vs. Alabi** no longer represents the position of the Law. Be that as it may, since the ruling of this court delivered on the 15th of January, 2007 is still extant, the present appeal cannot be incompetent. For all I have said, the preliminary objection is without merit and it is hereby overruled.

G Now, on the main appeal, before I consider the argument of learned senior counsel on both sides with a view to resolving parties contentions, I will set out albeit in brief the facts of this case as ably articulated by the lower court. Sometime in the year 1985, the appellant applied for and was granted an overdraft of N400,000:00 by the respondent to execute a contract it entered into with the University of Jos. The terms of the overdraft include a chargeable interest of 13%, the up-stamping of two deeds of legal mortgages as well as executing another deed of legal mortgage over a landed property situate at Bisichi Jantar in Barkin Ladi Local Government of Plateau State. After perfecting the required

- A** conditions, the appellant applied for the release of some amount of money out of the overdraft in order to purchase materials needed for the due execution of its contract. The University of Jos also paid mobilization fee to the appellant who utilized part of it together with the money which was
- B** withdrawn from the respondent in purchasing materials including iron pipes. The contract with the University, was for the development of infrastructural facilities on the campus. The University later experienced difficulties in securing funds to execute the contract. It therefore suspended
- C** the contract on the sewage main line for which the iron pipes were procured.

In the mean time, the Appellant's overdraft became due for repayment. The appellant who hadn't the capacity to repay the overdraft

D approached the University to find out how to settle the overdraft. The University and the appellant agreed after several meetings to sell the iron pipes which were no longer required for the contract and whose value had by then risen tremendously.

- E** The iron pipes were accordingly sold off in four deals and the money forwarded to the respondent. Then series of meetings were held to determine how the proceeds from the sale of the iron pipes were to be shared. The respondent said that as a result of the meetings between it, the
- F** appellant and the university, it was agreed that the proceeds be shared between the University and the appellant in the ratio of 55% and 45% respectively. The respondents made it clear that the share of the appellant would be paid into its account from which the overdraft will be serviced.
- G** After the payment of the proceeds of the sale of the pipes, the respondent forwarded to the university its 55% and credited the balance into the appellant's account from which it applied same in recovering its overdraft and the interest that accrued thereto. At this point, the appellant denied ever
- H** agreeing on any sharing formula and insisted that the whole proceed was to be paid into its account. The appellant claimed that the proceeds of the sale of the iron pipes which amounted to N780,813.57 had effectively settled its indebtedness with the respondent, leaving a credit balance of N240,611.74
- I** to its favour. The respondent on its part contended that the appellant's share of 45% of the proceeds of sale of the pipes only reduced the outstanding

A overdraft and the interest thereon and that the overdrawn balance against the appellant still stood at N1,418,076.10.

Because of the sharp differences between the appellant and the respondent, the appellant on the 12/7/91 took out a writ of summons against the respondent in which it claimed the reliefs I have already set out elsewhere in this judgment.

On issue one, learned senior counsel for the appellant submitted that the lower court agreed with the manner in which the appellant effectively challenged the treatment given to Exhibit 16A by the trial court, yet in a dramatic turn of events, attempted to justify the treatment given to the said Exhibit. This, Learned Senior counsel further submitted that the lower court had fallen into the error of substituting its own finding on the ground upon which Exhibit 16A could be used as credible evidence in the proceedings with that of the trial court without being urged to do so by way of a respondent's notice. It is the learned senior counsel's contention that the lower court's action amounted to making a case for the respondent, as there was no process filed by the respondent seeking for the variation of the ground upon which the trial court made use of Exhibit 16A. Learned counsel submitted that a court has a duty not to make a case for another party, as a court must stand as an unbiased umpire in the course of the proceedings before it. In aid, learned senior counsel cited:- **Osolu Vs. Osolu (2003)11 NWLR (pt. 832) 608 at 631 paragraphs A-C; Adeniji Vs. Adeniji (1972) 1 All NLR (Pt. 1) 298; Adegoke Vs. Adibi (1992) 5 NWLR (Pt. 242) 410; Olusanya Vs. Ousanya (1983) 1 SCNLR 134, (1983)3 SC. 41; Ebba Vs. Ogodo (1984) 1 SCNLR. 372.** Still in argument, Learned Senior Counsel submitted that the lower court ought to have confined itself to the question as to whether the weight that the trial court attached to Exhibit 16A was proper in the circumstances of the case. According to the learned counsel, the lower court went beyond what it was called upon to do and without the prompting of the respondent, made a dramatic variation to the ground upon which the trial court had earlier found in favour of the respondent, and thereby affirming the judgment of the trial court on different grounds. It is the further submission of learned senior counsel that the finding that the appellant was present at the meeting

A that gave rise to Exhibit 16A is not supported by evidence and it is therefore perverse. Finally on this issue learned senior counsel urged this court to interfere with the concurrent findings of fact by the two lower courts on the authority of **J.C. Ltd Vs. C.M. & Partners Ltd. (2002) 9-10 SC. 153 at B 164 paragraphs 25.**

C With respect to the learned senior counsel for the appellant, I do not think that the lower court made a new case for the respondent. Exhibit 16A, even though unsigned and had no evidential value, is a document that was before the lower court. Even though a respondent in appeal who wishes to contend that the decision of the court should be affirmed on grounds other than those relied on by the trial court could do so by way of respondent's notice, the lower court by its rules is not excluded from affirming or varying a decision of a trial court on grounds other than those relied upon by the trial court, provided that the decision is taken on the basis of the evidence before the trial court. See order 51 Rule 20(4) and (5) of the Court of Appeal Rules 1981, which was the applicable Rules when this appeal was heard and judgment delivered. Although the lower court found like it did, that the trial court was in error when it ascribed some weight to unsigned exhibit 16A, it was however right when it used the said exhibit to hold that the meeting that gave rise to that exhibit indeed took place.

F This is what the court said at page 159-160 of the printed record of this appeal:-

G *“The Appellant said no weight should be attached to exhibit 16A because it was an unsigned document. Mind you, it is not the contention in this appeal that no such meeting ever took place!! DW1 gave evidence about the meeting convened as reflected in exhibit 16A although his account of it was given in a rather unsatisfactory manner. However, that the meeting was held and discussions made about the disposal of the iron pipes is beyond doubt. To that extent, the use to which the Learned trial judge made of exhibit 16A could be justified on different ground and his conclusion about the convening of the meeting in which appellant was present in*

H

I

A *my view, is correct, given the evidence of DW1.”*

Clearly, an incompetent Exhibit 16A is an evidence that there was a meeting, just as an incompetent proceeding or decision of a court is an evidence of the fact that the court sat and conducted proceeding that is incompetent. The Justices that took part in the proceedings and the lawyers that appeared for the parties will be part of the established facts of what happened. So it is with exhibit 16A that was admitted in evidence at the trial court and same was in the lower court's file. This Court has held in a number of cases that the courts have absolute power to look at the documents in their files and utilize them to support established facts. *See Agbasi Vs. Ebikorefe (1991)4 NWLR (Pt. 502) 630; Uzodinma Vs. Izunaso (No. 2) (2011) 17 NWLR (Pt. 1225)30 at 90 paragraphs B-C, G and T Invest Ltd Vs. Witt & Bush Ltd.*

D The content of Exhibit 16A shows clearly that the appellant was represented by Alhaji Isa Haruna and its Engineer Mr. Uche Onjuka and a Quantity Surveyor, respectively, and this is consistent with the evidence of **E** DW1, Stanley Ejoma at page 62 lines 17-19 of the record of this appeal where he said:

F *“The plaintiff was represented by Alhaji Isa Haruna and his Engineer Mr. Uche Onjuka and the Quantity surveyor who was there.”*

This piece of evidence having the backing of Exhibit 16A, cannot be supplanted by oral evidence of PW1 who claimed that the appellant was not represented at the meeting. *See Chief S. O. Agbareh & 1 Or. Vs. Mr. Anthony Mimra (2008) 2 NWLR (Pt. 1071) 378 at 410-411 paras F-B.*

G I therefore agree with Mr. G. Ofodile Okafor, learned senior counsel **H** for the respondent that the judgment of the lower court is not perverse as contended by the learned appellant's counsel, since same is based on facts, evidence and the relevant Laws applicable to the case. I am therefore not prepared to disturb the concurrent findings of the two lower courts on this **I** score. This issue is resolved against the appellant and in favour of the

A respondent.

On the second issue for determination, learned appellant's counsel submitted that the lower court was wrong when it held that the appellant was bound by the terms of Exhibit 17A, when it found that the appellant was undoubtedly not a party to the said exhibit. According to the learned counsel, a person is not under an obligation to bear the burden of a contract to which it is not a privy, even though the contract is in his favour or benefit. In aid, learned counsel cited **Makwe Vs. Nwukor (2001)14 NWLR (Pt. 733)356 at 358 and 359; UBA PLC Vs. Jargaba (2007)11 NWLR (Pt. 1045)247 at 256.** Learned counsel forcefully argued that there is no evidence that the appellant ever agreed to be bound by the terms of Exhibit 17A which it was never a party to in the first instance and that the appellant cannot be held liable for an agreement as reflected in Exhibit 17A which was executed by the respondent and the University of Jos, since the respondent is not an agent of the appellant. In a further argument, learned senior counsel submitted that not only was there no agreement between the appellant and the University of Jos regarding the sale of the iron pipes and the sharing formula being bandied around by the respondent, there was never any agreement between the appellant and the respondent for the creation of a suspense account into which the proceeds of the sale of the iron pipes to be paid.

Exhibit 17A is the minutes of another meeting in which an agreement was reached as to the sharing formula of the proceeds from the sale of the iron pipes in the ratio of 32.8% for the appellant and 67.5% for the University of Jos. This sharing formula was to be put into effect by the respondent since the money realized was to be lodged into the appellant's account domiciled with the respondent.

The lower court, after a careful examination of Exhibits 17A, 18, 19, 20 and 21 came to the following conclusion:

“Having regard to Exhibits 19, 20 and 21 therefore the conclusion, of the Learned trial Judge that there was a sharing formula agreed upon between the appellant and the

A *University of Jos cannot be faulted.”*

The Lower court was right in its conclusion. This is so because the appellant, is the author of Exhibits 19, 20 and 21. In Exhibit 19, the appellant directed the respondent as follows:-

B

“The above payment is to go into EDILCON account and out of this, thirty five thousand naira (N35,000) should be deducted for the commission and other commitments as agreed with the former manager. Therefore we are applying as agreed to the branch manager to give us N35,000 out of N147,612.50 should be paid to EDILCON account and the University as per agreement.” (underlining mine).

D

In paragraph 2 of Exhibit 20, the appellant drew the attention of the respondent to the previous meetings they held with the University of Jos, as follows:

E

“We wish to draw your attention during our previous meetings with University Authority and the former Bank Manager, that EDILCON NIG. LTD will be given some percentage for the transaction, handling charges and payment of watchmen and others. But to our surprise, this verbal agreement was not fully implemented, because the money given by the bank was not in any way sufficient to solve the problems.”

G

After the total proceeds of N785,823.57 was realized from the sale of the iron pipes, and in order to ascertain the State of its account and the share collected by the University, the appellant wrote the respondent seeking among other things the following clarification as contained in paragraph 2 of Exhibit 21 as follows:

H

I *“That out of the aforesaid, the sum of N40,000.00 was paid to*

A *the company to enable it settle salaries of watchmen who took care of the pipes, that the balance of N745,000.00 was lodged in favour of Edilcon and Jos University.*

B *That since the aforesaid lodgment about 2 years ago we have not been made aware of the amount paid to EDILCON'S account and also the University.”*

C The passages quoted from Exhibits 19, 20 and 21 above clearly show that the appellant impliedly adopted the agreement contained in the Exhibit by its subsequent conduct in dealing with the respondent. Where that happens as in this case, the parties will be bound by the terms of the agreement as if they executed it. **See McDonald Vs. John Twiname Ltd (1953)2 QB. 304 at 314.**

E This is a clear manifestation that the appellant participated in the meetings that gave rise to Exhibits 16A, 17A and 18, and endorsed the agreement to sell the pipes and share the proceeds in accordance with the formula agreed upon. The lower court was therefore right when it held that the appellant is bound by the contents of exhibit 17A which was duly signed by the chairman of the meeting. This is so, because, it is the law that where parties have entered into agreement voluntarily and there is nothing to show that such agreement was obtained by fraud, mistake, deception or misrepresentation, they are bound by the terms of the agreement. **See A.G. Rivers State Vs. A.G. Akwa-Ibom State (2011)8 NWLR (Pt. 1248)31 at 81.**

G This issue for determination relates to Exhibit 17A only. I cannot therefore go outside the said issue to discuss questions, bothering on whether the respondent is an agent of the appellant. Throughout the series of meetings culminating into the execution of Exhibits 16A, 17A and 18, the appellant was duly represented. For all I have said, this issue is resolved against the appellant and in favour of the respondent.

H On the third issue for determination of this appeal, learned senior counsel for the appellant submitted that there was no evidence before the trial court that contradicted the fact that appellant had paid N780,823.57

- A** into his account which is domiciled with the respondent. It is learned senior counsel's submission that the money paid was intended to liquidate the appellants indebtedness to the respondent for the overdraft facility which stood at N540,181.83 as at 29th June, 1987. Still in contention, learned
- B** senior counsel submitted that the appellant was not a party to Exhibits 17A and 18 on the basis upon which payment was made to the University of Jos.

In a further argument, learned senior counsel submitted that the payment to the University was a unilateral action by the respondent as

C confirmed by the evidence of DW2, as such the lower court should have delivered judgment in favour of the appellant. I do not think, learned appellants counsel is correct. DW1 at page 62 of the record said:

- D** *“During the meeting, it was agreed that the pipes be sold and the proceeds be shared at the ratio of 55 to University of Jos and 45 to the defendant I refer in Exhibit 16 where it was so agreed.”*

E The same DW1 could not have testified that the payment to the University of Jos was effected arbitrarily. The appellant's account was always shown to be in debit balance and this is consistent with the findings

F of the trial court, where it held at page 89 lines 9 13 as follows:

- G** *“The plaintiff assumed that if he had lodged a total sum of 780,823.57 and the Defendant deducted N540,181.93, he would have a balance of N240,641.74. This would have been correct if nothing was shared between the University of Jos and the defendant at the ratio of 55.45”*

H The lower court did affirm the position of the trial court, when it held at page 176 lines 17-22 as follows:

- I** *“Furthermore, Exhibit 25 did show the debit balance of the appellant standing at N1,181,176.10 as at 27/9/93 after the appellant's share of 45% was credited to its account and*

A *accordingly utilized in reducing its outstanding indebtedness in relation to the overdraft. The finding of the learned trial judge at page 96 lines 8 13 appears to be well founded given the state of the pleadings and the evidence led.”*

B

The trial court had no reason to give judgment to the appellant, having regard to the overwhelming evidence against it, which showed that of the total sum of N780,523.57 that was paid into its account as agreed, 45% accruing to it was used to reduce its indebtedness to the respondent which stood at N1,418,178.10 as at 27/9/93.

C

On the basis of the parties submission, I agree with learned senior counsel for the respondent that this issue ought to be and it is accordingly resolved against the appellant.

D

Having resolved all the three issues submitted for determination of this appeal against the appellant, this appeal shall be and it is hereby dismissed for lack of merit. The cost of prosecuting this appeal is assessed at N200,000.00 in favour of the respondent and against the appellant.

E

CROSS APPEAL

The respondent in the appeal is dissatisfied with certain aspects of the judgment of the lower court. Being aggrieved he brought this appeal.

F

The Cross appellant formulated one issue for determination of this appeal as follows:

G

“Whether the Court of Appeal was right when it set aside the 21% interest awarded to the Cross Appellant.”

The cross respondent adopted the sole issue formulated by the cross appellant.

H

The cross appellant herein, who was the defendant at the trial court, counter-claimed against the cross respondent as follows:

I

*“(a) N868,597.02 as debt
(b) Interest at Bank rate of 22.50% from 1/2/92 until*

A *judgment and thereafter at 10% until full payment.”*

(See page 41 of the printed record of this appeal).

In his judgment, the learned trial judge, Ahinche J. made the following orders:

B

“Therefore, judgment is entered in favour of the counterclaim in the sum of N1,418,076.10 with the interest at Bank rate of 34% from 1/10/93 to the date of judgment, and 21% interest from the date of judgment until the whole debt is liquidated.

C

On appeal, the Court of Appeal per Isa AbubakarMagaji (JCA) held:

D

“Consequently, the award of 21% interest rate on the judgment debt having been made contrary to 0.40 rule 7 of the Plateau State High Court (civil procedure) Rules, 1987, is hereby set aside. All other issues are resolved against the appellant. The Judgment of Ahinche J. in suit No. PLD/3177/91 dated 30/1/96 is hereby affirmed except as it affects the payments of 21% interest rate on the judgment debt which is accordingly set aside.”

E

F

I have reproduced elsewhere in this judgment the cross appellant counterclaim which it endorsed in its amended statement of defense at pages 38-41. At paragraph 26 of the said amended statement of defense and counter-claim, the cross appellant claimed 10% post judgment interest and not 34% as claimed in the cross appellant's brief of argument. I failed to see where the cross appellant counter claimed 34% post judgment interest, as presented by parties in their briefs of argument. With the admission by parties that the counter claim was 10%, it clearly appears that there was no agreement between the parties as to the quantum of post judgment interest. A court has no power to make an order or grant a relief which has not been asked for by any of the parties. A court of Law may award less, but not

G

H

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A more than what the parties have claimed. A fortiori, the court should never award that which was never claimed or pleaded by either party. In **A.G. Federation Vs. AIC Ltd (2000) 10 NWLR (Pt. 675) 293 at 305** it was clearly held as follows:

B

“It should always be born in mind that a court of Law is not a charitable institution. Its duty in civil cases is to render into everyone according to his proven claim. This is based on the fundamental principle of adjudication that a defendant must be given opportunity to answer the claim against him and if need be to resist it.”

C

D *See Ekpenyong Vs. Nyong (1975)2 SC. 71; Obejimi Vs. A.G. Western Nigeria (1967) A.N.L.R. 33.*

The trial court granted a post judgment interest which was neither claimed nor authorized. Interest may be awarded in a case in two distinct circumstances:

E

“(a) As of right as agreed by the parties or under a mercantile custom or under a principle of equity, much as a breach of Fiduciary relationship, and

F

(b) Where there is a power conferred by statute to do, in exercise of the court's discretion.”

G

See Ekwunife Vs. Wayne (W.A. Ltd) 1989)5 NWLR ((Pt. 122) 422.

Post judgment interest in the instant case is provided for under order **H** 40 Rule 7 of the Plateau State High Court (civil procedure) Rules 1987 and it is pegged at 10% of the total sum awarded to a claimant. In absence of any agreement, the trial court had no jurisdiction to award more than what is statutorily provided for. The lower court was therefore right when it set **I** aside the post judgment interest as it was awarded in error and without

A justification. The sole issue formulated for determination of this cross appeal is accordingly resolved in favour of the cross Respondent: This cross appeal shall be and it is accordingly dismissed.

No Order as to cost.

B

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

C **RHODES-VIVOURE, (JSC):** I have had a preview of the leading judgment which has just been read by my learned brother, **Galinje JSC**. I agree entirely with his lordship's reasoning and conclusions.

**Olabode Rhodes-vivour
Justice Supreme Court**

D

BATA OGUNBIYI, (JSC) I read in draft the lead judgment of my learned brother, **Galinje JSC**. I agree that the appeal is devoid of any merit and should be dismissed with no order made as to cost.

E In respect of the cross appeal same also applies that it should be dismissed with no order as to costs.

The facts that led to the appeal and cross appeal are well spelt out in the lead judgment and I will not repeat same.

F The claims by the plaintiff/appellant and the counter claim by the defendant/respondent herein are very well and explicitly set out by my learned brother Galinje, JSC.

G Suffice it to say that the trial High Court, in its considered judgment dismissed the plaintiff's claims and entered judgment for the defendant on its counter claim.

H The Court of Appeal (lower court)) allowed the plaintiff/appellant's appeal in part wherein the 21% interest rate on the judgment debt was found contrary to order 40 of the Plateau State High Court (civil procedure) Rules 1987 and set aside. Hence, the further appeal now before this court.

I My brother has dealt exhaustively with all the three issues raised in this appeal and I adopt his judgment as mine. However, and just for purpose of emphasis, I will put in one or two words of mine in respect of

A issue No. 3, which reads as follows:

B ISSUE 3

C Whether the lower court was right when it upheld the judgment of the trial court and entered judgment in favour of the respondent.

It is the appellant's case that it maintained a current account with the respondent and had lodged various sums of money amounting to
D N780,823.57 in the said account, sometimes between January, 1987 and June, 1989. The evidence of PW1 was relied upon, as the Chairman and Chief Executive officer of the appellant.

While the respondent conceded to the payment of the said sum supra,
E by the appellant into its account with the respondent, the caveat however, was that it was disbursed by the respondent to the appellant and University of Jos in accordance with the agreement reached in Exhibits 16A, 17A and 18 respectively, that it was the appellant's entitlement out of the sum of
F N780,532.57 that the respondent applied in reducing the appellant's indebtedness to it as a result of the loan it took. The lower court in its review could not be faulted in upholding the trial court and entering judgment for the Respondent as rightly submitted by the Respondent's
G counsel.

With the few words of mine and relying particularly on the comprehensive reasoning by my learned brother, **Galinje JSC**, I also dismiss the entire appeal as lacking in merit.

H For the same reasons also given on the lead judgment, I find no merit in the cross appeal which is hereby dismissed. I abide by the orders made in the lead judgment inclusive of costs.

I

Clara Bata Ogunbiyi
Justice, Supreme Court

A

CENTUS NWEZE, (JSC): My Lord, Galinje, JSC, obliged me with the draft of the leading judgment just delivered now. I agreed with His Lordship that both the main appeal and cross appeal, being unmeritorious,

B ought to be dismissed.

Learned senior counsel for the appellant, most vociferously, entreated this court to interfere with the concurrent findings of facts by the lower courts, citing **J. C. Ltd. Vs. C.M. and Partners Ltd (2002)9 10 SC**

C **153, 163**. With profound respect, it would seem obvious that this entreaty was prompted by a misconception of the rationale of the above decision, let me explain.

It has long been established that an appellate court, generally speaking, should not interfere with findings of fact of trial courts. The reason is simple. The latter courts, that is, trial courts, had the unique opportunity of seeing and hearing the witnesses give evidence. They not only see the witnesses, they, equally, observe all their habits and mannerisms. These include their demeanour and idiosyncrasies.

As a corollary to these peculiar advantages, the Law anticipates that they should utilize all their judicial competence: competence or skill rooted or anchored on law and commonsense to evaluate the evidence by eliminating the chaff from the grain of probative evidence. Proper conclusions which a reasonable court ought to arrive at, expectedly or ideally, should eventuate from that rigorous exercise.

That is why the law takes the view that a failure in this regard would warrant the interference of the appellate Court, **Adeye and Ors Vs. Adesanya and Ors [2001] 6 NWLR (Pt. 708) 1; Olatunde Vs. Abidogun [2001] 18 NWLR (Pt. 746) 712; Adeleke Vs. Iyanda [2001] 12 NWLR(Pt. 729) 1; Udo Vs. CRSNC [2001] 14 NWLR (Pt. 732) 116; Enilolobo Vs. Adegbesan [2001] 2 NWLR (Pt. 698) 611.**

This, then, is the foundation for the number of exceptions to this general rule against non-interference. For example, one major exception to the said general rule is that, where such findings are in fact inferences from findings properly made, the appellate court is in as good a position as the

A trial court to come to a decision, **Ebba Vs. Ogodo [1984] 1 SCNLR 372; [1984] 4 SC 84, 98-100; Fabunmi Vs. Agbe [1985] 1 NWLR (Pt. 2) 299, 314; Fatoyinbo Vs. Williams [1956] SCNLR 274; (1955) 1 FSC 87; Ukatta Vs. Ndinaeze [1997] 4 NWLR (Pt. 499) 251, 263.**

B This explains the prescription that an appellate court will also interfere with findings of fact where such findings are perverse, that is, persistent in error, different from what is reasonable or required, against weight of evidence; put differently, where the trial Judge took into account, matters which he ought not to have taken into account or where he shut his eyes to the obvious, **Atolagbe Vs. Shorun [1985] LPELR-592 (SC) 31; C-D.** Such a perverse finding is a finding of facts which is, merely, speculative and is not based on any evidence before the court. It is an unreasonable and unacceptable finding because it is wrong and completely outside the evidence before the trial judge, **Iwuoha and Anor Vs. NIPOST and Anor (2003) LPELR-1569 (SC) 39-40; Overseas Construction Company Nig, Ltd. Vs. Creek Enterprises (Nig.) Ltd. [1985] 3 NWLR (Pt. 13) 407.**

E In all, then, a decision is said to be perverse: (a) When it runs counter to the evidence; or (b) where it has been shown that the trial court took into account matters which it ought not to have taken into account or shut its eyes to the obvious; or (c) When it has occasioned a miscarriage of justice, **Messrs Vs. Ibrahim [1975] 5 SC 55; Incar Ltd. Vs. Adegboye [1985] 2 NWLR (Pt. 8) 453; Atolagbe Vs. Shorun (1985) 4 SC (Pt. 1) 250, 282.**

G Learned senior counsel for the appellant failed to show how the concurrent findings of the lower courts could be pitch-forked into the above categories! Contrariwise, I agree with the leading judgment that Chief G. Ofodile Okafor, SAN's submission on this point is unanswerable. Chief Ofodile Okafor, SAN, for the respondent, had canvassed the view that the judgment of the lower court is not perverse based, as it was, on facts, evidence and the relevant laws applicable to the case. I, entirely, endorse this effervescent submission. Accordingly, I fail to see how this court could, justifiably, interfere with the said concurrent findings of the lower courts.

H

I

A Having said that, I must observe here that for the eloquent reasons advanced in the leading judgment, while the main appeal must fail; the cross appeal must suffer the same fate since the post-judgment interest was awarded contrary to established principles, **Ekwunife Vs. Wayne B (W/Africa) Ltd [1989] 5 NWLR ((Pt 122) 422; also, C.C. Nweze, Law and Procedure on Suits on the Undefended List (Enugu: Hamson Publishers, 1998) passim.**

**Chima Centus Nweze
Justice, Supreme Court**

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**EMEKA OKO
AND
THE STATE**

SC. 242/2013

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

FRIDAY, 12TH MAY, 2017

BEFORE THEIR LORDSHIPS

**MUSA DATTIJO MUHAMMAD
KUMAI BAYANG AKA' AHS
KUDIRAT M. O. KEKERE-EKUN
EJEMBI EKO
SIDI DAUDA BAGE**

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

COURT: Self defence – The test for its reasonableness – Factors relevant thereto.

COURT: Murder trial – Duty thereon – Whether has a duty to consider all possible defences available to the accused on the evidence before it.

COURT: Provocation – Resolution thereof – Where court applied the principles of self defence in determining – Whether or not provocation applies – Impropriety thereof.

*CRIMINAL LAW: Defence – Provocation – Where after the alleged provocative act of the deceased there was sufficient time for anger to cool – Whether provocation will not avail the accused – The principle in *Igwe Vs. Queen (1963) 1SCNLR 307*.*

CRIMINAL LAW: Defence – Provocation – Where the accused did the

unlawful act in the heat of passion – Whether the defence of provocation applies.

CRIMINAL LAW: Defence – Provocation – Whether the age of the accused is a relevant factor in considering how he responded in the provocation.

CRIMINAL LAW: Defences – Self defence – Where successfully pleaded – Effect.

CRIMINAL LAW: Provocation – Elements thereof.

CRIMINAL LAW AND PROCEDURE: Failure to appeal on a material finding – Where the learned trial judge held that Exh. A is not credible – Respondent failed to appeal against this finding – Whether respondent cannot assert the credibility of Exh. A on appeal.

CRIMINAL LAW AND PROCEDURE: Self defence – Onus on accused thereto – What he must establish.

Issues for Determination

- 1. Whether the learned Justices of the Court of Appeal were right when they held that since the defence of self defence could not avail the appellant on the facts and evidence, the same facts and evidence could not ground a defence of provocation.**
- 2. Whether the learned Justices of the Court of Appeal were right when in the face of the evidence before the court, they held that the defence of provocation was not proved and did not avail the appellant.**
- 3. Whether the learned Justices of the Court of Appeal were right when they recorded and pronounced a sentence of death by hanging on the appellant.**

Facts of the Matter

The appellant herein was arraigned before the High Court of Enugu State holden at Enugu on 6th October, 2005, on a one-count charge of murder contrary to Section 274 (1) of the Criminal Code Cap. 36 Vol.1 Laws of Anambra State of Nigeria, 1986, applicable to Enugu State. He was alleged to have murdered one Ikenna Friday Mbah on the 3rd day of June, 2001 at the Estate Shopping Centre, Federal Housing Estate, Trans Ekulu, Enugu in Enugu East Local Government Area of Enugu State (hereinafter referred to as the Shopping Centre). The case was first investigated at Trans Ekulu Police station and later transferred to State C.I.D. for further investigation.

The appellant pleaded not guilty to the charge. The prosecution called six witnesses and tendered documents, which included the appellant's extra judicial statement (Exhibit A) and a medical report (Exhibit D). The appellant testified in his own defence and tendered Exhibit F, the extra judicial statement which he made at Trans Ekulu Police station on 3/6/2001, the day of the incident. He did not call any other witness. In Exhibits A and F and in his testimony before the court, the appellant admitted inflicting the matchet cut that led to the death of the deceased.

The facts of the case, as presented by the prosecution, are as follows: On 2/6/2001, the appellant and his friend went to the shopping centre to buy pure water. While there, the deceased, a friend of the appellant's elder brother, challenged him and slapped him for failing to greet him and for not showing respect. The appellant, according to the prosecution, apparently still smarting from the previous day's encounter, returned to the shopping centre the next day and inflicted a blow to the neck of the deceased with a matchet, which led to his death.

The appellant's version of events, on the other hand, was that on 2/3/2001, he escorted a friend to the Shopping Centre to buy pure water. That while waiting for the water, the deceased, whom he had not noticed before, called him and challenged him for not acknowledging or greeting him. That in spite of his apology the deceased began slapping and beating him. That people around chastised him for his actions, as he (the appellant) had not done anything wrong. Eventually he left and went back home accompanied by his friend, one Friday Ogbu.

On 3/6/2001, he went back to the shopping centre, as it is also a recreation centre, to relax with friends. The deceased accosted him and challenged him again, this time for not showing remorse for his disrespectful behaviour the previous day. A quarrel ensued. He testified that the deceased grabbed a bottle, which he broke and tried to stab him with it. That in an attempt to defend himself, he picked up something which he found on the floor, which felt like iron and hit him with it. He (the deceased) immediately fell to the floor. That he did not know that the object he picked up was a matchet until he got to the police station and was so informed by the police. He also could not recall which part of the deceased's body he hit. However, in his extra judicial statement, Exhibit A, he stated that two of his friends who were with him on 2/6/2001 when the deceased slapped him advised him to retaliate otherwise he would be considered a fool. Exhibit A was admitted in evidence after the conduct of a trial within trial, as it was objected to on grounds of duress. During his evidence in the substantive trial, he maintained that Exhibit A was obtained under duress.

At the conclusion of the trial, the learned trial Judge considered whether the defences of self-defence or provocation availed him. The court ruled out self-defence but held that the defence of provocation was established. He was found not guilty of murder but convicted for the lesser offence of manslaughter and sentenced to 15 years imprisonment with hard labour.

The prosecution was dissatisfied with the judgment and appealed to the Court of Appeal, Enugu Division. The sole issue for determination before that court was “*whether from the facts and evidence before the learned trial Judge, the defence of provocation was available to the respondent.*” On 22/4/2013 the court answered in the negative. It held *inter alia*, that the trial court was wrong to have relied on evidence found insufficient to support a defence of provocation in holding that the defence of provocation was made out. It allowed the appeal and set aside the judgment of the trial court. The appellant was convicted of murder and sentenced to death. He is understandably dissatisfied with his conviction and sentence, hence the instant appeal.

Held: *(Unanimously allowing the appeal)*

1. *In a charge for murder the court has a duty to consider all available defences on the evidence before it.*
As rightly submitted by learned counsel on both sides, in a trial for murder, the court has a duty to consider all possible defences available to the accused person on the evidence before it, whether raised by him or not and no matter how stupid they might seem.
See Laoye Vs. The State (1985) 2 NWLR (Pt.10) 832; Ada Vs. The State (2008) 13 NWLR (Pt.1103) 149; Uwaekweghinya Vs. The State (2005) 9 NWLR (Pt.930) 227.(P 209 paras G – I)

2. *Onus on a person relying on self defence.*
An essential feature of the defence of self-defence is that it involves a process of reasoning, the guiding principles being necessity and proportion. The person relying on it must be able to satisfy the court that he had reasonable grounds for believing that his life was in danger and that the action he took was the only available option to save his life. The test is objective. Some of the factors the court would consider are whether the force used by the accused person was proportionate to that used by the deceased, the circumstances in which the force was used, the part of the body hit in self-preservation by the accused, among others. *See Chukwu Vs. The State (2012) LPELR-9829 SC @ 9 – 10 D – F; Kwagshir Vs. The State (1995) 3 NWLR (Pt. 386) 651; Omoregie Vs. The State (2008) 18 NWLR (Pt. 1119) 464.(P 210 paras E – H)*

3. *Effect of a successful plea of self defence.*
It is also trite that where it is successfully made out, the defence is a complete defence to a charge of murder. *See Omoregie Vs. The State (supra); Apugo Vs. The State (2006) 16 NWLR (Pt.1002) 227 @ 255–256 H – A; Baridam Vs. The State (1994) 1 NWLR (Pt. 320) 250 @ 262.(P 210 paras H – I)*

4. *The elements of the defence of provocation.*

A defence of provocation on the other hand, involves the opposite of reasoning. The elements of the defence of provocation are:

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

Provocation arises from an act or series of acts done by the deceased to the accused person, which would cause in a reasonable man, and did in fact cause in the accused person at the material time, a sudden and temporal loss of self control, rendering him so subject to passion as to make him or her for the moment not the master of his mind. See Akalezi Vs. The State (1993) 2 NWLR (Pt.273) 1; Stephen Vs. The State (1986) 5 NWLR (Pt. 46) 978; R Vs. Duffy (1949) 1 ALL ER 932; Oladiran Vs. The State (1986) 1 NWLR (Pt.14) 75. Provocation may be verbal or physical or both. What constitutes provocation is a question of fact to be determined based on the circumstances of each case. See Lado Vs. The State (1999) 9 NWLR (Pt.619) 369 @ 380 F. The effect of a successful defence of provocation is to reduce a conviction for murder to one of manslaughter.(P 211 paras A–G)

5. *It is not correct that the Court of Appeal did not consider the issue of provocation at all.*

Learned senior counsel for the appellant in her amended reply brief argued that the court below did not consider the defence of provocation at all. With due respect to learned senior counsel, this is

not quite accurate. At pages 197 200 of the record, the court did not consider it. It however came to the conclusion that since the trial court made the following findings: that the appellant was not apprehensive for his life or of grievous bodily harm; that there was no evidence of an attempt to avoid or retreat from the deceased;

That there was no sign of physical attack on the appellant from the encounter of 3/6/2001 and based thereon held that the defence of self-defence did not avail him, the same evidence could not support the defence of provocation. On whether the appellant's temper (or passion) had time to cool, the court held that his temper had time to cool between 2/6/2001 and 3/6/2001, when they had the second encounter.(Pp 211 – 212 paras G – B)

Per Kekere-Ekun (JSC)

“I, however, agree with learned senior counsel for the appellant that the lower court erred in applying the same principles to the separate defences. As stated earlier, provocation involves the sudden loss of self-control. Therefore the lack of evidence of physical attack on the appellant, whether or not he was apprehensive of death or grievous bodily harm or the absence of the actual word uttered by the deceased would not be proper consideration in determining whether the appellant was provoked or not. The important consideration is whether from the facts of the case a reasonable man, and indeed the accused person, could have been provoked by the scenario that played out on the fateful day.

In the instance case, it is pertinent to bear in mind the fact that the evidence of the appellant was the only eye-witness account before the court. PW1, PW2 and PW4 were police officers involved in the investigation of the crime. PW3 was the father of the deceased who identified his corpse. PW5 was the medical doctor who carried out the post-mortem examination on the deceased and the author of the medical report, Exhibit D. PW6 was the photographer who was

invited by the police to take photographs of the corpse. He tendered the photographs and negatives, which were admitted as Exhibit E3 and E4 respectively. The appellant's encounter with the deceased the previous day on 2/6/2001 at the shopping centre and the fact that the deceased challenged him for not greeting him and slapped him for being disrespectful was not in dispute".(P 212 paras B – G)

6. *The trial court was right to hold that the appellant established provocation.*

I am of the considered view that the learned trial Judge properly appraised the evidence before him and rightly found that the appellant established the defence of provocation. I agree that the incidence of the previous day, coupled with the aggressive encounter on 3/6/2001, where the deceased not only repeated the challenge of the previous day but in addition, attempted to stab the appellant with a broken bottle, was sufficient provocation that made him experience temporary loss of self-control and react on the spur of the moment, before his temper had time to cool.

(P 215 paras E – G)

7. *The age of the accused is a relevant factor in the consideration of defence of provocation.*

This finding confirms the fact that the appellant reacted instantaneously by picking up something from the ground, which turned out to be a matchet, and striking the deceased with it. I also agree with the learned trial Judge that the young age of the appellant, which was stated in Exhibit F to be 18 years, is a relevant factor in considering the precipitate manner in which he responded to the provocation. An older, more mature person might have responded differently. This is why each case must be determined on its own facts. *See Lado Vs. The State (supra).*(Pp 215 – 216 paras I – B)

8. *Since the accused was the only eye witness any doubt will be resolved in his favour.*

I am also of the view that any doubts as to the correct version of what took place on 3/6/2001 must be resolved in the appellant's

favour, in the absence of any other eye-witness account.

I, therefore, hold that the lower court erred in applying the principles applicable to a defence of self-defence in determining whether or not the defence of provocation availed the appellant. In the light of my findings in the course of this judgment, I resolve issues 1 and 2 in favour of the appellant and against the respondent. (P 216 paras B–D)

Per Eko (JSC)

“This is a murder case. Where on a murder charge there is evidence on which the court can find that the person charged was provoked, whether by things done or by things said or both, to lose his self-control, the question whether the provocation was enough to make a reasonable man to do what he did is one fact. In determining that question, the material facts to consider are the facts of what the deceased did or said that caused the defendant to be so provoked to do what he did resulting in the death of the deceased. The test is objective, and it is whether a reasonable man, in the circumstances, would have been provoked. Lord Diplock used this “reasonable man” test in *D.P.P. Vs. Camplin* (1987) 67 Cr. APP. R 14, and I think it is reasonable to adopt it and I hereby adopt it for this case.

The “reasonable man” in this context is the ordinary person in the social and age bracket of the defendant. The “reasonable man” test is not oblivious of the relationship between the gravity of the provocation and the defendant or the fact that the accused person retaliated. Both are judged by the social standards of the day. See *Archbold: Criminal Pleading & Evidence*, para. 2846 40th ed.

The test is objective, and not subjective. Thus as Nigerian Courts had held in a number of cases, the test is what effect would such provocative act have on a reasonable man in the station or situation of life of the accused person at the material time. See *The State Vs.*

Obaji (1965) 1 ALL NLR 269 at 273; The State Vs. Ozaki (1986) 5 NWLR (Pt. 40) 258; Oladiran Vs. The State (1986) 1 NWLR (Pt. 14) 75 at 81.

On this defence of provocation, the only evidence is that of the appellant, the accused person. His testimony and Exhibit F, his extra-judicial statement made to the police long before the trial, have not been discredited. The effect of these is that the deceased had constituted himself a bully tormenting the teenager, the accused. On 2nd June, 2001, the appellant was beaten up, unprovoked, by the deceased, merely for not recognizing and greeting him promptly. The appellant had come to shopping mall to buy water. He did not know that the deceased was already seated there. The deceased who was already there drinking with friends called the appellant, challenged him for not greeting him and proceeded to slapping him for being disrespectful. The prosecution did not discredit this fact. The police investigators did not produce any person present and those others who were drinking with the deceased to testify to the contrary. The effect is: Facts not discredited, challenged or controverted are taken as admitted and therefore credible to be acted upon by the court. The evidence of the appellant is, in my view, very credible and reliable to be acted upon. There was nothing that made it inherently unreliable.”

(Pp 217–218 paras C–D)

9. *Prosecution failed to call relevant evidence.*

This story and the appellant's account in Exhibit F are virtually the same. The prosecution did not call evidence from any of the “people around” who watched and heard what was being done to the appellant by Ikenna, the deceased, and the reaction of the appellant to the deceased. In other words, there was no eye witness account to the contrary, if there was any such evidence at all. The appellant, the accused, was by the law entitled to the benefit of doubt. In addition, the law is settled, as I earlier stated, that facts not

challenged, contradicted or discredited are entitled to be given credibility unless they are inherently incredible in themselves.

(P 219 paras A– C)

10. *The decision that Exh. A is not credible is subsisting since there was no appeal in that regard.*

Exhibit A was made, allegedly, by the appellant on 5th June, 2001. Exhibit F was made on 3rd June, 2001. The learned trial Judge did not believe that Exhibit A was credible. He accorded no probative value to it. The prosecution have not contested the discretion and decision of the learned trial Judge not to accord any probative value to Exhibit A. In the circumstance, the decision of the learned trial Judge that Exhibit A has no probative value or credibility remains inviolate and subsisting. It inures in favour of the appellant. In result, the testimony of the appellant, in harmony with Exhibit F, should have been given a more serious and dispassionate consideration by the lower court.

It was in Exhibit A that the appellant allegedly, stated that he was goaded or counselled previously by Friday Ogbu and EjikeEze to retaliate the assault on him on 2nd June, 2001. If Exhibit A had been believed it would have discredited Exhibit F and the testimony of the appellant. Exhibit A was not believed.*(P 219 paras C– F)*

Per Eko (JSC)

“Let me now come back to the test of the “reasonable man.” The test is objective. It elicits the question: was it reasonable in the circumstance for the appellant, the accused, who was being bullied and humiliated in the public by the deceased to do what he did? Given the social background of the appellant and his age, I answer the question in the affirmative. I do not think it would be reasonable for anybody, including the lower court, to expect the appellant, a teenager between 16 and 18 years of age, to meekly “turn the other cheek” for the persistent and unprovoked assault of the deceased on

him in public places. The appellant was entitled, under Section 34(1) of the Constitution, not to be subjected to degrading onslaught on his person in the public places as deceased was being wont to doing to him. I think, and I so hold, that it would be unreasonable for anybody, including the court, to expect the appellant to behave, in the circumstance, in the pacifist mould or ways of Jesus Christ or Mahatma Ghandi, or the piety of Mother Theresa. The finding of the learned trial Judge at page 197 of the record that the

“evidence shows that he (the accused) met the challenge of the deceased without a second thought”

confirms and supports provocation. It negates premeditation.

In all the cases where the defence of provocation was held to avail the accused, he did so in the heat of passion. Thus, in Momeh Vs. State (unreported: SC 469/65 of 15th April, 1966) it was held that the accused who did not act in the heat of passion cannot successfully plead the defence of provocation. The defence would also fail if the act of retaliation was done after there had been sufficient time for the passion to cool down. (Pp 219–220 paras G–E)

11. *Provocation does not apply where there is time for the passion to cool. See Igwe Vs. Queen (1963) 1 SCNLR 307 where after the alleged provocative act of the deceased the appellant left the scene to his house, a mile away, and got hold of a matchet with which, on his return, he murdered the deceased. The defence of provocation was held not to avail him. In this case, if Exhibit A had been believed and acted upon, it would have been a case of the accused, appellant, committing the murder of the deceased in a deliberate and calculated act of retaliation which would have denied him the defence of provocation. See Momeh Vs. State (supra).*

There is, in law, provocation if the victim by his conduct or act (which includes words or action) had incited the accused to impulsively do something harmful or injurious to the former.

The inciting act or conduct of the victim must be such as could cause the accused to lose his reasoning and self-control at the material time and before his passion could cool down. The above stated finding of the trial court corroborates what I am saying. (P 220 paras E–I)

12. *The nature, purport and significance of provocation.*

A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is in fact, deprived by the provocation of the power of self-control and acts upon it on the sudden and before there is time for his passion to cool.

Evidence in the record shows that on the 2/6/2011 and the subsequent day, the deceased challenged an attempt to stab the appellant with a broken bottle. I agree that this was sufficient provocation that made the appellant temporary lose his control and picked something from the floor and used it on the deceased.

There is no evidence before the trial Court that the appellant had sufficient time to cool down his temper. (P 221 paras D–F)

Nigerian Cases cited in this Judgment

Abegunrin Vs. The State (2009) LPELR-8282 CA;
Ada Vs. The State (2008) 13 NWLR (Pt. 1103) 14;
Ada Vs. The State (2008) 13 NWLR (Pt. 1103) 149;
Adeyeye Vs. The State (2011) ALL FWLR (Pt. 562) 1766;
Ajunwa Vs. The State (1988) 4 NWLR (Pt. 89) 380;
Akalezi Vs. The State (1993) 2 NWLR (Pt. 273) 1;
Akalezi Vs. The State (1993) 2 NWLR (Pt. 273) 1;
Akpan Vs. The State (1994) 9 NWLR (Pt. 368) 347;
Akpan Vs. The State (Supra);
Amala Vs. The State (2004) ALL FWLR (Pt. 219) 1102; (2004) LPELR-453;
Apugo Vs. The State (2006) 16 NWLR (Pt. 1002) 227;
Baridam Vs. The State (1994) 1 NWLR (Pt. 320) 250;
Braide Vs. The State (1997) 5 NWLR (Pt. 504) 141;

Chukwu Vs. The State (2007) ALL FWLR (Pt. 389) 1224;
Chukwu Vs. The State (2012) LPELR-9829 SC;
Edache Vs. The Queen (1962) NNLR 56;
Ekpenyong Vs. The State (1993) 6;
Gale & Anor. Vs. Serious Organised Crime Agency (2011) LPELR-17843 UKSC;
Inyang Etim Akpan Vs. The State (1994) 12 SCNJ 140;
Isaac Stephen Vs. The State (1986) 12 SC 450;
Kalu Vs. The State (1988) 4 NWLR (Pt.90) 503;
Kim Vs. The State (1992) 4 NWLR (Pt. 233) 17;
Kwagshir Vs. The State (1995) 3 NWLR (Pt. 386) 651;
Lado Vs. The State (1999) 9 NWLR (Pt.619) 369;
Lado Vs. The State (supra);
Laoye Vs. The State (1985) 2 NWLR (Pt.10) 832;
Maigari Vs. The State (2011) ALL FWLR (Pt.546) 405;
Obaji Vs. The State (1965) 1 ALL NLR 269;
Ofoke Nwambe Vs. The State (1995) 3 SCNJ 77;
Okonji Vs. The State (1987) 1 NWLR (Pt.52) 659;
Okoro Vs. The State (1988) 12 SC (Pt.II) 8;
Oladiran Vs. The State (1986) 1 NWLR (Pt.14) 75;
Oladiran Vs. The State (1986) 1 NWLR (Pt.14) 75;
Omorie Vs. The State (2008) 18 NWLR (Pt. 1119) 464;
Oteki Vs. A.G. Bendel State (1986) 2 NWLR (24) 64;
R Vs. Duffy (1949) 1 ALL ER 932;
Sheidu Vs. The State (2010) LPELR-23018 SC;
Stephen Vs. The State (1986) 5 NWLR (Pt. 46) 978;
Uwaekweghinya Vs. The State (2005) 9 NWLR (Pt.930) 227; and
Yaro Vs. The State (2007) 7 10 SC 77.

Nigerian statutes cited in this Judgment

Criminal Code Cap. 36 Laws of Anambra State, 1986 Section 273;
Criminal Code, Cap. 30 of the Revised Laws of Enugu State of Nigeria Section 274 (1).

A Representation

A. O. Mogboh Jnr. for the appellant with **F.I. Asogwa Jnr.**

P.C. Ugwueze (Esq.), Chief Legal Officer, Ministry of Justice, Enugu State for the Respondent.

B

KEKERE-EKUN, JSC (Delivering the Lead Judgment):The appellant herein was arraigned before the High Court of Enugu State

C holden at Enugu on 6th October, 2005, on a one-count charge of murder contrary to Section 274 (1) of the Criminal Code Cap. 36 Vol.1 Laws of Anambra State of Nigeria, 1986, applicable to Enugu State. He was alleged to have murdered one Ikenna Friday Mbah on the 3rd day of June,

D 2001 at the Estate Shopping Centre, Federal Housing Estate, Trans Ekulu, Enugu in Enugu East Local Government Area of Enugu State (hereinafter referred to as the Shopping Centre). The case was first investigated at Trans Ekulu Police station and later transferred to State C.I.D. for further investigation.

E The appellant pleaded not guilty to the charge. The prosecution called six witnesses and tendered documents, which included the appellant's extra judicial statement (Exhibit A) and a medical report (Exhibit D). The appellant testified in his own defence and tendered Exhibit

F F, the extra judicial statement which he made at Trans Ekulu Police station on 3/6/2001, the day of the incident. He did not call any other witness. In Exhibits A and F and in his testimony before the court, the appellant admitted inflicting the matchet cut that led to the death of the deceased.

G The facts of the case, as presented by the prosecution, are as follows: On 2/6/2001, the appellant and his friend went to the shopping centre to buy pure water. While there, the deceased, a friend of the appellant's elder brother, challenged him and slapped him for failing to greet him and for not

H showing respect. The appellant, according to the prosecution, apparently still smarting from the previous day's encounter, returned to the shopping centre the next day and inflicted a blow to the neck of the deceased with a matchet, which led to his death.

I The appellant's version of events, on the other hand, was that on 2/3/2001, he escorted a friend to the Shopping Centre to buy pure water.

- A** That while waiting for the water, the deceased, whom he had not noticed before, called him and challenged him for not acknowledging or greeting him. That in spite of his apology the deceased began slapping and beating him. That people around chastised him for his actions, as he (the appellant)
- B** had not done anything wrong. Eventually he left and went back home accompanied by his friend, one Friday Ogbu.

- On 3/6/2001, he went back to the shopping centre, as it is also a recreation centre, to relax with friends. The deceased accosted him and
- C** challenged him again, this time for not showing remorse for his disrespectful behaviour the previous day. A quarrel ensued. He testified that the deceased grabbed a bottle, which he broke and tried to stab him with it. That in an attempt to defend himself, he picked up something
- D** which he found on the floor, which felt like iron and hit him with it. He (the deceased) immediately fell to the floor. That he did not know that the object he picked up was a matchet until he got to the police station and was so informed by the police. He also could not recall which part of the
- E** deceased's body he hit. However, in his extra judicial statement, Exhibit A, he stated that two of his friends who were with him on 2/6/2001 when the deceased slapped him advised him to retaliate otherwise he would be considered a fool. Exhibit A was admitted in evidence after the conduct of a
- F** trial within trial, as it was objected to on grounds of duress. During his evidence in the substantive trial, he maintained that Exhibit A was obtained under duress.

- At the conclusion of the trial, the learned trial Judge considered
- G** whether the defences of self-defence or provocation availed him. The court ruled out self-defence but held that the defence of provocation was established. He was found not guilty of murder but convicted for the lesser offence of manslaughter and sentenced to 15 years imprisonment with hard
- H** labour.

- The prosecution was dissatisfied with the judgment and appealed to the Court of Appeal, Enugu Division. The sole issue for determination before that court was “*whether from the facts and evidence before the*
- I** *learned trial Judge, the defence of provocation was available to the respondent.*” On 22/4/2013 the court answered in the negative. It held

A *inter alia*, that the trial court was wrong to have relied on evidence found insufficient to support a defence of provocation in holding that the defence of provocation was made out. It allowed the appeal and set aside the judgment of the trial court. The appellant was convicted of murder and
B sentenced to death. He is understandably dissatisfied with his conviction and sentence, hence the instant appeal.

The parties duly filed and exchanged briefs of argument in compliance with the rules of this court and adopted and relied on same in
C urging their respective positions on the court.

In the appellant's brief filed on 3/6/2013, settled by Chief (Mrs.) Offia SAN, the following 3 issues were formulated for determination:

D 4. ***Whether the learned Justices of the Court of Appeal were right when they held that since the defence of self defence could not avail the appellant on the facts and evidence, the same facts and evidence could not ground a defence of provocation.***
E

 5. ***Whether the learned Justices of the Court of Appeal were right when in the face of the evidence before the court, they held that the defence of provocation was not proved and did not avail the appellant.***
F

 6. ***Whether the learned Justices of the Court of Appeal were right when they recorded and pronounced a sentence of death by hanging on the appellant.***
G

The respondent adopted the issues as formulated by the appellant in its brief settled by P. C. UGWUEZE ESQ., Assistant Chief Legal Officer, Ministry of Justice, Enugu, which was deemed filed on 22/10/14. It is
H noted that the appellant also filed an amended reply brief, which was deemed filed on 23/2/2017. Issues 1 and 2 shall be determined together.

I

A Issues 1 & 2

- Learned senior counsel for the appellant argues that the defences of self-defence and provocation are different and distinct legal defences under the Criminal Code and are neither synonymous nor coterminous in nature, as each depends on different and specific facts and circumstances, which must be proved before an accused person can rely on them. She submitted that while the self-defence requires the use of reason to protect oneself from attack, the defence of provocation implies the opposite i.e. a momentary loss of reason. She relied on the definition of *self defence*, as contained in Black's Law Dictionary, 9th edition and the authorities of: **Braide Vs. The State (1997) 5 NWLR (Pt.504) 141 @ 149; Amala Vs. The State (2004) ALL FWLR (Pt.219) 1102; (2004) LPELR-453 SC @ 50 A.** She submitted that the doctrine of self-defence posits that a person can act in ways that would otherwise be unlawful to prevent injury to himself or others or to prevent the commission of a crime. That the defence is a justification rather than an excuse. *See Maigari Vs. The State (2011) ALL FWLR (Pt.546) 405.* She submitted that for a successful plea of self defence, it must be proved that the accused person had an honest belief that his life was in so much danger from the act of the deceased, that the only means of escape from imminent death or injury was to do the act for which he is charged; that he used reasonable force in retaliation and that he acted consciously, being aware of the impending danger and took steps to avoid it. She likened it to the survival instinct where a man whose life is threatened would intentionally find a way to preserve it. She submitted that a person relying on a plea of self- defence need not establish that he was provoked but rather must show that he feared the incoming danger to his life and was compelled to take steps to avoid it. Relying on several authorities, including **Adeyeye Vs. The State (2011) ALL FWLR (Pt.562) 1766; Chukwu Vs. The State (2007) ALL FWLR (Pt. 389) 1224 and Akpan Vs. The State (1994) 9 NWLR (Pt. 368) 347 @ 363 – 364 D – A**, she referred to other facts the court would take into consideration in determining whether the defence is made out or not.
- I** With regard to provocation, she referred to the meaning ascribed to its in *Black's Law Dictionary, 9th edition* and by the court's in cases such

- A** as: **Akalezi Vs. The State (1993) 2 NWLR (Pt.273) 1 @ 10 F – G; Akpan Vs. The State (Supra) at 364 F – G**, to wit: “an act or series of acts done by the deceased to the accused to make the latter for the moment not master of his mind.” She submitted that in order to raise the plea of
- B** provocation successfully, the following factors must be established.
- a. The act of provocation must be sudden.**
 - C b. The accused person must have lost actual and reasonable self control.**
 - c. The degree of retaliation by the accused person must be proportionate to the provocation offered.**
 - D d. That the accused acted in the heat of passion and before there was time for his passion to cool.**
- E** She referred to: **Yaro Vs. The State (2007) 7 – 10 SC 77; Obaji Vs. The State (1965) 1 ALL NLR 269; Oladiran Vs. The State (1986) 1 NWLR (Pt.14) 75; Sheidu Vs. The State (2010) LPELR-23018 SC @ 35 C – F. Relying on Edache Vs. The Queen (1962) NNLR 56.** She submitted that
- F** words alone and or actions can constitute provocation in a case of murder.
- In further contending that the defence of provocation was available to the appellant upon the same facts and evidence, which did not support self-defence, learned senior counsel submitted that a significant difference
- G** between the two defences is their legal effect where a charge of homicide is established. She submitted that a plea of self-defence, if successful, is a complete defence and would absolve the offender of criminal liability while provocation only goes to mitigation of what would otherwise have
- H** been murder to manslaughter. *See* **Ajunwa Vs. The State (1988) 4 NWLR (Pt. 89) 380; Abegunrin Vs. The State (2009) LPELR-8282 CA @ 20 C – F.** She submitted that the lower court's findings at page 197 of the record that the facts that were unable to sustain a plea of self defence could not be
- I** used to establish a defence of provocation is what led it to erroneously dismiss the defence of provocation. She maintained that a holistic

- A** examination of all the facts established at the trial showed that the provocation was grave and sudden and that the appellant lost self-control and acted in the heat of passion before there was time for his passion to cool.
- B** Learned senior counsel submitted that in a murder trial the court has a duty to consider all legal defences available to the accused before arriving at a conviction and sentence. She cited several authorities in support of this submission. She submitted that the learned trial Judge ruled out retaliation and premeditation. With regard to premeditation, she noted
- C** that the learned trial Judge rightly resolved the doubt created by the appellant's extra judicial statements, Exhibits A and F, as to whether the appellant brought the machet to the shopping centre or picked it up from the floor, in his favour. She referred to **Kalu Vs. The State (1988) 4 NWLR (Pt.90) 503; Okonji Vs. The State (1987) 1 NWLR (Pt.52) 659**.
- D** She submitted that the finding of the court below, that there was no evidence that the appellant tried to retreat from the deceased and that the
- E** evidence showed that he met the challenge of the deceased without a second thought, supports the contention that there was indeed a challenge or provocation by the deceased to which the appellant reacted immediately and without a second thought. She noted that the lower court
- F** also found that there was evidence of an argument between the appellant and the deceased. She submitted that these findings were sufficient for the lower court to have held that the defence of provocation was made out. She submitted that by accosting the appellant on 3/6/2001, the day after he had
- G** slapped him for being disrespectful, the deceased resurrected and rekindle the appellant's humiliation of the previous day. That by the verbal exchange, the breaking of the bottle and the attempt to stab the appellant with it, the appellant's reaction was on the spur of the moment before the
- H** aggravated provocation had time to abate. She argued further, that the tender age of the appellant is a significant factor in the circumstances of this case. In further support of the contention that the appellant acted on the spur of the moment, she referred to his testimony that in an attempt to
- I** defend himself, he picked up something from the floor and hit the deceased with it, and argued that the use of the word "something" suggests

A that the appellant had temporarily lost control of his reason and did not even know the real nature of the object he picked up. She submitted that the lower court erred in law in holding that provocation did not avail the appellant. She urged the court to resolve the two issues in the appellant's
B favour.

In response to the submission of the learned senior counsel for the appellant, learned counsel for the respondent referred to Section 273 of the Criminal Code Cap. 36 Laws of Anambra State, 1986, applicable to Enugu
C State, which provides thus:

D **“273 When a person who unlawfully kills another in circumstances which, but for the provision of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation and before there is time for his passion to cool, he is guilty of manslaughter.”**

E He referred to the factors that must be established for a successful plea of provocation along with the findings of both the trial court and the court below and submitted that both courts found that there was no evidence
F suggesting that the appellant felt threatened by the act of the deceased or was apprehensive of death or grievous bodily harm; that there was no evidence to show that the appellant tried to avoid or retreat from the deceased, especially as people around were said to have challenged the
G deceased for treating the appellant in that manner; and that there was no evidence of a physical attack on him. He submitted that not having appealed against the finding of the court below, that there was no evidence that he was fearful for his life or of any physical attack on him, the defence
H of provocation could not avail him. He submitted further that having regard to his evidence, that there were people around who berated the actions of the deceased, there was an opportunity to reflect on his intended action. He relied on **InyangEtimAkpan Vs.The State (1994) 12 SCNJ**
I **140 @ 157.** He submitted that there was no evidence of any words uttered by the deceased to justify the defence of provocation since provocation

A includes not only wrongful acts but also insults. He submitted that mere anger is no provocation. He relied on **Isaac Stephen Vs. The State (1986) 12 SC 450 @ 499; OfokeNwambe Vs. The State (1995) 3 SCNJ 77 @ 93; Ekpenyong Vs. The State (1993) 6 @ 195.**

B He submitted that the arguments of learned senior counsel in respect of the facts upon which the defence of provocation could stand are not premised on the accepted facts as established on the printed record. He referred to the finding of fact of the two lower courts at pages 196 197 and
C 199 200 of the record. He argued that the submissions of the learned senior counsel cannot be a substitute for the unchallenged findings of the lower court, which rejected the plea of provocation. He submitted that the submissions of learned senior counsel were based on sentiment, which
D have no place in judicial proceedings. He is of the view that the court below correctly applied the principles of law to the facts of the case.

He disagreed with the contention that the lower court demonstrated a lack of understanding of the distinction between the defence of self-
E defence and provocation. He argued that the lower court was not invited to distinguish between the two defences and noted further that there was no appeal against the decision of the court below rejecting the defence of self-
F defence. He submitted that in the absence of any evidence as to the actual words exchanged in the argument between the appellant and the deceased, the lower court was right when it held that the defence of provocation did not avail him. While maintaining that the lower court reached the correct conclusion in the circumstances of this case, he argued that even if the court
G had confused the distinction between the two defences (not conceded), such error has not affected the justice of the case, as there has been no miscarriage of justice. He referred to **Kim Vs. The State (1992) 4 NWLR (Pt. 233) 17 @ 45 C – D** and urged the court to resolve issue against the
H appellant and affirm the judgment of the court below.

In the appellant's amended reply brief on points of law, Chief (Mrs.) Offiah, SAN, argued that the submissions of learned counsel for the respondent at paragraphs 4.10 4.26 of his brief of argument to the effect
I that the lower court weighed the elements of the defence of provocation against the facts before the trial court, is not supported by the record. She

- A** submitted that the lower court did not consider the defence of provocation, having determined that it could not be founded upon the same facts as those relied upon for the defence of self-defence. She therefore urged the court to discountenance the submissions.
- B** In the event that this court holds otherwise, she submitted that learned counsel's arguments that the appellant had time to reflect on the action he was about to take, that there was no evidence of the words uttered in provocation and that anger does not constitute provocation, are mere conjectures of learned counsel, which have no basis in criminal law where
- C** the prosecution is bound to prove its case beyond reasonable doubt. She contended further that the suggestion that the appellant ought to have applied reason is the antithesis of the defence of provocation, which causes
- D** the accused person momentary loss of self-control. She submitted that any gaps in the case of the prosecution, such as the absence of evidence of the word uttered, must be resolved in favour of the accused i.e. that the words uttered, if any, must have been provocative. She referred to **Gale & Anor. Vs. Serious Organised Crime Agency (2011) LPELR-17843 UKSC; Oteki Vs. A.G. Bendel State (1986) 2 NWLR (24) 64; Okoro Vs. The State (1988) 12 SC (Pt.II) 8**. In response to the contention that even if the court below confused the defences of self-defence and provocation, there
- F** was no miscarriage of justice, learned senior counsel argued that the court has a duty to consider all defences available to an accused person arising from the evidence on record and that in this case there was certainly a miscarriage of justice, as the court below did not consider the defence of
- G** provocation at all. She submitted that the act of misconstruing or confusing the defences in a criminal trial constitutes a miscarriage of justice in itself. She relied on **Ada Vs. The State (2008) 13 NWLR (Pt.1103) 14**.
- As rightly submitted by learned counsel on both sides, in a trial for
- H** murder, the court has a duty to consider all possible defences available to the accused person on the evidence before it, whether raised by him or not and no matter how stupid they might seem.
- See **Laoye Vs. The State (1985) 2 NWLR (Pt.10) 832; Ada Vs. The State (2008) 13 NWLR (Pt.1103) 149; Uwaekweghinya Vs. The State (2005) 9 NWLR (Pt.930) 227**.
- I**

A Section 286 of the Criminal Code provides:

B *“When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for him to use such force to the assailant as is reasonably necessary to make effectual defence against the assault:*

C *Provided that the force used is not intended, and is not such as to cause reasonable apprehension of death or grievous harm.*

D *If the nature of the assault is such as to cause reasonable apprehension of death or grievous harm, and the person using force by the way of defence believes, on reasonable grounds that he cannot otherwise preserve the person defended from death or grievous harm, it is lawful for him to use such force to the assailant as is necessary for defence, even though such force may cause death or grievous harm.”*

F An essential feature of the defence of self-defence is that it involves a process of reasoning, the guiding principles being necessity and proportion. The person relying on it must be able to satisfy the court that he had reasonable grounds for believing that his life was in danger and that the action he took was the only available option to save his life. The test is objective. Some of the factors the court would consider are whether the force used by the accused person was proportionate to that used by the deceased, the circumstances in which the force was used, the part of the body hit in self-preservation by the accused, among others. See **Chukwu Vs. The State (2012) LPELR-9829 SC @ 9 – 10 D – F; Kwagshir Vs. The State (1995) 3 NWLR (Pt. 386) 651; Omoregie Vs. The State (2008) 18 NWLR (Pt. 1119) 464**. It is also trite that where it is successfully made out, the defence is a complete defence to a charge of murder. See: **Omoregie Vs. The State (supra); Apugo Vs. The State (2006) 16 NWLR (Pt.1002) 227 @ 255 – 256 H – A; Baridam Vs. The State (1994) 1 NWLR (Pt. 320) 250 @ 262**.

A A defence of provocation on the other hand, involves the opposite of reasoning. The elements of the defence of provocation are:

B (a) **The act of provocation was done in the heat of passion.**

C (b) **The loss of self control, both actual and reasonable, that is to say, the act was done before there was time for passion to cool**

D (c) **The retaliation was proportionate to the provocation.**

D

Provocation arises from an act or series of acts done by the deceased to the accused person, which would cause in a reasonable man, and did in fact cause in the accused person at the material time, a sudden and temporal loss of self control, rendering him so subject to passion as to make him or her for the moment not the master of his mind. *See Akalezi Vs. The State (1993) 2 NWLR (Pt.273) 1; Stephen Vs. The State (1986) 5 NWLR (Pt. 46) 978; R Vs. Duffy (1949) 1 ALL ER 932; Oladiran Vs. The State (1986) 1 NWLR (Pt.14) 75.* Provocation may be verbal or physical or both. What constitutes provocation is a question of fact to be determined based on the circumstances of each case. *See Lado Vs. The State (1999) 9 NWLR (Pt.619) 369 @ 380 F.* The effect of a successful defence of provocation is to reduce a conviction for murder to one of manslaughter.

E Learned senior counsel for the appellant in her amended reply brief argued that the court below did not consider the defence of provocation at all. With due respect to learned senior counsel, this is not quite accurate. At **F** pages 197-200 of the record, the court did consider it. It however came to the conclusion that since the trial court made the following findings: that the appellant was not apprehensive for his life or of grievous bodily harm; that there was no evidence of an attempt to avoid or retreat from the deceased;

G

H

I

- A** That there was no sign of physical attack on the appellant from the encounter of 3/6/2001 and based thereon held that the defence of self-defence did not avail him, the same evidence could not support the defence of provocation. On whether the appellant's temper (or passion)
- B** had time to cool, the court held that his temper had time to cool between 2/6/2001 and 3/6/2001, when they had the second encounter. I, however, agree with learned senior counsel for the appellant that the lower court erred in applying the same principles to the separate defences. As stated
- C** earlier, provocation involves the sudden loss of self-control. Therefore the lack of evidence of physical attack on the appellant, whether or not he was apprehensive of death or grievous bodily harm or the absence of the actual word uttered by the deceased would not be proper consideration in
- D** determining whether the appellant was provoked or not. The important consideration is whether from the facts of the case a reasonable man, and indeed the accused person, could have been provoked by the scenario that played out on the fateful day.
- E** In the instance case, it is pertinent to bear in mind the fact that the evidence of the appellant was the only eye-witness account before the court. PW1, PW2 and PW4 were police officers involved in the investigation of the crime. PW3 was the father of the deceased who
- F** identified his corpse. PW5 was the medical doctor who carried out the post-mortem examination on the deceased and the author of the medical report, Exhibit D. PW6 was the photographer who was invited by the police to take photographs of the corpse. He tendered the photographs and
- G** negatives, which were admitted as Exhibit E3 and E4 respectively. The appellant's encounter with the deceased the previous day on 2/6/2001 at the shopping centre and the fact that the deceased challenged him for not greeting him and slapped him for being disrespectful was not in dispute.
- H** As regards what transpired the following day, 3/6/2001, the appellant testified in his evidence in chief as follows:

- I** **“On 3/6/2001, I went to the shopping centre again because it is a recreation centre. I went there to relax with friends. I was doing so when Ikenna suddenly re-appeared again and**

A told me that I was not showing any sign of remorse for the insult I gave him yesterday. I asked him why I should be sorry when he was the one that attacked me for no just cause. At that point, people around started challenging him. He was holding a bottle in his hand and at this point he had (sic) the bottle on one of the chairs and tried to stab me with the broken bottle. In an attempt to defend myself I saw something on the floor which I picked up and hit him with it. He fell on the ground. I cannot remember the actual place I hit him. People around came and started attending to him. I went home and explained to my mum what happened. After some time a team of policemen came to my house and arrested me.”

Exhibit F is the appellant's first statement to the police made on 3/6/2001. It is in all material respects the same as the appellant's oral evidence before the court. Exhibit A was made on 5/6/2001, after the case has been transferred to State CID. It was in Exhibit A that the appellant allegedly stated that he was counselled by his friends, Friday Ogbu and Ejike Eze to retaliate against the deceased for what happened on 2/6/2001 and advised him to go to the shopping centre on 3/6/2001, armed with a bottle or knife. The trial court considered the contents of Exhibit A along with the evidence led by the prosecution, particularly the fact that PW4, one of the investigating police officers, testified that although he arrested Friday Ogbu and Ejike Eze, who allegedly advised the appellant to retaliate and who were with him at the time of the incident, they were subsequently released. The learned trial Judge was of the view that the release of the two suspects after investigation must have been because PW4 found the aspect of the statement regarding the advice to retaliate and to go to the shopping centre armed with a knife or bottle to be false. The court therefore attached no probative value to that aspect of Exhibit A. There was no appeal against the finding of the court in this regard. The lower court was therefore left with the version of events as narrated by the appellant in his oral evidence and as contained in Exhibit F.

A At pages 138 – 140 of the record, the learned trial Judge held as follows:

B *“On the fact before the court, it is not in dispute that the*
C *deceased on 2/6/2001 beat up the accused for not recognizing*
D *and greeting him promptly. It is also in evidence that on*
E *3/6/2001, the deceased reappeared again to question the*
C *accused on his failure to show remorse over what happened*
D *on 2/6/2001. Exchange of words ensued and in the process*
E *the deceased tried to stab him with a broken or unbroken*
D *bottle in his hand. Could the above be held to be sufficient*
E *provocation to what happened thereafter? I am inclined to*
D *think so. The court was not given any reason why the*
E *deceased expected immediate and prompt recognition or*
D *greeting from the accused. Which the accused failed to give*
E *and for which he was beaten up on 2/6/2001 and had to be*
E *rescued by his friends and other people around.*

F *And the deceased coming back again the next evening*
F *raising the same issue is enough to provoke a reasonable*
F *person. Now, add this to the deceased use of broken bottle to*
F *threatening (sic) the accused and it will be sufficient to*
F *provoke the accused or a reasonable person to seek a weapon*
F *with which to defend oneself.*

G *After all, the deceased beat him up the previous day, 2/6/2001*
H *for the same reason, he accosted him again on 3/6/2001 and*
H *there is no reason to doubt that the deceased will not use the*
H *bottle on him. The court also takes into consideration the age*
H *of the accused whether 16¹/₂ or 18 years, still in secondary*
H *school.*

I *Bearing in mind the evidence of what happened between the*
I *two youth, I must find that the accused certainly received*

A *grave and sudden provocation on 3/6/2001 when the deceased threatened him with a broken bottle for no reason at all. I agree that the assault and anger over the incident of 2/6/2001 must have been rekindled in the face of another threat of immediate assault and threat to life.*

B

C *According to the evidence, he just picked something from the floor and used it on the deceased. This shows that the accused was not thinking at all at that moment and had lost his self-control when he reacted.*

D *There is no evidence before the court that the accused had sufficient time to cool down in the face of provocation by the deceased by his continue (sic) attack on him.*

E *I must, therefore find that the defence of provocation can avail the appellant and I uphold same.”*

F I am of the considered view that the learned trial Judge properly appraised the evidence before him and rightly found that the appellant established the defence of provocation. I agree that the incidence of the previous day, coupled with the aggressive encounter on 3/6/2001, where the deceased not only repeated the challenge of the previous day but in addition, attempted to stab the appellant with a broken bottle, was sufficient

G provocation that made him experience temporary loss of self-control and react on the spur of the moment, before his temper had time to cool. Indeed, at page 197 of the record the lower court itself stated thus:

H *“Rather, evidence shows that he met the challenge of the deceased without a second thought.” (Underlining mine for emphasis)*

I This finding confirms the fact that the appellant reacted instantaneously by picking up something from the ground, which turned out to be a

A matchet, and striking the deceased with it. I also agree with the learned trial Judge that the young age of the appellant, which was stated in Exhibit F to be 18 years, is a relevant factor in considering the precipitate manner in which he responded to the provocation. An older, more mature person
B might have responded differently. This is why each case must be determined on its own facts. *See Lado Vs. The State (supra)*. I am also of the view that any doubts as to the correct version of what took place on 3/6/2001 must be resolved in the appellant's favour, in the absence of any
C other eye-witness account.

I, therefore, hold that the lower court erred in applying the principles applicable to a defence of self-defence in determining whether or not the defence of provocation availed the appellant. In light of my findings in the
D course of this judgment, I resolve issues 1 and 2 in favour of the appellant and against the respondent.

Issue 3 challenges the sentence of death pronounced and imposed on the appellant having regard to the contention that he was a child of 16
E years and 6 months of age at the time the offence was committed. Learned senior counsel submitted that having found him guilty and convicted him of the offence of murder, a sentence of death ought not to have been imposed on him. That rather, he ought to have been ordered to be detained,
F during the Governor's Pleasure Pursuant to Section 274 (1) of the Criminal Code, Cap. 30 of the Revised Laws of Enugu State of Nigeria. Having resolved Issues 1 and 2 in the appellant's favour, this issue has become academic.

G In conclusion, the appeal succeeds. The judgment of the Court of Appeal, Enugu Division delivered on 22/4/2013 convicting the appellant of murder and sentencing him to death by hanging is hereby set aside. The judgment of High Court of Enugu State delivered on 7/7/2008 convicting
H the appellant of the offence of manslaughter and sentencing him to 15 years imprisonment with hard labour is hereby affirmed.

Appeal allowed.

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

I

A EJEMBI EKO, JSC: I read in draft the judgment just delivered in this appeal by my learned brother, K.M.O. KEKERE-EKUN, JSC. The judgment covers all that I need to say in this appeal. I hereby adopt it including the consequential orders made therein.

B At the lower court, the only issue was whether, from the facts and evidence before the learned trial judge, defence of provocation was available to the appellant herein? The lower court answered the question in the negative.

C This is a murder case. Where on a murder charge there is evidence on which the court can find that the person charged was provoked, whether by things done or by things said or both, to lose his self-control, the question whether the provocation was enough to make a reasonable man

D to do what he did is one fact. In determining that question, the material facts to consider are the facts of what the deceased did or said that caused the defendant to be so provoked to do what he did resulting in the death of the deceased. The test is objective, and it is whether a reasonable man, in the circumstances, would have been provoked. Lord Diplock used this “reasonable man” test in **D.P.P. Vs. Camplin (1987) 67Cr. APP. R 14**, and I think it is reasonable to adopt it and I hereby adopt it for this case.

E The “reasonable man” in this context is the ordinary person in the social and age bracket of the defendant. The “reasonable man” test is not oblivious of the relationship between the gravity of the provocation and the defendant or the fact that the accused person retaliated. Both are judged by the social standards of the day. See **Archbold: Criminal Pleading & Evidence, para. 2846 40th ed.**

F The test is objective, and not subjective. Thus as Nigerian Courts had held in a number of cases, the test is what effect would such provocative act have on a reasonable man in the station or situation of life of the accused person at the material time. See **The State Vs. Obaji (1965) 1 ALL NLR 269 at 273; The State Vs. Ozaki (1986) 5 NWLR (Pt. 40) 258; Oladiran Vs. The State (1986) 1 NWLR (Pt. 14) 75 at 81.**

G On this defence of provocation, the only evidence is that of the appellant, the accused person. His testimony and Exhibit F, his extra-judicial statement made to the police long before the trial, have not been

A discredited. The effect of these is that the deceased had constituted himself a bully tormenting the teenager, the accused. on 2nd June, 2001, the appellant was beaten up, unprovoked, by the deceased, merely for not recognizing and greeting him promptly. The appellant had come to
B shopping mall to buy water. He did not know that the deceased was already seated there. The deceased who was already there drinking with friends called the appellant, challenged him for not greeting him and proceeded to slapping him for being disrespectful. The prosecution did
C not discredit this fact. The police investigators did not produce any person present and those others who were drinking with the deceased to testify to the contrary. The effect is: Facts not discredited, challenged or controverted are taken as admitted and therefore credible to be acted upon
D by the court. The evidence of the appellant is, in my view, very credible and reliable to be acted upon. There was nothing that made it inherently unreliable.

E In Exhibit F as well as the *viva voce* evidence of the appellant at the trial court, he further averred uncontradicted, thus:

F ***“On 3/6/2001 I went to the shopping centre again because it was a re-creation centre. I went to relax with friends. As I was doing so- Ikenna (the deceased) suddenly re-appeared and told me that I was not showing any sign of remorse for the insult I gave him yesterday. I asked him why I should be sorry when he was the one who attacked me for no just cause. At that point people around started challenging him. He was holding a bottle in his hand and at this point he had (smashed?) the bottle.....and tried to stab me with the broken bottle. In an attempt to defend myself I saw something on the floor which I picked up and hit him with it. He fell on the ground, I cannot remember the actual place I hit him. People around came and started attending to him. I went home and explained to my mother”.***

I

- A** This story and the appellant's account in Exhibit F are virtually the same. The prosecution did not call evidence from any of the “people around” who watched and heard what was being done to the appellant by Ikenna, the deceased, and the reaction of the appellant to the deceased. In other words,
- B** there was no eye witness account to the contrary, if there was any such evidence at all. The appellant, the accused, was by the law entitled to the benefit of doubt. In addition, the law is settled, as I earlier stated, that facts not challenged, contradicted or discredited are entitled to be given
- C** credibility unless they are inherently incredible in themselves.

Exhibit A was made, allegedly, by the appellant on 5th June, 2001. Exhibit F was made on 3rd June, 2001. The learned trial Judge did not believe that Exhibit A was credible. He accorded no probative value to it.

- D** The prosecution have not contested the discretion and decision of the learned trial Judge not to accord any probative value to Exhibit A. In the circumstance, the decision of the learned trial Judge that Exhibit A has no probative value or credibility remains inviolate and subsisting. It inures in
- E** favour of the appellant. In result, the testimony of the appellant, in harmony with Exhibit F, should have been given a more serious and dispassionate consideration by the lower court.

- F** It was in Exhibit A that the appellant allegedly, stated that he was goaded or counselled previously by Friday Ogbu and Ejike Eze to retaliate the assault on him on 2nd June, 2001. If Exhibit A had been believed it would have discredited Exhibit F and the testimony of the appellant. Exhibit A was not believed.

- G** Let me now come back to the test of the “reasonable man.” The test is objective. It elicits the question: was it reasonable in the circumstance for the appellant, the accused, who was being bullied and humiliated in the public by the deceased to do what he did? Given the social background of
- H** the appellant and his age, I answer the question in the affirmative. I do not think it would be reasonable for anybody, including the lower court, to expect the appellant, a teenager between 16 and 18 years of age, to meekly “turn the other cheek” for the persistent and unprovoked assault of the
- I** deceased on him in public places. The appellant was entitled, under Section 34(1) of the Constitution, not to be subjected to degrading

- A** onslaught on his person in the public places as the deceased was being wont to doing to him. I think, and I so hold, that it would be unreasonable for anybody, including the court, to expect the appellant to behave, in the circumstance, in the pacifist mould or ways of Jesus Christ or Mahatma
- B** Ghandi, or the piety of Mother Theresa. The finding of the learned trial Judge at page 197 of the record that the:

- C** *“evidence shows that he (the accused) met the challenge of the deceased without a second thought”.*

confirms and supports provocation. It negates premeditation.

- D** In all the cases where the defence of provocation was held to avail the accused, he did so in the heat of passion. Thus, in **Momeh Vs. State (unreported: SC 469/65 of 15th April, 1966)** it was held that the accused who did not act in the heat of passion cannot successfully plead the defence of provocation. The defence would also fail if the act of retaliation
- E** was done after there had been sufficient time for the passion to cool down. *See Igwe Vs. Queen (1963) 1 SCNLR 307* where after the alleged provocative act of the deceased the appellant left the scene to his house, a mile away, and got hold of a matchet with which, on his return, he
- F** murdered the deceased. The defence of provocation was held not to avail him. In this case, if Exhibit A had been believed and acted upon, it would have been a case of the accused, appellant, committing the murder of the deceased in a deliberate and calculated act of retaliation which would
- G** have denied him the defence of provocation. *See Momeh Vs. State (supra)*.

- H** There is, in law, provocation if the victim by his conduct or act (which includes words or action) had incited the accused to impulsively do something harmful or injurious to the former.
- The inciting act or conduct of the victim must be such as could cause the accused to lose his reasoning and self-control at the material time and before his passion could cool down. The above stated finding of the trial
- I** court corroborates what I am saying.

A It is for the foregoing and the fuller reasons contained in the lead judgment, that I allow the appeal and set aside the judgment of the Court of Appeal delivered on 22nd April, 2013, in appeal **No. CA/E/277/2009**.
B The judgment of the High Court of Enugu State delivered on 7th July, 2008 in the charge **No. E/3C/2002**, convicting and sentencing the Appellant to 15 years imprisonment is hereby restored.

Ejembi Eko,
Justice, Supreme Court

C **DAUDA BAGE, JSC:** My learned brother Kekere-Ekun, JSC, availed me with a copy of the judgment just delivered in draft form. I agree with the reasoning and conclusion therein, I will add a few words of my own.

D A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is in fact, deprived by the provocation of the power of self-control and acts upon it on the sudden and before there is time for his passion to cool.

E Evidence in the record shows that on the 2/6/2011 and the subsequent day, the deceased challenged an attempt to stab the appellant with a broken bottle. I agree that this was sufficient provocation that made the appellant temporary lose his control and picked something from the floor and used it on the deceased.

F There is no evidence before the trial Court that the appellant had sufficient time to cool down his temper.

G For the more detailed reasoning in the lead Judgment. The judgment of the lower court is hereby set aside by me. I abide by all the orders made in the lead Judgment.

Appeal allowed.

Sidi Dauda Bage,
Justice, Supreme Court

H

I