

IN THE COURT OF APPEAL
IN THE AKURE JUDICIAL DIVISION
HOLDEN AT AKURE

ON FRIDAY THE 24th DAY OF MAY, 2019

BEFORE THEIR LORDSHIPS

MOHAMMED A. DANJUMA	JUSTICE, COURT OF APPEAL
RIDWAN M.ABDULLAHI	JUSTICE, COURT OF APPEAL
PATRICIA AJUMA MAHMOUD	JUSTICE, COURT OF APPEAL

APPEAL NO. CA/AK/239C/2016

BETWEEN:

RICHARD OLA BELLO  **APPELLANT**

AND

COMMISSIONER OF POLICE  **RESPONDENT**

J U D G E M E N T

DELIVERED BY HON. JUSTICE PATRICIA AJUMA MAHMOUD

This is an appeal against the judgment of **Hon. Justice Sehinde Kumuyi (then Chief Judge of Ondo State)** delivered on the 18/08/2016. It affirmed the conviction and sentence of the appellant for the offence of obtaining under false pretences by his Worship I. C. Adeyanju, Senior Magistrate Grade 1 of the Akure Magisterial District.

The one count charge against the appellant in the magistrate court was as follows:-

"That you Richard Ola Bello 'M' between 22/01/2014 and 21/02/2014 in the day time at suit 1, 7 and 13 Sarajoe centre Oke Ijebu, Akure Magisterial District did obtain by false pretence a total sum of Five Hundred and Eighty Thousand Naira (₦580,000.00) cash from one Emmanuel Oluwafunsho Demehin 'M' and promised to secure him a working visa to Dubai in the United Arab Emirates and failed to do so and thereby committed an offence punishable under Section 419 of the Criminal Code, Cap. 37 Vol. 1 Laws of Ondo State of Nigeria 2006."

The case of prosecution in the magistrate court was that the complainant, Emmanuel Demehin (PW1) and his mother (PW2) approached the appellant who is the owner of a travel agency, Rich View Travel Agency and an alleged agent in Nigeria recruiting people for employment for a company in Dubai to process a work visa for the complainant in the USA or Qatar. This request was informed by the fact that the complainant had a sister in the U.S and a friend in Qatar. The appellant however informed the complainant that it was easier to get a work visa in Dubai than in the other two places. They settled on Dubai and agreed on a total fee of ₦580, 000. This was paid in two installments of ₦300, 000 and ₦280, 000. After the first installment was paid, the complainant and his mother went

to visit the appellant to follow up on the progress of the work visa. It was on that visit that the appellant informed them that the Dubai Government had suspended the issuance of work visas. He however suggested to them to get a visitor's visa and then get a work visa when he got to Dubai. He actually told the complainant that he had a job waiting for him in Dubai. He also assured them that this latter arrangement would not attract extra charges to the agreed amount of ₦580, 000.

The complainant eventually travelled to Dubai on the 24/02/2014. He alleged that he faced a lot of difficulties in Dubai and could not get the job promised. That the agent of the appellant in Dubai was not forthcoming on any of the promises made to him in Nigeria. He indeed expressed his fears to his mother that he thought they had been duped. The complainant had to return to Nigeria as his visa to Dubai had expired.

At the conclusion of hearing the learned trial magistrate found the appellant guilty as charged. He convicted and sentenced him accordingly. Dissatisfied with this decision the appellant appealed to the High Court on five grounds. After hearing both parties the learned trial chief judge (as he then was) affirmed the conviction and sentence of the appellant by the trial magistrate.

Further dissatisfied by the affirmation of his conviction and sentence, the appellant by a notice of appeal dated and filed on the 19/08/2016 appealed to this court on four grounds as follows:-

GROUND 1

The learned Chief Judge erred in law when he held as follows:-

"In the instant case, the issue as to whether this matter is a civil or criminal case was never raised in the trial court. Therefore, raising it on appeal without the leave of court makes it incompetent and I so hold."

Particulars of Error

- (a) The issue of whether a matter is a civil or criminal case borders on jurisdiction.
- (b) The issue of jurisdiction can be raised at any time even at the Supreme Court.
- (c) The lower court made use of the appellant's reply to the written address of the respondent before concluding that the appellants never raised the fact that it is a civil action before arriving at the decision affirming the judgment of the trial court.
- (d) The issue whether the court has criminal jurisdiction to hear the matter can be deduced from the available evidence of the witness in this case.
- (e) As a matter of fact the issue whether the transaction is civil action was raised in the Magistrate Court by the appellant's counsel in his address.

GROUND 2

The learned High Court Chief Judge erred in law to have held that the appellant induced the complainant to travel to the United Arab Emirates with a promise that a job had been secured for him over there.

Particulars of Error

- (a) The appellant informed the complainant that work visa in Dubai had been suspended before the conclusion of the contract.
- (b) There is evidence that the appellant offered to refund the deposit paid for the visa since work-visa was no longer feasible but the complainant opted for visiting visa.
- (c) Both PW1 & PW2 confirmed in evidence that the appellant duly informed them that work-visa can no longer be obtained.
- (d) There is evidence from PW1 in examination in chief thus: "the accused person told us that there is a problem that the Dubai Government had stopped the issuance of work permit and that alternative is giving me a visiting visa."
- (e) PW1 further said under cross-examination that "the accused person told me that the Dubai government has

stopped the issuance of work visa before I made the second payment."

- (f) PW2 also gave evidence "that Dubai government had suspended the issuance of work visa to people."

GROUND 3

The learned chief judge erred in law when he held thus:-

"I am of the view that the trial court considered the totality of evidence adduced having established in the lower court that a payment of ₦580, 000 was made to the Accused/Appellant by the Complainant/Respondent in fulfillment of their agreement to enable the Complainant/Respondent travel to Dubai for work and was never controverted."

Particulars of Error

- (a) There were material contradictions in the evidence of both PW1 & PW2 during trial.
- (b) There was evidence that both PW1 – the complainant and PW2 knew that work-visa was no longer possible before PW1 travelled to Dubai.
- (c) Ingredients of obtaining under false pretence were never established.
- (d) Criminal case must be proved beyond reasonable doubt.

GROUND 4

The learned Chief Judge erred in law not to have considered the reply of the appellant to points of law raised in the respondent's brief before coming into conclusion.

Particulars of Error

- (a) Addresses of counsel are to be considered in full by courts.**
- (b) Courts have constitutional responsibility to consider counsel submission and analyzed same before coming into conclusion.**
- (c) If the lower court had considered the reply brief of the appellant to the respondent's brief the court would have come to a different conclusion.**

Whereof the appellant urged the court to allow the appeal, set aside the judgment of the lower court including the conviction, discharge and acquit the appellant.

Counsel to the appellant, Mr. Ekerete Udofot filed his brief of argument on the 30/05/2017. In arguing the appeal Mr. E. Udofot adopted the brief as his legal arguments in support of the appeal. In it he raised three issues for determination of the court:-

- 1. Whether there is evidence on record that the prosecution proved the offence charged as**

required by law to have warranted the court below to affirm the conviction and sentence of the appellant (Grounds 2 and 3).

2. Was the court below right in holding as incompetent the issue of whether the transaction between the appellant and PW1 is civil in nature or not? (Ground 1).

3. Was the court below right in ignoring and not considering the appellant's written reply on points of law? (Ground 4).

On issue (1) Mr. Udofot submitted that the legal burden to prove its case against the accused rests squarely on the prosecution and never shifts. Counsel referred to **SECTION 135(1) OF THE EVIDENCE ACT, 2011** and the case of **EGBIRIKA V STATE (2014) AFWLR PT 725, 237 AT 260 PARAS D-G**. Counsel submitted that the count upon which the appellant stood trial was a promise to secure PW1 with "a working visa TO DUBAI as opposed to a working visa IN Dubai (Emphasis mine). That a working visa TO Dubai presupposes that the working visa will be given in Nigeria and not otherwise. That the appellant having told PW1 and PW2 that the working visa to Dubai had been stopped could not be held to have made any false representation to PW1. That false representation being an ingredient of the offence of obtaining under false pretences must be proved by the prosecution before it can be said to have proved the offence charged. Counsel referred to the case of **EDE V FRN (2001)**

FWLR, PT 81, 837. Counsel urged the court to resolve this issue in favour of the appellant and allow the appeal.

On issue (2) Mr. Udofot submitted that the evidence before the court was that the transaction between the appellant was a business transaction. That the civil nature of the transaction was raised in evidence before the magistrate and was found as a fact by the learned trial magistrate. That the chief judge in the court below was therefore in error when he found that the issue of whether the case was a civil or criminal case was never raised in the trial court. Mr. Udofot further submitted that what happened between the appellant, PW1 and PW2 was entirely civil in nature. That it was the failure of the appellant to fulfill all the terms of the contract between him and the complainant and his mother that created an issue between them. Counsel referred to the case of **AMADI V COP (2000) FWLR, PT 2, 329 AT 322.** Counsel contended that in law where money was obtained under a contract for the doing of an act which was not done, the remedy lies in a civil action for money had and received without consideration and not in a criminal charge. Counsel referred to the case of **STATE V OSLER (1991) 6 NWLR PT 576.** That even if the allegation that the appellant was not able to get a job for PW1 in Dubai as promised is true; these were not the particulars of the offence as alleged. That at best this is pretence as to a future conduct which cannot successfully sustain a charge of obtaining by false pretence under *SECTION 419 OF THE CRIMINAL CODE*. Counsel referred to the cases of **STATE V OSLER (SUPRA) AT 586 – 587** and **ACHONRA V POLICE (1958), 3 FSC, 30**

and **ANU V POLICE (1958) SCNLR, 367**. Counsel urged the court to resolve this issue in favour of the appellant.

On issue (3) counsel submitted that the learned trial chief judge ignored the appellant's reply brief and that this has occasioned a miscarriage of justice to the appellant. That it amounts to a denial of fair hearing for a court to ignore or fail to take cognizance of an address filed by a party. Counsel referred to the case of **F. S. UWAFO V AG OF BENDEL STATE & ORS (1982) 7 SC, 127 AT 187**. That if the learned trial chief judge had considered the appellant's reply brief, he would have properly come to the conclusion that the complaint against the appellant in the magistrate court is civil and not criminal in nature was not a fresh issue. That this would have led to a discharge of the appellant. Counsel urged the court to also resolve this issue in favour of the appellant, allow this appeal and set aside the conviction and sentence of the appellant.

Mr. Niran Disu of counsel for the respondent filed his brief on the 27/03/2018. The brief was deemed as properly filed on the 15/10/2018. In it counsel raised a sole issue for the determination of the court as follows:-

"Whether the lower court is right in affirming the conviction and sentence of the appellant for the offence of obtaining the sum of ₦580,000 under false pretence, contrary to SECTION 419 of the Criminal Code, Laws of Ondo State."

In opposing this appeal and answering this question in the positive, Mr. Disu submitted that the evidence of PW2 and PW3 corroborate that of PW1 to the effect that the sum of ₦580, 000 was obtained to procure a Dubai work visa but instead the appellant procured a tourist visa on the pretext that when PW1 got to Dubai a job would be waiting for him when the appellant knew that representation to be false. That it was based on this false representation that PW1 parted with ₦580, 000. Counsel referred to the case of **MICHEL ALAKEE & ANOR V THE STATE (1991) 7 NWLR, PT 205, 567 AT 591** showing the seven ingredients of the offence of obtaining by false pretence and which the prosecution must prove:-

- a) *that there was pretence;*
- b) *that the pretence emanated from the accused person;*
- c) *that the pretence was false;*
- d) *that the accused person knew of its falsity or did not believe in its truth;*
- e) *that there was an intention to defraud;*
- f) *that the thing is capable of being stolen and*
- g) *that the accused person induced the owner to transfer his whole interest in the property.*

Mr. Disu referred to the evidence of the appellant in cross examination as contained at page 29 of the records and Exhibit A as establishing the settled intention of the appellant to induce PW1 to part with his money. Counsel contended that PW1 wanted to go to the US or Qatar but the

appellant deceived him to go to Dubai for work with a promise to get him a work visa. That the appellant instead got a tourist visa for PW1, assuring him that he had a job waiting for him in Dubai which turned out to be a sham. Counsel further contended that the original agreement was that the appellant would secure a work visa to Dubai for PW1. Counsel referred to the receipt acknowledging the initial payment which bears "work visa" as the purpose for which the money was obtained. That the evidence that the Dubai government had suspended work visa was not proved by the appellant, lacked probative value and was a grand design to perpetuate the deceit by the appellant.

On the appellant's contention that the transaction that resulted to this appeal was a contractual business relationship, Mr. Disu submitted that based on **SECTION 419, Criminal Code, CAP 37 Vol 1, Laws of Ondo State**, such a contention is immaterial. The Section provides in part thus:

"It is immaterial that the thing obtained or its delivery is induced through the medium of a contract induced by false pretence." (Underlining mine).

Counsel also referred to the case of **JOSEPH OKPU V C O P (1964) MNLR, 1 AT 12.**

On the submission of the appellant that the decision of the lower court was perverse when it held that the question whether the matter was civil or criminal was never raised in the trial court and could not be raised in the lower court without leave counsel argued that that represents the

correct position of the law. Mr. Disu further submitted that the decision of the trial magistrate court was based solely on **SECTION 419 Criminal Code, Laws of Ondo State**. That the question as to the civil nature of the transaction was never an issue at the trial court and there was no decision of the court to that effect. That there being no decision whether the transaction was civil ousting the jurisdiction of the trial court, the lower court was right when it held that raising it on appeal without leave of court makes it incompetent.

On the contention of the appellant that the pretence if any is as to future conduct which cannot successfully sustain a charge of obtaining money by false pretence under **SECTION 419 of the Criminal Code**, Mr. Disu submitted that the false pretence is as to an existing fact and not a promise for the future. That the appellant obtained ₦580, 000 to process a work visa for Dubai. But later procured a tourist visa for PW1 to enable him obtain the work visa in Dubai which turned out to be false. That the pretence is as to an existing fact and urged the court to so hold and to dismiss the appeal.

On failure of the lower court to consider the reply brief of the appellant, Mr. Disu contended that based on Page 118 of the records the lower court considered the appellant's reply brief of 21/01/2015. That it was a consideration of this that made the court below to come to the conclusion, rightly that the matter was a criminal matter within the purview of **SECTION 419 of the Criminal Code, Laws of Ondo State**. Counsel urged the court to dismiss this appeal and uphold the judgment of the

lower court which affirmed the decision of the trial magistrate court which convicted and sentenced the appellant for the offence of obtaining money under false pretences.

Before going into a consideration of this appeal, I find it pertinent to resolve my observation as to the fact that there are two notices of appeal filed in this matter both on the 19/08/2018. The first is contained at pages 126-127 of the printed records containing a sole ground of appeal. The second notice is contained in the Additional Criminal Record of Appeal transmitted to this court on the 07/04/2017. It contains four grounds of appeal. This notice, like the first one was also filed on the 19/08/2016. The original record was transmitted to this court on the 26/10/2016. There is nothing in the file to guide me explain this state of affairs. It is only from the brief of the appellant that I realize that it is the second notice of appeal contained at pages 1-4 of the Additional Criminal Record of Appeal that was used by the appellant in his brief. The respondent appears not to have made any reference to either notice of appeal in his brief. Counsel are to note that it is not enough to raise issues in an appeal for determination without recourse to the notice of appeal which not only contains the grounds of appeal but is also the originating process for the appeal. It is important therefore for both sides to be conscious of the exact notice of appeal in their brief to be sure that it is competent and that the issues formulated derive therefrom.

Be that as it may, in the case of **SOCIO-POLITICAL RESEARCH DEVELOPMENT V MINISTRY OF FCT & 2 ORS (2019) 1 NWLR, PT**

1653, 313 AT 330 PARAS F-G the Supreme Court held that filing of more than one notice of appeal does not affect the validity of an appeal if all the notices are filed within the statutory period for appealing. In the instant case the two notices of appeal were filed on the same day, which is the 19th of August, 2016 a day after judgment was delivered, on the 18th of August, 2016. In other words an appeal is not incompetent because it is brought by more than one notice of appeal. It follows that the filing of two notices of appeal by the appellant in the instant case does not affect the competence of this appeal.

It was pertinent for me to resolve this issue even if suo moto in order to be able to determine this appeal. This became necessary because the issue did not come to my notice and the learned counsel to the respondent was not able to draw the attention of the court to it. Having however found that this does not affect the competence of the appeal in any way I now go to the resolution of the issues raised in this appeal.

I would decide this appeal on the three issues formulated by the appellant. The first issue as raised is whether there is evidence on record that the prosecution proved the offence charged as required by law to have warranted the court below to affirm the conviction and sentence of the appellant. I have considered the submissions of both counsel on this issue. It is important to see what the ingredients of the offence of receiving by false pretences are in order to determine whether or not the evidence on record establishes/proves same beyond reasonable doubt.

To prove obtaining by false pretences, my learned brother Sankey, JCA in the case of **ADIJEH V COP, NASARAWA STATE (2018) LPELR – 44563 (CA)** said:-

"The term "false pretences" denotes the offence of knowingly obtaining another person's property by misrepresenting a fact and/or facts with the intent to defraud that person. The offence of obtaining money by false pretences has been aptly defined under the Advance Fee Fraud and Fraud Related Offences Act, 2006 thus:

"20. In this Act – "false pretence" means a representation, whether deliberate or reckless, made by word, in writing or by conduct, of a matter of fact or law, which the person making it knows to be false or does not believe to be true."

The essential elements of the offence of obtaining by false pretence under **SECTION 419 of the CRIMINAL CODE** which the prosecution must prove to succeed therefore are:-

1. that there is a pretence;
2. that the pretence emanated from the accused person;
3. that it was false;

4. that the accused person knew of its falsity or did not believe in its truth;
5. that there was an intention to defraud;
6. that the thing is capable of being stolen and
7. that the accused person induced the owner to transfer his whole interest in the property.

See the case of **ONWUDIWE V FRN (2006) 10 NWLR, PT 988, 382**. This offence is in pari materia with the offence created under the **Advance Fee Fraud and other Fraud Related Offences Act, 2006**. See **OSAREREN V FRN (2018) LPELR – 43839 (SC)**. It is clear from these ingredients that to establish the offence of obtaining by false pretences, the prosecution must prove that the accused had the intention to defraud and had induced his victim to make him part with a thing that is capable of being stolen.

The twin questions to ask and answer in this case to my mind are, whether the appellant induced PW1 to part with his money and whether he intended to defraud him? I refer to the testimony of the appellant in cross examination at page 29 of the records:-

"Yes it is true that I am the one that collected the sum of ₦580, 000 from the PW1. It is true that before the money was given to me, PW1 told me he want to go to USA or Qatar. Yes it is true that I was the one that persuade them that there is a job offer in Dubai."

This piece of evidence tallies with the testimony of PW1 as corroborated by PW2. This is that they had both approached the appellant to get a work visa for PW1 preferably to the USA or Qatar. The USA because PW1's sister is there and Qatar because his friend is there and for good reasons. The appellant induced them with the fact that Dubai was easier to get a work visa. Indeed, the uncontradicted evidence of PW1 in chief at page 6 of the printed records is that the appellant introduced himself to them as an agent of a company in Dubai and told them that PW1 should go to Dubai where he, appellant had a job for him. He even informed PW1 that he was to resume the work on the 10th February, 2014. So at the outset, the appellant promised PW1 a job already waiting for him in Dubai. He immediately proceeded to name the fess for this work visa at ₦600, 000 which they negotiated to ₦580, 000. That PW1 paid ₦300, 000 with the understanding that the balance would be paid when the work visa was out. The further evidence of PW1 was that they went back a week after the payment to follow up on the progress of the work visa. This was when the appellant told them that the Dubai Government had stopped the issuance of work permit. It is curious that the appellant never informed the victim (PW1) of this until they got there: One is tempted to ask whether this happened after PW1 got back to his office; if not why they were not informed. To complete the inducement and fraudulent intention of the appellant, he did not apologize and offer to refund the money. Instead the appellant tried to rope in PW1 more deeply into his clutches. He then told them another alternative of getting PW1 to Dubai so that he could take up the job offer already waiting. PW1 perhaps desperate like

most young men his age to get a job in Dubai got sucked in by all the inducement of the appellant. This included how his agent was waiting in Dubai at the airport to take PW1 to the company where PW1 would be given employment letter and the company would commence the processing of his work visa. And how they would not need to pay anything additional. It is obvious to me from the testimony of PW1 that all the seven elements of the offence of obtaining by false pretence were present in this case. It is clear that there was pretence to get a work visa for PW1 by the appellant which was false and which the appellant also knew was false. There was an obvious intention by the appellant to defraud PW1. This is apparent from the way the story about the work visa was changing from stage to stage. Also why was it after the appellant collected more than 50% of the agreed fees that he realized that the Dubai Government suspended the issuance of work visa? What are all those levels of agents who make more than twenty people sleep in one room at \$250 per month? To me the whole set up appears like an orchestrated scheme to defraud people. I shudder at the number of people who fell victims to this fraud and got stranded in Dubai without a hope of getting enough money to come back home. PW1 was luckier than most as he had the support of his mother, PW2 who supported him throughout his ordeal in Dubai and made it possible for him to return home after all the ordeal.

On the whole and from the unchallenged and uncontradicted evidence of the prosecution in the trial magistrate court as contained at pages 6-22 of

the printed records I hold that the prosecution proved the offence charged as required by law. The evidence of PW1 at pages 8-10 of the records:

"I called my mother the next morning that we have been duped that all the promises that the accused person made was a lie. That I sat on a staircase till this morning. My mother went to his office. It was after several hours, the accused person's agent number that I have been calling now decided to give me a call that I should meet him up in one of the peseta in restaurant. When I got there around 3:30pm Dubai time he said if I am not alright with the first accommodation that I complained about that I should follow him to another one. The room that was given to me by the agent called David is the size of two and half bed. I have the picture to show. Two people were on the bed and the owner of of the room was sleeping on the ground. His name is called Mr. Leke. The said David collects the sum of 600 dirham from me and paid it to Mr. Leke. I paid that sum for two months for staying in Dubai that is ₦54, 000 Nigeria money. After that day, I did not see Mr. David again for the next two weeks. This time around he called me and asked me to follow him to somewhere for induction in an office where I will be resuming. The said Mr. David took me to under a tree with a woman to give

me tips on how to get a job. After everything the lady gave me two numbers. One of the numbers is Alimat and Farouk. She told me to call these people that they will give me a job. The next day, I went to resident where she told me that those people are working. When I got there, I called the numbers nobody was picking. I went up to meet with the receptionist. I told the receptionist that I am looking for Mr. Farouk and Alimat. The receptionist told me that those people are not existing in that company. That they don't work there.

I picked phone and called the lady that gave me the names and the numbers. Immediately I told her my ordeal, she switched off her phone. I called Mr. David again, he told me to be going home. I did not see him again till another one week. This time around he said he had an offer. That the salary is 60, 000. On hearing that I complained because that was not our agreement from Nigeria. I told him that our agreement was ₦150, 000 from Nigeria. I told him to allow me make two calls to the accused person and my mother.

I called the accused person first. The accused person said I should collect the job to enable me get papers. I called my mother after I have dropped the call. My

mother said I should take the job also. All this while, the accused person's agent Mr. David was in my front.

When I told him that we should go to the company, he did not come again for the next two weeks. He did not take me to the company. This time it was remaining just two weeks for me to spend in Dubai.

After two weeks, the said Mr. David came to me with a written document that he has entered an agreement with another person in Nigeria by name Oladele that he will help in the processing of my work visa. Upon looking at the typed paper he brought, my name was not written on it to show that he was processing anything for me. I challenged him that as a recipient of the document he was to produce that my name ought to be in that letter.

The said David took me to Oladele. When I got to his house, I told him that why did he not write my name on the paper. The said Oladele told me that this is Dubai that I should forget it. We were in his bed room. When I looked at the bed I discovered that the lady on the bed was the lady that gave me a fake information sometime ago.

It was then that I concluded that they were all syndicates. I did not see Mr. David again. He never call me. I was the one calling him in Dubai.

The night my paper will expire, the said Mr. David came to meet me that I should follow him to Mr. Oladele's house to collect an offer letter. At this time I have just one hour left to stay I (sic) Dubai, I told him that I cannot follow him because I have a limited time that I was going to get my flight. I told him to forward his so called offer letter to my e-mail.

It was on 24th of April, 2014 I was already in Nigeria. I was driving home when Mr. David that is the accused person's agent in Dubai called that he has sent an offer letter to my e-mail. Upon hearing that I ran to the Cyber Café to download the offer letter. When I looked at the so called offer letter, there was no contact number there were to addresses. So I went to google the name of the company which is Knightsbridge Security Company and I discovered that day that the numbers attached to the security company were not going. I printed out all the numbers of that company to show that I went on the net.

I went to my mother and told her not to go back to the accused person because the accused person is a fraud.

My mother had already went to a lawyer before I came back from Dubai. I told the lawyer all that happened to me in Dubai.

The lawyer wrote a petition against the accused person to the Commissioner of Police and so the accused person was arrested. When the accused person was arrested, the police collected all our statements and took us to an office and asked the accused person he has heard what we have all said. That what is he going to do. He said he was not going to do anything. That he had provided me with a job. The police officers asked him what is the proof to show that he gave me the job. The accused person brought out the so called offer letter.

Upon citing the offer letter I challenged him in the station that I have googled this company. The police officers asked me for my proof. I brought out my phone Black Berry Z 10. I google that on phone and brought all information concerning the company there we discovered that the company is a liquidated company because none of the numbers that we called was going.

The police officers turned to the accused person and asked him to call his agent to give them the number of the company to verify the authenticity of the company and the offer letter they sent. He called his agent who

later sent one number. We tried the number at the station. It was the police officer that called the number. The person picked and the police officer asked the person whether he knew anything concerning the offer letter bearing Demehin Emmanuel.

The person said he knows nothing about the offer letter.

The police officers again told the accused person to call his agent Mr. David again to know if the job is real or nothing since we have tried every available means to know the authenticity of the job he claimed to have provided.

Based on this, a call was made to Mr. David by the accused person in the presence of the police officers. The phone was on speaker. The police officer asked the said Mr. David how about this job. His reply was that there is no job. The said Mr. David told the accused person still on the call that he should return our money to us since there is job. Thereafter the police asked the accused person again what he was going to do. The accused person said he was going to bring half of the money. That is ₦290,000. He said since he had paid the flight ticket to Dubai."

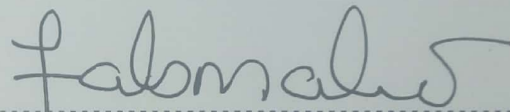
If this is not evidence of an organized fraud then I don't know what is. It is easy from the evidence on record to and I do hereby resolve this issue against the appellant and in favour of the respondent.

Issue (2) is whether the court is right in holding as incompetent the issue of whether the transaction between the appellant and PW1 is civil in nature or not. I also considered the submission of both counsel on this issue. It is clear therefrom that the learned counsel is misconceived on the holding of the learned former chief judge. The issue is not whether the transaction is civil or criminal in nature. The issue as the respondent's counsel more aptly put it is the failure of the appellant to raise this issue in the trial magistrate court. That having not raised the issue for the court to have pronounced on it, the appellant could only raise it on appeal in the court below with leave of that court as a fresh issue on appeal. This is the position of the law. It is indeed trite that a party cannot argue or raise a fresh point on appeal unless leave of the appeal court is first sought and obtained. See the apex court cases of **JIBRIN V FRN (2018) LPELR – 43844 (SC)** and **STATIOIL (NIG) LTD V INDUCON (NIG) LTD & ANOR (2018) LPELR – 44387 (SC)**. This was the holding of the learned former chief Judge in the court below. I find that he is right in his holding and the holding is not perverse. Rather it is the appellant's counsel who is misconceived. I therefore also resolve this issue against the appellant and in favour of the respondent.

The last issue is whether the court below was right in ignoring and not considering the appellant's written reply on points of law. I find that the submissions of the appellant's counsel on this issue are a bit mixed up. It is not clear whether the submissions are still on issue (2) or really on issue (3). There is no evidence to show that the learned former chief Judge

failed to consider the reply brief of the appellant as alleged. The fact that he disagreed with the position of the appellant and upheld that of the respondent in my view is not a reason to suggest that the learned former chief Judge of the court below did not consider the reply brief. It is clear from the records particularly pg 118 line 11 that the learned former chief Judge painstakingly went through the records of the trial magistrate court. This is to ensure among other that the decision is not perverse but based on evidence before the court. This is the expectation of courts that their decisions are based on evidence and not perverse. A brief (an address) is a useful tool that aids and guides the court in reaching a considered decision. What is more, a reply brief is competent if it is on point of law. It is important that the appellant's counsel points out what new point of law the respondent raised that he was responding to. If he was not responding to a point of law but merely repeating an issue he has raised to which the respondent responded, it does not amount to a reply on points of law to repeat the submissions already contained in his brief or in the respondent's brief which is merely an answer to his own without raising a fresh issue of law. If this is the scenario in this case, then I hold that the learned former chief Judge rightly disregarded such a reply brief. What is more, it is settled law that an address of counsel no matter how brilliant cannot take the place of evidence. See the cases of **ADEGBITE & ANOR V AMOSU (2016) LPELR – 40655 (SC)** and **LAWALI V STATE (2019) LPELR – 46405 (SC)**. It is of no moment therefore if the learned Chief Judge paid no heed to the reply brief. This issue without hesitation is also resolved in favour of the respondent against the appellant.

Having resolved all the issues raised against the appellant in this appeal, I am also satisfied that the findings of both the trial court and the lower court are not perverse but the result of a proper evaluation of the evidence. I am guided by the well established presumption that concurrent findings of fact by both the trial court and the lower High Court cannot be faulted. I see no reason in this appeal to disturb this concurrent finding by both courts. I find no merit in this appeal. The only thing left for me to do in the circumstances is to affirm the decision of the lower court delivered by Hon. Justice Olasehinde Kumuyi (former chief Judge) on the 18/08/2016 in suit NO: AK/ICA/2014. I hereby do so. I therefore dismiss this appeal in its entirety.



PATRICIA AJUMA MAHMOUD
JUSTICE, COURT OF APPEAL

APPEARANCES:

- 1. MR E. UDOFOT for the appellant**
With him is MR. L. E. UDOFOT
- 2. MR NIRAN DISU for the respondent**

MOHAMMED AMBI-USI DANJUMA, JCA

Having perused before now, the lead judgment in draft, I agree that the appeal against same has no merit and has rightly been dismissed by my learned brother, ***Patricia Ajuma Mahmoud, JCA.***

The evidence of the prosecution as clear from the witnesses- PW1, PW2, PW3 and documents tendered is over whelming such that it had been proved beyond reasonable doubt that the Appellant had obtained sums of money under false pretence contrary to Section 419 of the Criminal Code, Laws of Ondo State.


The conviction was unassailable. The red-herring effort at pulling the wool on the face by a resort to the argument on uncertainty of whether it was a civil case of breach of contract or a crime of obtaining by false pretences cannot avail the Appellant, whose conduct was purely criminal.

To have racked up the question of breach of fair hearing on the basis of non – consideration of an Appellant's Reply Brief of Argument is of no moment as the Appellant had not shown that the non consideration of the Appellant's Reply Brief of Argument (if so) had prejudicially affected him. There is no miscarriage of justice and in

CONTRIBUTION FROM HONOURABLE JUSTICE MOHAMMED A. DANJUMA (JCA)

the fact of the concurrent findings of the trial and lower court on the facts and the law, we cannot interfere.

I join my Lord in the lead to confirm the conviction and sentence as entered by the trial court and also affirm the judgment appealed; and accordingly dismiss the appeal.



MOHAMMED A. DANJUMA
JUSTICE, COURT OF APPEAL

APPEAL NO: CA/AK/239^C/2016
RIDWAN MAIWADA ABDULLAHI, JCA

The draft copy of the lead judgment delivered by my learned brother, **PATRICIA AJUMA MAHMOUD, JCA** was made available to me and read same. The issues raised in the briefs of argument are judiciously and judicially considered and determined by my lord and the reasoning together with the conclusion are agreed by me being the exact faith of the appeal as submitted vide grounds of appeal in the Notice of Appeal before this court.

I am also satisfied that the findings of both the trial court and lower court are not perverse, hence dismiss the appeal and affirm the decision of the court below delivered by Hon. Justice Olasehinde Kumuyi on the 18th of August, 2016 in Suit No. AK/1CA/2014.


RIDWAN MAIWADA ABDULLAHI,
JUSTICE, COURT OF APPEAL.