IN THE COURT OF APPEAL
IBADAN JUDICIAL DIVISION
HOLDEN AT IBADAN
ON THURSDAY THE 23RD DAY OF MARCH, 2017
BEFORE THEIR LORDSHIPS:

MONICA BOLNA'AN DONGBAN-MENSEM	JUSTICE, COURT OF APPEAL
MODUPE FASANMI	JUSTICE, COURT OF APPEAL
HARUNA SIMON TSAMMANI	JUSTICE, COURT OF APPEAL

CA/IB/202/2014

BETWEEN:

JOHN AWUDU KANU (a.k.a. Baba Ade) ..... APPELLANT

AND

FEDERAL REPUBLIC OF NIGERIA .... RESPONDENT

JUDGMENT

(Delivered by HARUNA SIMON TSAMMANI, JCA)

This is an appeal against the judgment of the Oyo State High Court sitting in Ibadan, delivered by M. O. Ishola, J on the 20th day of December, 2013 in Suit No: I/3EFCC/2013

Before the Oyo State High Court, the Appellant was charged along with 4 others and convicted on a two counts Information as follows:

STATEMENT OF OFFENCE – 1ST COUNT

Obtaining money by false pretence contrary to Section 1(3) of the Advance Fee Fraud and Other Fraud Related Offences Act, No.14 of 2006.

PARTICULARS OF OFFENCE

John Awudu Kanu (a.k.a. Mr. Ade), Chidi (a.k.a. Pastor) (still at large), Oliche (a.k.a. Mr. Michael) (still at large) and Kingsley (still at large) on or about the 14th day of March, 2013 at Ibadan within the jurisdiction of this Honourable Court, with intent to defraud, obtained the sum of ₦50,000 (Fifty Thousand Naira) from Shakirah Hassan on the false representation that the money was the cost of healing Oliche (a.k.a. Mr. Michael) of a dreadful charm which representation you knew to be false.

STATEMENT OF OFFENCE – 2ND COUNT

Attempt to obtain money by false pretence contrary to Section 5(2)(b), 8(b) and 1(3) of the advance Fee Fraud and Other Fraud Related Offences Act, No.14 of 2006.

PARTICULARS OF OFFENCE

John Awudu Kanu (a.k.a. Mr. Ade), Chidi (a.k.a. Pastor) (still at large), Oliche (a.k.a. Mr. Michael) (still at large) and Kingsley (still at large) on or about the 25th day of March, 2013 at Ibadan within the jurisdiction of this Honourable Court, with intent to defraud attempted to obtain the sum of ₦150,000.00 (One Hundred and Fifty Thousand Naira) from Shakirah Hassan on the false representation that the money was for the cost of cleansing a "Ghana Must Go" sack filled with foreign currencies equivalent to Three Hundred Million Naira.

The Information which is dated the 22/5/2013 was signed by one G. K. Latona for the Chairman of the Economic and Financial Crimes Commission (E.F.C.C.) and filed before the trial High Court on the 23/3/2013. It was accompanied by the Proof of Evidence. The plea of the Accused/Appellant was taken on the 16/12/2013 whereof the Appellant pleaded guilty on the two counts in the Information. On the plea of guilty by the Appellant, Mr. Abba Mohammed of learned prosecuting counsel reviewed the evidence against the Appellant and urged the trial court to

proceed to convict the Appellant on his plea of guilty. Mr. N. Dike of learned counsel for the Appellant who was in court submitted that:

> "In view of the fact that accused person pleaded guilty to the offence, I am satisfied with the review of the facts presented by the Prosecutor."

The learned trial Judge then proceeded to make some brief findings and thereafter convicted the Appellant upon his plea of guilty. The Judgment of the trial court was on the 20/12/2013. However, by a turn of events, the Accused/Appellant felt unsatisfied with the judgment of the trial court. He accordingly filed this appeal.

The Original Notice of Appeal which is in pages 62 – 63 of the Record of Appeal was dated and filed on the 14/2/2014. However, by leave of this court granted on the 17/5/2016, the Appellant amended the Notice of Appeal. The Notice of Appeal upon which this appeal was heard is therefore the Amended Notice of Appeal dated and filed on the 22/10/2015; and deemed filed on the 17/5/2016; and it consists of two Grounds of Appeal. The parties' thereafter complied with the Rules of this court by filing Briefs of Arguments; and on the 16/2/17 when this appeal was heard, the parties adopted their Briefs as their arguments in the appeal.

The Appellant's Brief of Arguments was dated and filed on the 7/6/2016. Therein, two issues were nominated for determination as follows:

1. Whether the learned trial Judge rightly assumed jurisdiction to hear and determine the charges against the Appellant when Section 340(1) and (2) (a) and (b) of the

Criminal Procedure Law, Cap.39, Volume II, Laws of Oyo State, 2000 was not complied with by the prosecution.

2. Whether the sentences of 7 years imprisonment without option of fine imposed on the Appellant on each of the two counts by the learned trial Judge and to run concurrently was not excessive in the circumstances of the case.

The Respondent's Brief of Arguments was dated the 16/11/2016 and filed on the 17/11/2016 but deemed filed and served on the 16/11/2017. Unlike the Appellant, the Respondents raised only one issue for determination as follows:

> "Whether having regard to the provisions of Section 340(3)(b) of the Criminal Procedure Law of Oyo State, this appeal is not incompetent and an abuse of court process."

It would be seen that, the only issue raised by the Respondent appear to be an objection to the competence of the appeal. In that respect, I shall determine this appeal on the issues distilled for determination by the Appellant. Furthermore, after a careful reflection on the preliminary point raised by the Respondent, I am of the view that, the arguments thereon are only fit for consideration under issue one settled for determination by the Appellant. I therefore begin with issue one.

On issue one (1), learned counsel for the Appellant referred to Sections 9 and 10 of the High Court Law of Oyo State, Cap.55, Vol. III, Laws of Oyo State of Nigeria, 2000; Sections 270(1) and 272(1) and (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended);

and Section 19(1) and (3) of the Economic and Financial Crimes Commission (Establishment) Act, 2004. He also referred to the case of **A.G; Lagos State v. Dosumu (1989) 3 NWLR (pt.111) p.552 at 566 – 567 paragraphs A – B**, to submitted that jurisdiction is the authority of a court to exercise judicial power. The cases of **Surgeon Captain C. T. Olowu v. The Nigerian Navy (2011) 12 S.C.M. (pt.2) p.381 at 404 paragraphs D – D**; **Madukolu v. Nkemdilim (1962) 2 S.C.N.L.R. P.341** and **Obikoya v. Registrar of Companies (1975) 4 S.C. p.32**, to further submit that, a court is properly constituted and therefore has jurisdiction to entertain a case when:

(a) It is properly constituted as regards members and qualifications of the members of the bench and no member is disqualified for one reason or another;

(b) The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising it's jurisdiction; and

(c) The case comes before the court initiated by due process of the law and upon condition precedent to the exercise of jurisdiction.

It was then contended that, the Appellant rests his complaint on item C, as the indictment against the Appellant at the trial court was not initiated by due process of law. That, it is the law that any defect in competence of a court is fatal as it renders the proceedings of the court a nullity, no matter how well conducted and decided. The case of **Orakul**

Resources Ltd v. N.C.C. (2007) 16 NWLR (pt.1064) p.270 at 310 – 302 paragraphs F – A was cited in support.

Learned Counsel for the Appellant went on to contend that, in order to invoke the criminal jurisdiction of the Oyo State High Court, certain procedural steps have to be complied with. Examples of such provisions given by learned counsel for the Appellant are Sections 77(a) and (b); 72(1) and (2), 275(1)(a)(iii), (iv) and (b); and 340(1) and (2)(a) and (b) and 3(a) and (b) of the Criminal Procedure Law, Cap.39, Vol.II, Laws of Oyo State (supra). That under the Law, two modes of initiating criminal proceedings recognized are; (a) Trial by Information and (b) Summary Trial. Learned Counsel then cited the provisions of Section 340(1), (2)(a) and (b), (3)(a) and (b) of the Criminal Procedure Law of Oyo State (herein referred was CPL), as the relevant provision to the complaint in this appeal. Learned Counsel then submitted that, an ordinary letter to the Chief Judge or a Judge of the High Court suffices as consent required in Section 340 of the CPL (supra). The case of **Abacha v. State (2002) FWLR (pt.118) p.1224 at 1271 paragraphs C – F** was cited in support.

Learned Counsel for the Appellant also submitted that in the instant case, the prosecution commenced the proceedings leading to the conviction and sentence of the Appellant vide a letter with reference Number CB: 35/5/2013, addressed to the Chief Registrar of the High Court of Oyo State, to which they attached the Information containing the two counts charge. That the letter and the Information were both filed in the Registry of the High Court of Oyo State, and registered as Charge No: I/3EFCC/2013. It was thus submitted that the mode of commencement

employed by the prosecution in this case did not conform with Section 340(1) and 2(a) and (b) of the C.P.L. of Oyo State (supra) dealing with the procedure for preferment of indictable offences by way of Information. That, it is apparent from the contents of the letter that the Respondent did not apply for the consent of a Judge of Oyo State High Court to prefer the charge as required by Section 340(1) and 2(a) and (b) of the C.P.L. (supra) and that none was granted.

It is also submitted by learned counsel for the Appellant that, Sections 174(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and 13(2) of the Economic and Financial Crimes Commission Act (supra) relied upon by the Respondents in forwarding the letter containing the Information, only deal with the prosecutorial powers of the Attorney-General of the Federation and the Legal and Prosecution Unit of the E.F.C.C. and not with the mode of commencement of trial by Information in the High Court of Oyo State, which is regulated by Section 340(1) and (2)(a) and (b) of the C.P. Law (supra). That by Section 7(2)(f) of the E.F.C.C. Act, the commission is bound to observe the provisions of the C.P. Law in initiating Criminal Proceedings in the High Court of Oyo State.

Learned Counsel for the Appellant also cited the cases of **Bakare v. Attorney-General (1990) 5 NWLR (pt.152) p.516 at 545 paragraphs E – G**; **Tanko v. State (2009) 4 NWLR (pt.1131) p.430 at 457 paragraph H** and **Kankara v. C.O.P. (2002) 13 NWLR (pt.785) p.611 paragraphs F – H** to further submit that, it is the law, that when a Law has provided for a procedure for doing an act, non-

compliance with such procedure makes the act null and void. In other words, that where a statute has provided for a particular method of performing a duty regulated by statute, that method and no other must be adopted; and that a Statutory Provision cannot be waived. The cases of **Miscellaneous Offences Tribunal v. Okoroafor (2001) 18 NWLR (pt.745) p.295**; **Okiye v. State (2014) All FWLR (pt.756) p.555 at 583 – 584 paragraphs F – C**; **Garuba v. State (2014) All FWLR (pt.756) p.423 at 499 paragraphs B – H**, etc, were cited in support. Furthermore, that since the indictment has not been instituted in accordance with the law, no legal consequence can flow from it, as the trial court assumed jurisdiction on it in breach of the Fundamental Rights of the Appellant to fair trial; and thus an abuse of process. The cases of **Offor v. Leaders & Co. Ltd (2007) 7 NWLR (pt.1032) p.1 at 24 paragraphs B – C**; **Macfoy v. UAC (1962) A.C. p.152**; **Sken consult Nig. Ltd v. Ukey (1981) 1 S.C. p.2 at 56 paragraphs G – H** were cited in support, and to urge us to hold that a defect in competence is not only intrinsic but also extrinsic to the entire process of adjudication.

It was further submitted by learned counsel for the Appellant that, since the Respondents could not put something on nothing and expect it to stand, the consequence is that the Information preferred against the Appellant in breach of Section 340(1) and 2(a) and (b) of the Criminal Procedure Law (supra), is liable to be quashed. That it is irrelevant that no objection on the Information was raised in the trial court. The cases of **Okafor v. The State (1976) F.N.L.R. (Vol.1) p.53**; **The Nigerian Air Force v. Kamaldeen (2007) 1 NWLR (pt.1032) p.164**; **Nasir v.**

C.S.C. & Ors (2010) 2 S.C.M. p.105 at 117 – 118 paragraphs A – E and Ugwu v. State (2013) 6 S.C.M. p.231 were cited in support. The case of Zakari Goni v. The State (1996) 7 NWLR (pt.458) p.111 at 122 paragraphs B – C was then cited to urge us to quash the Information preferred against the Appellant and set aside the conviction and sentence meted on the Appellant, as the Information was preferred without jurisdiction and therefore the trial was a nullity. We were accordingly urged to resolve this issue in favour of the Appellant.

In response, learned counsel for the Respondent contended that, the Appellant's grouse against the charge are:

(a) That the Charge No: I/3EFCC/13 was not preferred in accordance with the Criminal Procedure Law of Oyo State dealing with the procedure for preferment of an indictable offence by way of Information.

(b) That the sentence of 7 years imprisonment without option of fine imposed on the Appellant on each of the two court to run concurrently is excessive.

Learned Counsel then contended that the Information was preferred in accordance with Section 340 of the C.P.L. of Oyo State. That in compliance with the said Law, the prosecution sent a letter dated the 22/5/2013 to the Chief Registrar of the High Court of Oyo State, Ibadan, pursuant to Sections 174(1) of the Constitution of the Federal Republic of Nigeria, 1999 and 13(2) of the Economic and Financial Crimes Commission Act, 2004 for the filing of the Information against the Appellant. Learned Counsel then submitted that, if the Judge adjudicated on the matter, then

the consent of the Judge was sought and obtained. The case of **State v. Sqd. Leader O. T. Onyeukwu (2004) LPELR – 3116 (SC)** was then cited to submit that, assuming (which is not conceded), that the consent of the Judge was not obtained, the Appellant having acquiesced to the proceeding in the trial court, cannot be heard to complain. We were accordingly urged to hold that the Appellant does not have the right to complain on appeal against the procedure he had fully participated in without objecting.

Learned Counsel for the Respondent went on to submit that the Appellant is trying to cause a legal riddle by asking this court to make an inappropriate order, when he urged us to quash the Information, set aside the conviction and sentence of the Appellant, and to discharge and acquit him. Learned Counsel then cited Section 340(3)(b) of the C.P.L. to further submit that the Appellant having been tried and convicted on the Information, and having not applied for the quashing of the Information at the trial court, the Information cannot now be quashed on appeal. The case of **Okereke v. Yar'adua (2008) 12 NWLR (pt.1100) p.95 at 127 paragraphs E – G** was then cited to submit that the Appellant filed this appeal urging this court to quash the Information without recourse to Section 340(3)(b) of the Criminal Procedure Law (supra). We were then urged to resolve this issue against the Appellant.

In reply on points of law, learned counsel for the Appellant contended that, the Respondent misconstrued the purport of Section 340(2)(b) of the C.P.L. of Oyo State (supra), which provides for the preferment of an Information with the consent of a Judge, and not the

Chief Registrar. That, the grant or refusal to grant consent to prefer a charge is a judicial act which must be done in accordance with the law. Learned counsel then submitted that the consent of a Judge to prefer an Information is therefore a condition precedent to the preferment of the Information and thus, assumption of jurisdiction by the trial Judge. The case of **Onu Okafor v. The State (1976) 1 F.N.L.R. p.52** was then cited to submit that Section 340(3)(b) of the C.P.L of Oyo State relied on by the Respondent is not helpful to the Respondent. Furthermore, that the case of **Francis Nkie v. The Federal Republic of Nigeria (2013) LPELR – 22877 (SC)** cited by the Respondents is inapposite in the circumstances of this case. We were again urged to quash the indictment, acquit and discharge the Appellant.

Now, Section 77 of the C.P.L. of Oyo State (supra) provide for the methods or modes of instituting criminal proceedings in Oyo State. Therein, it is stipulated that:

> "77. Subject to the provisions of any other enactment, criminal proceedings may in accordance with the provisions of this Law be instituted –
>
> (a) in magistrates' courts on a complaint whether or not on oath; and
>
> (b) in the High Court –
>
> (i) by Information of the Attorney-General of Oyo State in accordance with the provisions of Section 72; and
>
> (ii) by Information filed in the court after the accused has been summarily committed for

perjury by a Judge or Magistrate under the provisions of part 31, and

(iii) (Repealed by 1977 No.8), and

(iv) on complaint whether on oath or not.

Section 72 referred to in Section 77(b)(i) is on the powers of the Attorney-General to file Information in a Criminal case before the High Court. Section 340 of the C.P.L. of Oyo State then provides for the procedure to be followed where the Attorney-General has decided institute Criminal Proceedings against any person pursuant to the powers granted him under Section 72 of the C.P. Law (supra). Section 340(1) and (2) of the C.P. Law therefore stipulate that:

"340(1). Subject to the provisions of this section an Information charging any person with an indictable offence may be preferred by any person before the High Court charging any person with an indictable offence for which that person may lawfully be indicted, and wherever an Information has been so preferred the registrar shall, if he is satisfied that the requirements of the next following section have been complied with, file the Information and it shall thereupon be proceeded with accordingly:

Provided that if the registrar shall refuse to file an Information, a Judge, if satisfied that the said requirements have been complied with, may, on the application of the prosecutor or on his own motion, direct the Registrar to file the information and it shall be filed accordingly.

(2). Subject as hereinafter provided no information charging any person with an indictable offence shall be preferred unless either:

(a) the person charged has been committed for trial; or

(b) the Information is preferred by the direction or with the consent of a Judge or pursuant to an order made under Part 31 to prosecute the person charged for perjury."

For the purposes of this appeal, the proviso to Sub-Section 2 of Section 340 of the C.P.L. is not relevant. My understanding of the above cited provision of the C.P.L. of Oyo State is that, an application filed for leave to prefer a charge against an accused person is both an official and judicial act. The official part is done by the Registrar who may scrutinize the information so as to see or confirm if the requirements of the next following Section (which is section 341 of the C.P.L.) have been complied with. If he is satisfied, then he will file the information which shall then be proceeded with However, where the Registrar refuses to file the Information, a Judge of the High Court may, if satisfied that the requirements of Section 341 of the C.P.L. have been satisfied, over-rule the Registrar on the application of the prosecutor or on his own motion, and direct the Registrar to file the Information accordingly. Sub-Section 2 of the said Section 340 of the C.P. Law however stipulates that, in the case of an indictable offence, the Information shall not be preferred unless the direction or consent of a Judge of the High Court is obtained. It is this issue of obtaining consent that is the subject of this issue in this appeal.

The requirement of obtaining the consent or direction of a Judge before Information charging any person with an indictable offence can be preferred has been inserted into the Law for good reason. The reason for

requiring consent is to ensure that a person is not prosecuted for an offence where there may be no reasonable grounds to prosecute him based on the allegation and evidence contained in the Information, and the proofs of evidence. Accordingly when a Judge examines the proof of evidence accompanying the Information and is unable to find or detect the commission of an offence or a crime, the prosecution will not be granted leave to prosecute.

It is in recognition of the above stated reasons that, were a person has been charged on an Information alleging that he has committed an indictable offence, he may bring an application seeking that the Charge or Information be quashed on the ground that the Information or Charge is defective for one reason or the other; or that the proofs of evidence do not disclose a ***prima facie*** case against him, sufficient to warrant calling on him to answer or to undergo the rigour of a full trial. See; **Chief Lere Adebayo v. The State (2012) LPELR – 9464 (CA)** per **Kekere-Ekun, JCA** (as he then was).

Now, as stated earlier, the complaint of the Appellant on this issue is, that the consent or direction of a Judge of the Oyo State High Court was not obtained before the Information Charging him (Appellant) with the offence(s) was preferred. I wish to point out here, that there is a presumption of regularity in favour of any judicial or official act by virtue of Section 168(1) of the Evidence Act, 2011. The said section stipulates that:

> "168(1). When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requires for its validity were complied with."

The above cited provision of the Evidence Act is encapsulated in the Latin maxim; "***Omnia praesummuntur rite esse acta***", which means that, things are presumed to have been rightly and duly performed until it is proved to the contrary. See **Ugwu v. State (2013) 6 S.C.M. p.231**. In the case of **Makeri S. Co. Ltd v. Access Bank (Nig.) Plc (2002) 7 NWLR (pt.766) p.447 at 476**, **Obadina, JCA** explained the principle in these words:

> "It is a maxim of law that ***Omnia presumuntur rite et solemniter essa acta***, upon which ground it will be presumed, even in civil case, that one who acted in an official capacity was duly appointed and did rightly and regularly discharge his official duties. This common law presumption of regularity is mainly applied to judicial and official acts and although sometimes conclusive, it is in general only rebuttable."

This presumption of regularity has been applied in several other cases, such as, **Nsefik v. Muna (2007) 10 NWLR (pt.1043) p.502 at 518** per **Ogunbiyi, JCA** (as he then was); **Arnaka v. State (1995) 6 NWLR (pt.399) p.11 at 32 paragraph G** and **Okelola v. Boyle (1998) 2 NWLR (pt.539) p.533**. The burden is on the person who contends against the judicial or official act to rebut the presumption prescribed in favour of the document.

As I stated earlier, the proceeding leading to the conviction of the Appellant was initiated vide the document titled **CHARGE NO: I/3EFCC/2013; FEDERAL REPUBLIC OF NIGERIA V. JOHN AWUDU KANU (a.k.a. MR. ADE)** and further headed; "**INFORMATION**". It was

duly dated the 22/5/2013 and signed by one G. K. Latona, for the Chairman Economic and Financial Crimes Commission. Same was received in the High Court Registry at Ibadan on the 23/5/2013. The said document on its face satisfies the requirements of Section 341 of the Criminal Procedure Law of Ogun State (supra). It should be noted that, when the case came up for the first time before the trial High Court, the pleas of the Appellant were taken and he pleaded guilty to both counts. The prosecuting counsel then reviewed the entire evidence against the Appellant who was ably represented by counsel, who expressed satisfaction with the facts as reviewed by the prosecutor. The learned trial Judge then proceeded to prepare and deliver his judgment convicting the Appellant. It is my view that from the circumstances of the facts as disclosed by the Record of Appeal, the Appellant has not been able to rebut the presumption which enures in favour of the proceedings of the trial court by virtue of Section 168 of the Evidence Act, 2011.

Furthermore, learned counsel for the Respondent had submitted that, by Section 340(3)(b) of the C.P.L. of Oyo State, the Appellant ought to have filed an application at the trial court seeking that the Information be quashed. That, not having done so at the trial court, be cannot make such a Ground of Appeal or make such application for the first time in this court. Learned Counsel for the Appellant in reply on points of law, had relied on the case of **Onu Okafor v. The State (supra)** to submit that Section 340(3)(b) is not helpful to the Respondent, in that the Supreme Court had held that failure of the defence to have taken the objection in the lower

court would not prevent the Information from being quashed if no consent of a Judge to prefer the Information had been obtained.

I have been able to read the case of **Okafor v. The State (1976) All N.L.R. p.307; (1976) 5 S.C. p.7**. In that case, the Appellant was convicted for murder and sentenced to death by the then High Court of East Central State of Nigeria. The Information was preferred by leave of Araka, J pursuant to Section 340(2)(a) of the Criminal Procedure Law, Cap.31 in Vol.2, Laws of Eastern Region, 1963. That Law also contained a provision in ***pari materia*** with Section 340(3)(b) of the Criminal Procedure Law of Oyo State. However, at the time the matter was heard, Section 340(3)(b) of the C.P.L. of Eastern Region, had been replaced by Section 18(II) of the Edict of 1974. On appeal, it was argued that the trial in the lower court was a nullity and the court was therefore urged to quash the proceedings and order a new trial. The Supreme Court then held that:

> "There is no doubt that the Information in this case was not preferred in accordance with the provisions of the 1974 Edict and certainly not in accordance with the provisions of Sub-Section 2(a) of Section 340 of Cap.31 as amended by Section 18(2) of the 1974 Edict. No application was made at the lower court for the Information in the case in hand to be quashed."

Having thus found, the Supreme Court went on to hold as follows:

> "Prior to the amendment of the proviso to Sub-Section 3 of Section 340 of Cap.31, the position was that "where a person who has been committed for trial is convicted on any Information or on any Count of an Information, that Information or Count shall not be quashed under this Section (i.e. 340(3)

> of Cap.31) in any proceedings on appeal, unless application was made at the trial that it should be so quashed". This proviso therefore provides a kind of assurance in favour of the prosecution where an Accused was convicted by default on an Information proffered without authority, the default consisting in the omission by the defence to apply in the lower court for the Information to be quashed. [See also **R. v. NISBET (1972) 1 QB 37 at 46**]. The amendment to the said proviso (introduced by Section 18(ii) of the 1974 Edict) has, however, narrowed its scope and protection is now given to an Information preferred "without Jurisdiction" to which objection has not been taken by the defence, in the lower court..."

From the underlined portions of the judgment in **Okafor v. The State (supra)** cited above, it is clear to me that the portion cited and relied on by learned counsel for the Appellant in his Reply Brief is not apposite to the facts of this case. In that case, the Supreme Court pointed out clearly that Section 340(3) of the C.P.L of Eastern Region (which is in ***pari materia***) with Section 340(3) of the C.P.L. of Oyo State operates in favour of the prosecution, so that an accused person who has not applied in the lower court for an Information to be quashed, cannot do so on appeal. In the underlined portions, the Supreme Court made it clear that the amendment of Section 340(3) by the introduction of Section 18(2) in the Edict of 1974, has limited, narrowed or restricted the application of Section 340(3) to situations where the Information was preferred "without Jurisdiction". There is no such amendment to Section 340(3) of the C.P.L. of Oyo State and it has not been contended that the E.F.C.C have no powers to prefer the Information. In that respect, I am of the view that

Section 340(3)(b) of the C.P.L. of Oyo State is applicable to this case. That sub-section stipulates that:

> "340(3)(b) Where a person who has been committed for trial 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 was made at the trial that it should be so quashed."

Before I conclude on this point, I wish to remind myself that learned counsel for the Appellant had contended that failure to obtain the consent of Judge before preferring the Information is a condition precedent, failure of which affects the competence and jurisdiction of the Court. It is not in doubt that one of the elements of jurisdiction is, that the matter must have been initiated by due process of law and upon condition precedent to the exercise of jurisdiction. I wish to state however, that there is a distinction between substantive and procedural jurisdiction. One distinction between the two is that, while "procedural jurisdiction" can be waived by a litigant, "jurisdiction as a matter of substantive law" cannot be waived by either the litigant or the court. See **Etim v. Obot (2010) 12 NWLR (pt.1207) p. 108 at 150**; **Umaru v. Aliyu (No.1) (2010) 3 NWLR (pt.1180) p 135 at 174** and **Ndayako v. Dantoro (2004) 13 NWLR (pt.889) p. 187**. The issue of jurisdiction raised here, is a procedural one, which could be, and was indeed waived by the Appellant.

In the case of **Udosen v. State (2007) 4 NWLR (pt.1023) p.125,** the Supreme Court held that, an accused person who acquiesced to an irregular procedure must show that the irregularity occasioned a

miscarriage of justice to him. Thus, for such an accused person to succeed on appeal, he must show that he suffered some injustice due to non compliance with procedure. In the instant case, the Appellant was represented at the trial by counsel, he pleaded guilty on both counts and did not object to the review of evidence and the exhibits tendered. Indeed, learned counsel expressed satisfaction with the review of the evidence by the prosecuting counsel. I therefore hold that by virtue of Section 340(3)(b) of the C.P.L. of Ogun State, the Information charging the Appellant for having committed the offences therein cannot be quashed.

On issue two (2), learned counsel for the Appellant contended that, it is a principle of criminology and penology that, were a sentencing language in a statute is specific and mandatory, a court of law has no discretionary power to exercise. That, where the language used in the sentencing statute is in general terms, a court of law can exercise its discretion to pass a sentence commensurate to the factual situation of the case. Section 1 (3) of the Advance Fee Fraud and Other Fraud Related Offences Act, 2006 was referred to. That, Section 382(1) of the Criminal Procedure Law, cap. 39, Laws of Oyo State has given the trial court the discretion to impose a fine in lieu of imprisonment even where the court has no specific authority to impose a fine. The cases of **Price Control Board v. Esema & Anor (1982) 1 N.L.R. p.7**, **Odunlami v. Nigeria Navy (2013) 10 S.C.M. p. 146 at 170 - 171 paragraphs F - G, H - I and A - B;** and Section 382 (a) and (b) of the C.P.L. (supra) were cited in support.

It was further submitted by learned counsel for the Appellant, that the principle upon which an appellate court may act in an appeal against

excessive or severe sentence is, that the court should not ordinarily interfere unless the court is satisfied that the trial court had erred in principle. The case of **Alao v. Compol (1978) 1 L.R.W. p.8** was then cited to submit that in considering the plea for mitigation of sentence, the court would consider:

(a) the age of the convict
(b) whether or not he is a first offender.
(c) whether the convict pleaded guilty.
(d) the demeanour of the convict during the trial
(e) whether the convict was remorseful.
(f) the nature of the offence.

It was then contended that, from the records, the Appellant was 39 years of age at the time he was convicted, he was a first offender and remorseful. Furthermore, that he had returned the sum of fifty thousand naira only (₦50,000.00) he allegedly defrauded the victim of. That in the instant case, the learned trial Judge was focused on the nature of the offences charged to the detriment of the *allocutus* made by learned counsel to the Appellant. The cases of **Alor v. State (1997) 4 NWLR (pt.501) p.511**; **Laja v. I.G.P. (1961) 1 N.L.R. p.715** and **C.O.P v. Buhari (2000) FWLR (pt.1) p.164** were then cited to urge us to intervene by tampering justice with mercy. That, in any case, Sections 1 (3) of the Advance Fee Fraud and Other Fraud Related Offences Act (supra) and 382(1), (2) and 3 (a) and (b) of the C.P.L. of Oyo State give this court the power to exercise discretion to impose fine in lieu of imprisonment. For this submission the case of **Thomas v. State (1994)**

4 NWLR (pt.337) p.129 was cited in support. We were accordingly urged to resolve this issue in favour of the Appellant.

In response, learned counsel for the Respondent submitted that, Section 1(3) of the Advance Fee Fraud and Other Fraud Related Offences, Act, 2006 has provided the penalty for the offence for which the Appellant was convicted, for a maximum of 20 years and a minimum of 7 years. That the trial court however imposed the minimum sentence of 7 years without option of fine. That the sentences prescribed in the Act are specific. It was then submitted that, by the argument of the Appellant, he is contending that he should have been given a sentence less than that prescribed by the statute: That indeed, the learned trial Judge was very lenient to the Appellant when he took into consideration the period the Appellant had spent in custody in calculating the period he (Appellant) will spend in prison. We were then urged to resolve this issue also against the Appellant, and to dismiss the Appeal.

Now, Section 19(3) of the Court of Appeal Act, 2004 stipulates that:

> 19(3). On an appeal against sentence or, subject to the provisions of this Act, or on an appeal against conviction, the court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution therefore as it thinks ought to have been passed, and if not of that opinion, shall, in the case of appeal against sentence, dismiss the appeal."

The appeal herein is not against conviction per se but against sentence. The law is that, in cases of appeal against sentence, the Judge

who presided over the matter at the court of first instance, has the advantage of personally observing the demeanour of the accused person or convict, and is therefore in a better position to determine the sentence. Accordingly, where the trial court has imposed the sentence, this court, being a Court of Appeal, will be reluctant to interfere with the sentence, which do not in principle, seem to be wrong. There is however no hard and fast rule on the issue of sentencing, as even where the accused has pleaded guilty to the charge, as in the instant case, there may be special circumstances which may demand that a heavy sentence be imposed. See **Uwakwe v. the State (1974) All N.L.R. p.557.**

In the instant case, the Appellant was arraigned, tried and convicted upon his plea of guilty on the two counts charge of obtaining money by false pretences contrary to Section 1(3), and Attempt to obtain money by false pretences contrary to Sections 5(2) and 8(b) of the Advance Fee Fraud and Other Fraud Related Offences Act, No.14 of 2006. It should be noted that the sentences prescribed for an offence committed under Section 1(3) of the Advance Fee Fraud and Other Related Offences Act, 2006 is a maximum of 20 years and not less than 7 years. It means that the court has the discretion of imposing a sentence of between seven (7) years and twenty (20) years. The sentence to be imposed shall not exceed twenty years but must not be below or less than seven (7) years. It would be seen that the court has no discretion to impose a sentence which is below seven years. In the instant case, the learned trial Judge imposed the minimum sentence prescribed for the offences for which the Appellant

was convicted. Indeed, the learned trial Judge was very lenient to the Appellant when he directed that:

> "The sentences on the two counts shall run concurrently. The period that the convict has spent in custody shall be deducted or taken into consideration in calculating the period the convict will spend in prison"

The sections of the Advance Fee Fraud and Other Fraud Related Offences Act (supra) do not give the trial court any discretion to impose a lesser sentence. In the circumstances, I hereby hold that despite the admission of guilt by the Appellant, and the fact that he had refunded the fifty thousand naira (₦50,000.00) he is said to have defrauded his victim of, the learned trial Judge exercised his powers rightly under the law. This issue is therefore resolved, also, against the Appellant.

Having resolved the two issues against the Appellant, it is obvious that this appeal is devoid of any merit. It is accordingly dismissed. Consequently, the judgment of the Oyo State High Court in Charge NO: I/3EFCC/2013, delivered on the 20th day of December, 2013 is hereby affirmed.

HARUNA SIMON TSAMMANI
JUSTICE, COURT OF APPEAL.

COUNSEL:
Bayo Adegbite; **Esq** with **Morayo Kehinde**; **Esq** for the Appellant.

Idris A. Mohammed; **Esq** for the Respondent.

My learned brother **HARUNA SIMON TSAMMANI, JCA** has comprehensively addressed all the issues raised in this appeal.

The right of appeal provided by Section 240 at. el. of the 1999 Constitution must not be abused and turned into an avenue of individualistic expression. At the trial of the Appellant, all the requisite protocol of a criminal trial were complied with. The Appellant pleaded guilty to the two count charge proffered against him. A review of the evidence and exhibits assembled for the trial was made at the trial. The Appellant who was dully represented by a learned Counsel raised no objection to the absence of a procedural observance.

As clearly stated in the lead Judgment, there is a distinction between a procedural jurisdiction which can be deemed waived if not followed and a substantive jurisdiction which is fundamental to the assumption of authority by the Court and cannot be waived neither by the consensus of the parties nor by the Court. (See **NDAYOKO v. DANTONO 2004 13 NWLR pt. 889 pg. 187.**

In this appeal, if there were any omissions, which have not been so conceded, they were immaterial, peripheral and would constitute no legal impairment of the trial of the Appellant. In this wise, I too dismiss this appeal for the more detailed reasons contained in the lead Judgment.

I adopt the consequential orders made in the lead Judgment.

MONICA B. DONGBAN-MENSEM
JUSTICE, COURT OF APPEAL

CA/IB/202/2014

MODUPE FASANMI, JCA

I agree entirely with the lead judgment prepared by my learned brother ***Haruna Simon Tsammani, JCA***.

The appeal is dismissed by me too. I abide by the consequential orders contained therein.

MODUPE FASANMI
JUSTICE, COURT OF APPEAL