

**IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT MAITAMA – ABUJA**

BEFORE HIS LORDSHIP:	HON. JUSTICE S.E. ALADETOYINBO
COURT CLERKS:	M.S. USMAN & OTHERS
COURT NUMBER:	HIGH COURT THREE (3)
CASE NUMBER:	FCT/HC/CV/CR/87/2009
DATE:	11TH DECEMBER, 2017

BETWEEN:

FEDERAL REPUBLIC OF NIGERIA - COMPLAINANT

AND

SYDNEY ESSIEN - ACCUSED PERSON

Accused Person absent in court.

I.Deribe (Mrs) appearing for the prosecution holding the brief of S.A. Ugwuegbulam.

Orih Odumogwu appearing for the accused person.

Court – The judgment will be read in the absence of the accused person so as not to allow the judgment to be expired.

J U D G M E N T

The accused person Sydney Essien was arraigned before this court on the 28th Day of March 2012 on two counts charge of fraudulent misappropriation punishable under Section 312 of the Penal Code and obtaining money with intent to defraud contrary to Section (1) 2 of the Advance Fee Fraud and Other Fraud Related Offences Act 2003.

The 3rd count was abandoned by the prosecution; it was never read to the accused person. The two count charge is as follows:

Count 1:

That you Sydney Essien (F) a former staff of Eso Securities Limited on or about July to October 2007 in Abuja in the Abuja Judicial Division of the High Court of the Federal Capital Territory did fraudulently misappropriate the sum of Fourty Million Naira (N40,000,000.00) to your own use out of the total sum of Eighty Million Naira (N80,000,000.00) being money entrusted to you by one Wole Adebayo for the purchase of Spring Bank, FCMB and Japaul Shares in your capacity as a staff of Eso Securities Limited and thereby committed an offence punishable under Section 312 of the Penal Code.

Count 2:

That you Sydney Essien (F) a former staff of Eso Securities Limited on or about July to October 2007 in Abuja in the Abuja Judicial Division of the High Court of the Federal Capital Territory with intent to defraud and obtain the sum of Eighty Million Naira (N80,000,000.00) only from one Wole Adebayo under the pretext of buying shares for him which you knew was false and thereby committed an offence contrary to Section (1) 2 of the Advance Fee Fraud and Other Fraud Related Offences Act 2003.

Count No 1 relates to criminal breach of trust; the same transactions that lead to criminal breach of trust constitute Advance Fee Fraud in Count No. 2. It is not proper for the prosecutor to charge the accused person with two different

counts under different laws for the same transaction. Count No. 2 is duplicity of Count No. 1, same is therefore struck out. The only valid charge before this court is Count 1 which relates to breach of trust. The prosecutor called three witnesses in trying to establish the case of criminal breach of trust against the accused person. The 1st prosecution witness Adewole Adebayo, a legal practitioner was the victim of the alleged crime of criminal breach of trust or nominal complainant, he commenced his evidence-in-chief on the 12th Day of June 2012 wherein he told the court that he gave a total sum of N80,000,000.00 only (Eighty Million Naira) to the accused person to purchase various shares of different Banks and companies out of which N65,000,000.00 (Sixty Five Million Naira) only was for the purchase of shares of Spring Bank Plc of which the accused purchased for PW1 shares worth N40,000,000.00 (Fourty Million Naira) only. According to PW1, out of the Eighty Million Naira given to the accused person to purchase shares for him, accused converted the sum of N40,335,000.00 for her own use, the balance was used by the accused to purchase shares for PW1. The matter was then adjourned to 17th Day of February 2013 for cross-examination of the PW1, upon being cross-examined, PW1 confirmed to the court that the accused had paid all the outstanding balance of his money amounting to N33,000,000.00 (Thirty Three Million Naira) only. PW1 further confirmed to the court that accused no longer owed him any money as at 17th Day of February 2013.

PW2 one Abdullahi Shehu Mohammed investigating officer attached to EFCC told the court that he investigated this matter

and tendered the cautionary statements obtained from the accused person, he further told the court that the accused converted to her own part of the money given to her for purchase of shares for PW1. The nominal complainant PW3 James Odiah was attached to Spring Capital Market Plc during the incident; he confirmed that the accused only paid the sum of N40,000,000.00 to buy Spring Bank Shares.

The accused person gave evidence for her defence as DW1 after the court dismissed no case submission filed on her behalf by her counsel. In her defence DW1 claimed to have offered PW1 the sum of N28,685,000.00 as the balance of his money with her. The offer was made before she was reported to the police and EFCC. At EFCC's Office, accused further claim to have offered the same sum of N28,685,000.00 to PW1 as the balance of his money but insisted that his balance was N40,335,000.00 the accused alleged that she signed an undertaking to pay PW1 the sum of N40,335,000.00 under duress, PW1 later reduced the balance of his money from N40,335,000.00 to N33,000,000.00 which he stated before this court to be his balance. After PW1 gave evidence, DW1 claimed to have met him and reconciled all the accounts with him; she eventually paid the sum of N28,685,000.00 which he collected and which he had refused to collect before coming to court. She claimed to have paid the money through bank draft and through her formal counsel Max Ogar whom she had debriefed because he did not represent DW1 well. As to the payment of the balance of the money to PW1, according to DW1, if the PW1 had accepted the actual balance of his money which

she calculated to be N28,685,000.00, the matter could not have been brought to court.

After PW1 accepted the sum of N28,685,000.00 from DW1 she told him to go to the Police and EFCC and inform them that his actual balance was N28,685,000.00 and not the amount he was claiming in the Police Station and EFCC premises.

The photocopies of the three bank drafts totaling N28,685,000.00 which was paid by the DW1 to PW1 were tendered in evidence, after the evidence of DW1, parties filed final written addresses . At the adoption of the final written address, the accused person wrote to the court to excuse herself from being present at the adoption of final written address. Under Section 382(6) of ACJA, the accused has the right to consent to being tried in absentia. The section read as follows:

Section 382 (6):

"Nothing in this Section shall prevent the Defendant from being tried by reason only that the Notice of trial and the information were served on him less than three days before the date of trial, where he consents to being so tried"

See ODUNEYE v F.R.N. (2016) 31 CPCLR 265 at 276 where the court held as follows:

"Section 256 of the Administration of Criminal Justice Law, 2011 has now made it possible for an accused to be tried in absentia. It is well and good such provisions are intended to do away with unnecessary pranks and undue delay in the hearing of criminal matters. Such provisions are good for the country, particularly with the increasing effort to prosecute

rich offenders. They employ every conceivable tactic to delay the hearing of a case to the point when witnesses are no longer available or change their minds about testifying to the utter frustration of the prosecution".

If the accused person is equally absent on the day of judgment, the judgment will be read in her absent; on the authority of Section 382(6) of Administration of Criminal Justice Act 2015.

The final written addresses of the accused person and that of the prosecution were adopted in the absence of the accused person. The accused person who had written to the court to excuse herself from the proceedings where the written address will be adopted cannot later contend that she was not given a fair hearing.

The ingredients of the offence of criminal breach of trust contrary to Section 311 and punishable under Section 322 are as follows:

- "(a) That the accused was entrusted with property or with dominion over it.*
- (b) That he*
 - (i) Misappropriated or*
 - (ii) Converted it to his own use*
 - (iii) Used it, or*
 - (iv) Disposed of it*
- (c) That he did so in violation of:*
 - Any direction of law prescribing the mode in which such trust was to be discharged; or*
- (d) Any legal contract expressed or implied which he had made concerning the trust or*

(e) *That he intentionally allowed some other person to do so as above.*

(f) *That he acted as in (b) dishonestly.*

For the above see OUNOHA v THE STATE (1988) 7 C 74 at 93. The nominal complainant who was the victim of the criminal breach of trust commenced his evidence on the 12th Day of June 2012 wherein he stated that the total amount he gave to accused was N80,000,000.00 to buy shares, wherein the accused person converted the sum of N40,335,000.00 for her own use. The matter was then adjourned for cross-examination to 17th Day of February, 2013. On that day PW1 told the court that the accused person had paid all the outstanding balance amounting to the sum of N33,000,000.00. PW1 told the court that accused no longer owed him any money as at 17th Day of February 2013, apparently PW1 collected the balance of his money from the accused without the KNOWLEDGE AND CONSENT of the court and the prosecutor, if the offence of criminal breach of trust is a compoundable offence, at that stage of proceeding when the nominal complainant PW1 collected the balance of the money, the offence can no longer be compoundable having given evidence as PW1, the nominal complainant had waived his right to compound the offence of criminal breach of trust. See Page 286 of Black's Law Dictionary for the meaning of Compounding Crime which state as follows:

"Compounding Crime

Compounding Crime consists of the receipt of some property or other consideration in return for an agreement not to prosecute or inform on one who has committed a crime.

There are three elements to this offence at common law and under the typical compounding statute.

- (1) The agreement not to prosecute***
- (2) Knowledge of the actual commission of a crime and***
- (3) The receipt of some consideration.***

The next question for determination is whether the payment of the money by the accused alleged to have been misappropriated or converted to her own use automatically entitled her to be discharged and acquitted despite the payment of the money by the accused. The court allowed the case to continue because the charge had been read out to her, in other word, she had been arraigned before this court before the money was paid. If the balance of the money had been paid to PW1 before arraignment, the court could have thrown out the case as the accused could not have been said to have committed any offence known to law.

The next question for determination is whether the payment of the sum of N28,685,000.00 by the accused to PW1 the nominal complainant amount to an admission of guilt by the accused person.

In answering this question the court will consider the evidence before the court including the defence of the accused person. In her defence the accused stated that there was dispute between her and the nominal complainant PW1 as to the actual balance of his money while the accused insisted the balance of his money was N28,685,000.00 the nominal complainant insisted his balance

was N40,335,000.00 which was later reduced by him to N33,000.00, it appears there was no dishonest intention to permanently deprive the nominal complainant PW1 of the balance of his money by the accused. See *AIYEJANA v THE STATE* 1969 NNLR 73 at 74 where the court observed as follows:

"The offence of criminal breach of trust is defined in Section 311 of the Penal Code. An essential ingredient is that the person charged "dishonestly misappropriates or converts to his own use" the property. In that case, before a court could convict the appellant there must be a finding of fact that he misappropriate the 500.00 pounds"

The court went on to say at Page 75 of the said law report as follows:

"Conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property entrusted to him, or over which he has dominion even when a duty to account is imposed upon him, but when he is unable to account or renders an explanation of his failure to account which is untrue, an inference of misappropriation with dishonest intent may readily be made"

The nominal complainant PW1 told the court that he took the accused to civil court before he recovered the sum of N33,000,000.00 which he claimed to be the balance of his money with the accused person. Every breach of trust gives rise to civil suit, it is when there is fraudulent misappropriation of the subject of the contract that same become punishable as criminal breach of

trust. The charge against the accused person was that she fraudulently misappropriated or converted to her own use the sum of N40,335,000.00 belonging to the nominal complainant PW1. On the 12th Day of June 2012 when PW1 commenced his evidence-in-chief he confirmed to the court that the balance of his money was N40,335,000.00, he came back on the 17th Day of February 2013 for cross-examination only to confirm to the court that the accused had paid the balance of his money which he put at N33,000,000.00 but the accused insisted that she paid him N28,685,000.00 and tendered photocopies of the certified true copy of cheques with which she paid him the money.

From the above evidence, it is doubtful whether the accused had the dishonest intention to misappropriate or convert to her own use the balance of the money belonging to the nominal complainant which the evidence of nominal complainant regarding the balance remained inconsistent. See *BATSARI MOHMMAN v RANO NATIVE AUTHORITY* 1966 NNLR 151 at 153 where the court held as follows:

"The misappropriation or conversion of disposal must be with a dishonest intention. Every breach of trust gives rise to a suit for damages but it is only when there is evidence of a mental act of fraudulent misappropriation that the commission of embezzlement of any sum of money becomes a penal offence punishable as criminal breach of trust. It is his mental act of fraudulent misappropriation that clearly demarcates an act of embezzlement which is a civil wrong or tort, from the offence of criminal breach of trust. Every

offence of criminal breach of trust involves a civil wrong in respect of which the complainant may seek his redress for damages in the civil court but every breach of trust in the absence of men rea cannot legally justify a criminal prosecution"

At the same Page 153 the court went on to say as follows:

"Dishonest intention is the gist of the offence. Any breach of trust is not an offence. It may be intentional without being dishonest or it may appear dishonest without being really so"

In *ONUOHA v THE STATE* (1988) 7 SC (Pt 1) 74 at 94 KAYODE ESO JSC of Blessed Memory held as follows:

"I will only add that in construing the word "dishonest" in Section 311 of the Penal Code it will in my view be sufficient, if one construes it in its natural meaning i.e. intended to cheat, deceive or mislead as I have done"

See also *I.G. TIRAH v COMMISSIONER OF POLICE* (1973) NNLR 143 at 150 where the court held as follows:

"In cases of criminal breach of trust, failing to account for money proved to have been received by the accused or giving a false account as to its use is generally considered to be a strong circumstances against the accused. But accused must not be convicted on it alone, it is only an indication a piece of evidence pointing to dishonest intention and must be considered along with other facts of the case"

It was absolutely an error for the nominal complainant PW1 to go behind the court after giving evidence and collected the

balance of the money alleged to have been misappropriated by the accused person without the knowledge and consent of this court and the prosecutor. This court had become **dominis litis** in this case when the money was collected and therefore the court should have been put on notice when the accused wanted to pay the money. The court is not averse to the accused paying the money back, but the court could have asked the accused why she wanted to pay the money back at that stage of proceeding and if the reason given is satisfactory the case could have been terminated at that point. The court is not against Restitutory justice but in favour of same, restitutory justice is the act of giving back to the rightful owner what was alleged to have been taken away from him. The kind of justice recognized in the Penal Code is Retributive justice an act of punishment of the offenders. It has element of deterrent, warning to others not to engage in committing similar offences, but the Administration of Criminal Justice Act 2015 appears to have merged retributive justice with Restitutory justice by allowing the courts to order for compensation to the victim of crime. From the totality of evidence before the court, the prosecution had failed to establish the **men rea** of criminal breach of trust contrary to Section 311 and punishable under Section 312 of the Penal Code. The accused person is hereby discharged and acquitted on the one count charge.

(Sgd)
Hon. Justice S.E. Aladetoyinbo
(Presiding Judge)
11/12/2017

Court – Put to the counsel to the accused why she is not in court.
Orih Odumogwu – The accused person is yet to arrive from U.S.A.
where she went for treatment of her 9 year old boy.

(Sgd)
Hon. Justice S.E. Aladetoyinbo
(Presiding Judge)
11/12/2017

