

IN THE HIGH COURT OF JUSTICE  
OYO STATE OF NIGERIA  
IN THE IBADAN JUDICIAL DIVISION  
HOLDEN AT IBADAN

BEFORE THE HONOURABLE JUSTICE A.L. AKINTOLA - JUDGE  
DELIVERED ON TUESDAY THE 7TH DAY OF FEBRUARY, 2017

SUIT NO. 1/5CA/07

BETWEEN:

OGUNLOWO A. GBENGA ..... APPELLANT

A N D

COMMISSIONER OF POLICE ..... RESPONDENT

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Parties are absent.

James Onyirofie Esq. appears for the appellant.

N.A. Abiola Esq. Assistant Director Civil Litigation  
& Advisory Services (Oyo State Ministry of Justice)  
appears for the Respondent.

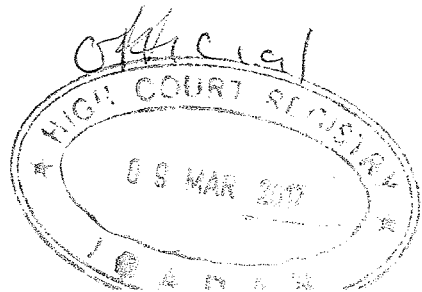
J U D G M E N T

This is an appeal against the Judgment of the Chief Magistrate's Court, Iyaganku, Ibadan wherein the appellant was charged on three counts of Conspiracy obtained by false pretence and stealing but the accused/appellant was discharged and acquitted on the first count of conspiracy while he was convicted on the two other Counts by obtaining the false pretence and stealing and sentenced accordingly.

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Dissatisfied with the judgment of the said Court, the accused/appellant has appealed to this Court. In all, the appellant filed nine grounds of appeal but at the hearing, learned counsel to the appellant O.L. Omoloye Esq. distilled from the nine grounds three issues for the determination of this court. They are:

- (1) Whether the prosecution proved its case beyond reasonable doubt to warrant the conviction and sentence of the accused person by the trial lower Court?
- (2) Whether the learned trial Judge was right in Law to convict and sentence the accused person even though the defence of alibi raised at the earliest opportunity which was never investigated and there was no conclusive evidence fixing the accused person at the scene of crime?  
And
- (3) Whether the findings of the trial court are perverse which have led to a miscarriage of justice to the appellant?

Learned counsel to the appellant then marshaled arguments in support of the three issues isolated for the determination of the Court in this appeal.

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On his own part, Learned counsel to the Respondent, N.A. Abiola Esq formulated an issue for the determination of the Court in this appeal and that is *"whether the prosecution proved its case beyond reasonable doubt to warrant the conviction and sentence of the accused person by the trial Court?"*

After the parties had concluded their arguments and the appeal had been adjourned for judgment, at the time the Court was about writing the judgment, it was discovered that the exhibits tendered in the lower court which formed a part of the record forwarded to this court had either been misplaced or lost by the Court's Exhibits keeper. As a result, the judgment could not be concluded readily as the court gave ample room for the Exhibits keeper to produce the said Exhibits. The wait turned out to be in vain as the Exhibits Keeper could not produce them. This development was reported to the then Honourable Chief Judge, Justice B.O. Adeniji (Rtd.) who then directed that the Exhibits Keeper and other staff in charge of the Exhibits room be tried at the Chief Magistrate's court in Charge No. MI/113c/2012: Commissioner of Police v. Bello Azeez & Yetunde Phillips which trial is still pending before the said court.

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Apart from the Exhibits in the present appeal, Exhibits in a number of other cases pending before this court were also either lost or misplaced by the said Exhibit Keeper. Some of such cases include I/3/ICPC/2007: FRN v. Tajudeen Olalere & 2 Ors and I/89c/2006: The State v. Dauda Isiaka & Anor.

The development seemed to have presented a fait accompli preventing this court from being able to conclude the judgment within the time limited by the constitution for the court to deliver judgments.

However, as this development was made known to counsel on both sides, Learned counsel to the appellant offered to look into his file with a view to seeing whether he still had photocopies of the exhibits certified true copies of which he had obtained in the course of preparing the appeal. Fortunately, learned counsel to the appellant, O.L. Omoloye Esq. graciously made available the photocopies of the Certified True Copies to the Court for the Court's use. The Court then sought the consent of the counsel to both parties for the court to place reliance on the said copies in writing this judgment which consent both counsel graciously gave.

Having carefully considered all the grounds of appeal against the background of the issues formulated therefrom by counsel

  
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the determination of the court in this appeal, this court is of the view that all the three grounds ably formulated by the learned counsel to the appellant are capable of being condensed into the only issue formulated by N.A. Abiola Esq., learned counsel to the Respondent in his address in reaction to the submissions of learned counsel to the appellant in this appeal. That issue is "whether the prosecution proved its case beyond reasonable doubt to warrant the conviction and sentence of the accused person by the trial court? By way of recapitulation, the appellant was convicted and sentenced on two of the three counts for which he was charged. The Counts are: (i) obtaining by false pretence and (ii) stealing.

In challenging the judgment of the Learned trial Chief Magistrate, going by the issues formulated by the learned counsel for the appellant for the determination of this court, counsel isolated the issue relating to the defence of alibi raised by the accused/appellant at the earliest opportunity and the alleged failure of the Police to investigate the same. The appellant argued that the alleged failure of the Police to investigate the alibi raised by the appellant resulted in the prosecution not allegedly succeeding in fixing the accused/appellant to the scene of crime.

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Closely related to the issue of alleged unresolved alibi is the alleged failure of the prosecution to conclusively establish the identity of the man who allegedly obtained money by false pretence from the complainant.

In relation to the count of obtaining by false pretence, learned counsel to the appellant had submitted that in order for the Prosecution to secure a conviction under this head, she must have proved its case against the accused/appellant beyond reasonable doubt under S. 138 (1) of the Evidence Act and that presupposes that all the essential elements of the offence are proved. Those elements are:

1. That there must have been a pretence.
2. That the pretence must emanate from the accused person.
3. That the pretence was false;
4. That the accused person knows its falsity and did not believe in its truth;
5. That there was an intention to defraud;
6. That the thing or property that was received is capable of being stolen.

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He cited in aid: ALAKA V. THE STATE (1991)

ONWUDIWE V. FRN (2006)

D-G AND

2 NWLR (PART 1177) 118 @ 134 Paragraphs C-E

Essentially, counsel attached the findings listed as Nos: 1-5,

In proof of the essential elements of the offence of obtaining by false pretence, the prosecution called PW1 & PW2.

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the complainant's statement to the Police where he had alleged that one Mr. Ojeniyi and Segun Abimbola received from him the sum of N360,000.00 under false pretence to sell a Mercedes Benz V. Booth Car to him. In his testimony, PW1 testified that it was one Mr. Ojeniyi and Segun Abimbola who collected the said sum of N360,000.00 from him. It is the case of the appellant that the failure of the prosecution to call the said Mr. Ojeniyi who was said to be alive at the time of the trial was fatal to the case of the prosecution.

The case of the prosecution, however, is that the accused/appellant was the said Mr. Ojeniyi who falsely obtained money from PW1. This was strengthened by the readiness of P.W1 to recognize and identify the accused/appellant at the Police Station long after the incident and when the appellant presented himself at the Police Station. The PW1 readily recognized and identified the appellant as the Mr. Ojeniyi who obtained money from him promising to sell to him a Mercedes V. Booth Car at Osogbo.

On the count alleging stealing, learned counsel to the appellant equally made submissions as to the essential ingredients of the offence of stealing being:

1. That there must have been a fraudulent taking of anything

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That is capable of being stolen or fraudulent conversion to His own use or the use of any other person anything capable of being stolen.

He submitted that the Prosecution did not prove the offence of stealing the said sum of N360,000.00 beyond reasonable doubt. He referred to the testimony of PW1 contained at Pages 4-9 of the records while that of PW2 is contained at pages 9-14 thereof. He again submitted that going by Exhibit 008, the statement made by PW1 to the Police that it was the duo of one Mr. Ojeniyi and Segun Abimbola whom the PW1 alleged that collected the sum of N360,000.00 from him. He made reference to the testimonies of the appellant and his witness which are contained at Pages 14-19 where the appellant denied vehemently being the Mr. Ojeniyi nor any knowledge of the said Segun Abimbola. He referred to Exhibit 007, the statement of the accused/appellant to the Police in order to buttress this submission. He further emphasized that the accused/appellant denied owning the Mazda Car with Registration No. AE780 AA which was purportedly driven by the said Mr. Ojeniyi and Mr. Segun Abimbola to pick the PW1 on the fateful day of the incident. He again drew the court's attention to the defence of alibi raised by the

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accused/appellant to show that at the time of the alleged offence on 9<sup>th</sup> September 2005, the appellant was in his Lagos office. A further reference was made to Exhibit 007, the last three lines thereof to buttress the argument on the defence of alibi. Reference was also made to Page 15 of the records on the issue of this alibi.

Learned counsel to the appellant submitted that the identity of who received or fraudulently converted from PW1 was crucial and needed to be proved. This argument was hinged on the failure of the Prosecution to call the alleged Mr. Ojeniyi whom the P.W.1 thought he was relating to when in point of fact he identified the appellant as being the Mr. Ojeniyi he was referring to. Counsel placed reliance on:

OPEYEMI V. THE STATE

(1985) 2 NWLR (PART 5) 101 @ 106-109, 111-112 & 114;

R.V. KUREE 7 WACA 175 @ 177; AND

ABUDULKADIR GUSAU V. COMM. OF POLICE

(1968) NMLR 329

To the effect that if the evidence of a witness is necessary or important, he must be called to establish or ventilate the justice of the case.

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In the instant case, it is the failure of the prosecution to call the alleged Mr. Ojeniyi of NEPA, an alleged friend or acquaintance of PW1 whom he thought he was dealing with when he was relating to the appellant is the point being canvassed here. This case throws up a puzzle and a bizarre combination of facts and/or mystery. The appellant at all times material to this case denied having ever met the PW1, the complainant whose money was allegedly obtained under false pretence and stolen. The case of the Prosecution however is that Exhibit 004, the alleged findings from the Motor Licensing Authority in Lagos by the Police led to the eventual arrest of the appellant. But the appellant maintained even throughout the investigation and trial that he did not own the Mazda 626 Car with registration number HE780AAA allegedly driven by the culprit on the fateful day. What is more, he raised a defence of alibi even at the earliest opportunity in his statement to the Police. Was this investigated at all by the Police? This will be addressed in the course of this judgment. The appellant in the course of investigation informed the police that he owned a Mazda 626 Car but with a different registration number from the one allegedly used by the culprit to pick the PW1 on the fateful day. The Registration number of the said Mazda 626 Car was AM 516 LND.

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This was investigated by the Police via Exhibit 005, a letter from the Assistant commissioner of Police, Agodi Area Command, Ibadan to the officer in charge, Motor Licensing Office, Lagos. In response to Exhibit 005, the Lagos State Ministry of Transportation, Oyingbo Directorate replied in Exhibit 006 which was a formal reply to say that the vehicle was owned by M/S Built Form Int. Ltd, Segun Falana Estate, Challenge, Ibadan.

Incidentally, that tallies with the name of the firm where the appellant said he practices as an Architect at Ibadan. Whereas, the Mazda 626 with AM516 LND allegedly owned by the appellant was traced to the Mechanic where he said he had abandoned it for a while, the other Mazda 626 car with registration number HE 780 AAA allegedly driven by the appellant on the fateful day was not found.

A comparison between Exhibits 006 and 004 both supposed responses from the Lagos State Ministry of Transportation, on the inquiry made by the Police into the ownership of the two Mazda Cars connected with the investigation of this case leaves one in doubt as to the authenticity of Exhibit 004.

Whereas Exhibit 006 could pass as a formal response from the Lagos State Ministry of Transportation to the inquiry made by the

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Police, Exhibit 004 on the other hand leaves one guessing. It can only be at best a documentary hearsay, the contents of which the I.P.O cannot give direct oral evidence on. See the case of OBINWA OSUOHA V. THE STATE (2010) 16 NWLR (Part 1219)364 @ 400 commended to this court by Learned counsel to the appellant. At page 401 Paragraphs E-G of the said Judgment, Owoade, JCA had this to say of documentary hearsay. "In my opinion, in the instant case, Exhibit 'B' has no probative value. The maker of the document did not give evidence at the trial and therefore was not exposed to cross examination, Exhibit 'B' was based on information passed to the maker by third parties. What is more? The content of the Exhibit relates to the truth of the assertions and not merely the fact that it was made – when in fact neither the maker nor the tenderer of Exhibit "B" was capable of giving direct oral evidence of its content. A Court of law cannot attached probative value to such an exhibit.

The Court went on further to hold that for a document to be admissible under the provisions of S. 91 (1)(a) and (b) of the Evidence Act, including the proviso thereto, the document must be tendered by a person who can give direct oral evidence of the contents of the document. Otherwise it is not admissible. The fact that the

  
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document was pleaded does not matter. A document even though pleaded, does not become admissible evidence by that reason alone. It must be tendered by a person who has direct oral evidence to give on the document. The court then went on to hold that in the said case that the Exhibit 'B' did not have probative value as the maker of the document did not give evidence at the trial and was therefore not exposed to cross-examination. Exhibit B was based on information passed to the maker by third parties. The contents related to the truth of the assertions and not merely the fact that it was made, when in fact neither the maker nor the tenderer of Exhibit B was capable of giving direct oral evidence of its content. In the circumstance, the court held that it could not attach probative value to such an exhibit. See pages 401-402 paragraphs H-F.

If a piece of document is a documentary hearsay, it only means that the same is inadmissible.

In the instant case Exhibit 004 is one such documentary hearsay that ought not to have been relied upon by the trial Chief Magistrate in convicting the appellant. The intriguing aspect of this case is that the said Exhibit 004 was the link of the Police with the appellant who despite being linked by Exhibit 004 continued to deny

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This denial to my mind ought to have dictated to the Police in this case to do much more than it did.

As urged on this Court, the identity of who allegedly received or fraudulently converted from PW1 was crucial and needed to be proved. Counsel relied on:

NMLR 329

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To buttress the submission and to advance the argument that if the evidence of a witness is necessary or important, he must be called to establish or ventilate the justice of the case.

In the course of this Judgment, I had earlier observed that one of the flaws of the Prosecution in this case is establishing a strong case of identification of the appellant was their failure to call the Mr. Ojeniyi a NEPA Staff who the PW1 testified was alive at the time especially so as the appellant throughout the investigation and trial maintained that he was not the Ojeniyi whom the PW1 thought he was relating with at the material time.

On the effect of the failure of the Prosecution to call a vital witness in a criminal case, the Court of Appeal in OSUOHA V. THE STATE (Supra) @ Pp 411-412 Paragraphs H-B held that where an accused person mention in his statement to the Police that somebody else was responsible for the offence with which he was charged, it is necessary to call the Policeman who took down the statement to testify on any investigation he carried out, if any, in respect of such defence. Failure of the Prosecution to call a vital witness in a criminal case is fatal to its case, for, in such a situation, the Prosecution has not proved its case beyond reasonable doubt. Also, the failure of the

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prosecution and court to consider and examine a defence is a failure to perform a vital duty and is likely to lead to a miscarriage of justice.

OPEYEMI V. STATE (1985) 2 NWLR (PART 5) 101 and

AITUMA V. STATE (2006) 10 NWLR (Part 989) 452 referred to).

In the instant case, given its peculiar circumstances, it is my view that the Prosecution ought to have called the Mr. Ojeniyi who PW1 testified was his friend and who was at the material time a staff of NEPA in Iseying to establish that in point of fact, it was indeed the appellant who fraudulently obtained money from the PW1 and not the said Mr. Ojeniyi. The failure of the Prosecution to call the Ojeniyi in the face of the vehement denial of the appellant that he was not at the scene of crime on the fateful day, nor had he ever met the PW1, neither was he the owner or driver of the Mazda 626 car with Registration No. HE780AAA allegedly driven by the said Mr. Ojeniyi on the fateful day, leaves a huge doubt in the mind of the Court which ought to have been resolved in favour of the appellant. This court accordingly holds that such failure was fatal to the case of the Prosecution and same occasioned a miscarriage of justice against the

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appellant leading to his conviction for both counts of obtaining by false pretence and stealing.

Closely connected to that is the submission of Learned counsel to the Respondent that it is not in all cases that identification parade is necessary.

While one may agree with that proposition of the Law, one must not fail to add that in the peculiar premise of this case, the Police ought to have conducted an identification Parade to eliminate every doubt. It must not be forgotten that Mr. Ojeniyi was not being met by the PW1 for the first time but before the fateful transaction in this case, he had never met the appellant before. It may well be that if there had been many more men at the Police station on the day that the appellant reported there at the invitation of the Police but nevertheless the PW1 was able to recognize and identify the appellant from among them, the doubt about the identification process would have been eliminated. Be that as it may, the Police still ought to have conducted an Identification Parade given the peculiar history of this case.

In the case of OLAYINKA AFOLALU V. THE STATE (2010) 16 NWLR (Part 1220) 584, the Supreme Court held that Identification

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Parade is not a sine qua non to a conviction for a crime alleged but it is only essential in the following circumstances:

- (a) Where the victim did not know the accused before and his acquaintance with him was during the commission of the offence;
- (b) Where the Victim or witness was confronted by the offender for a very short time; and
- (c) where the victim due to time and circumstance might not have had the full opportunity of observing the features of the accused. (Per Adekeye, JSC (as she then was)) @ P. 31 Paragraphs A-C.

The above views were echoed by Hon. Justice J.O. Ige (rtd) of blessed memory in his book, a Compendium of Practice Notes Vol. 1 at Pp 153-155. His Lordship opined that the conduct of an identification parade is only essential in situations where:

- (i) The accused was not arrested at the scene of the crime and he denied taking part in the crime.
- (ii) The Victim did not know the accused before;
- (iii) The Victim was confronted by the accused for a very short time; and

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- (iv) The Victim due to time and circumstances might not have had full opportunity of observing the features of the accused – ORIMOLOYE V. STATE (1984) 10 SC 138; ISIBOR V. THE STATE (2002) 3 NWLR (Part 754) 250 were referred to.

In the peculiar circumstances of this case, the Police ought to have conducted an identification parade in order to afford the opportunity to the appellant to be seen to have been given a fair trial especially as he maintained throughout the investigation and trial that he had never met or seen the PW1 before, see again

YUNUSA ADAMU & ORS V. THE STATE  
(1991) LPELR 73 (SC) 6 SCNJ 33.

The failure of the Police to conduct an identification parade in my respectful opinion occasioned a miscarriage of justice.

Appellant in this appeal also raised the issue of the failure of the prosecution to have investigated the alibi he raised at the earliest stage in the course of the investigation in this case. The alibi it must be noted was raised by the appellant in his statement to the Police at the earliest stage in the course of investigation in this case. See –

  
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OTTI V. THE STATE (1993)

4 NWLR (Part 290) 675.

Having raised such a defence, it behoves of the Prosecution to have investigated it.

In IKECHUKWU NWAOGU V. THE STATE (2012)LPELR 15420 (C.A) the Court of Appeal held that indeed, the principle has been well settled that once an accused person raises a defence of alibi it behoves upon the Prosecution to conduct an investigation with a view to rebutting the allegation in question. Per Saulawa, JCA @ Pp 40-41 Paragraphs F-A

See again - AGBANYI V. THE STATE (1995) 1 NWLR (Part 269)1 @ 27 and

ESANGBEDO V. THE STATE (1980) 20 NSCC (Part 111) 23 @ 31.

In the peculiar circumstances of this case, Exhibit 004 which in the course of this judgment, I have held to constitute a documentary hearsay and as such inadmissible in the first place, yet is was the link of the Prosecution to the appellant, coupled with the failure of the Prosecution to investigate the alibi and also conduct an Identification Parade when the Prosecution ought reasonably to have conducted one

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leaves a huge gap in the whole prosecutorial process that on the whole, one cannot reasonably say that there has not been a miscarriage of justice leading to the conviction and sentencing of the appellant in this case.

Having also carefully considered the submissions of learned counsel to the Respondent on the competence or otherwise of the grounds of appeal filed by the appellant in this case from which the issues were formulated for the determination of this appeal, I am not persuaded that the interest of Justice will be served by a mechanical or pedantic interpretation or approach to the said grounds. What is more, this court has adopted the sole issue formulated by Learned Counsel to the Respondent for the determination of this appeal into which the court believes the two issues formulated by learned counsel to the appellant could be collapsed. The truth of the matter is that the Court is not misled by any of the grounds of appeal filed and even if the grounds attacked are discounted, there is no doubt that one or two others of the remaining grounds may be sufficient to sustain the appeal.

In the final analysis, this court finds merit in the appeal, the same succeeds.

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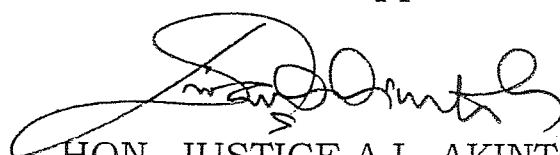
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Consequently, the conviction and sentencing of the appellant for the offences of obtaining by false pretence and stealing of the sum of N360,000.00 property of PW1 in this case are hereby reversed and set aside. In their stead, I hereby enter a verdict of acquittal on both counts of obtaining by false pretence and stealing respectively.

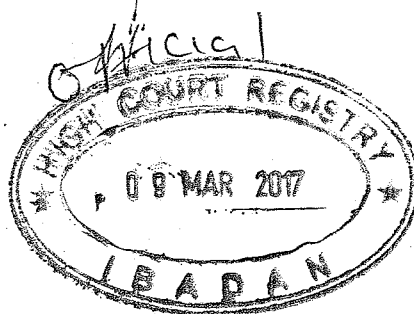
This shall be the judgment of this court in this appeal.



HON. JUSTICE A.L. AKINTOLA

JUDGE

07/02/2017.



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*S. R. BELLO (RM)*  
Principal Registrar

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