GUARD BOOK

IN THE COURT OF APPEAL
IN THE KADUNA JUDICIAL DIVISION
HOLDEN AT KADUNA
ON TUESDAY THE 4TH DAY OF DECEMBER, 2018
BEFORE THEIR LORDSHIPS

MASSOUD A. OREDOLA	**JUSTICE, COURT OF APPEAL**
IBRAHIM SHATA BDLIYA	**JUSTICE, COURT OF APPEAL**
OLUDOTUN A. ADEFOPE-OKOJIE	**JUSTICE, COURT OF APPEAL**

CA/K/155/C/2016

BETWEEN:

BALOGUN OLAITAN .....APPELLANT

VS.

FEDERAL REPUBLIC OF NIGERIA.....RESPONDENT

JUDGMENT

(DELIVERED BY OLUDOTUN ADEBOLA ADEFOPE-OKOJIE, JCA)

The Appellant was arraigned before the High Court of Kaduna State (hereafter referred to as "the lower Court"), together with a company, Disok International Ltd (referred to hereafter as the 2nd accused), on a six count charge of obtaining sums of money from several persons under false pretence and with intent to defraud, pursuant to *Section 1(1) (a) of the Advance Fee Fraud and Related Offences Act 2006* and punishable under *Section 1(3)* of the Act to wit:

"**Count one**

That you, Balogun Olaitan being the Managing Director of Disok International Ltd and Disok International Ltd on 23rd July, 2010 at Kaduna in the Kaduna Judicial Division of the High Court of Kaduna State with intent to defraud obtained the sum of N1,000,000.00 (One Million Naira) from one Edmond Nuhu Akawu through one Suleiman Usman a marketer in Disok International Ltd under the false pretence that you were going to invest it for him in the said company and to pay him 100% interest of the principal amount after Eighteen working days which you knew is false and thereby committed an offence contrary to Section 1(1) (a) of the Advance Fee Fraud and other Fraud Related Offences Act 2006 and punishable under section 1(3) of the same Act.

Count two

That you Balogun Olaitan being the Managing Director of Disok International Ltd and Disok International Ltd on 21st July, 2010 at Kaduna in the Kaduna Judicial Division of the High Court of Kaduna State with intent to defraud obtained the sum of N50,000.00 (Fifty Thousand Naira) from on Suleiman Usman under the false pretence that you were going to invest it for him in Disok International Ltd and to pay him 100% interest of the principal amount after Eighteen working days which you knew is false and thereby committed an offence contrary to Section 1(1) (a) of the Advance Fee Fraud and Other Fraud Related Offences Act 2006 and punishable under section 1(3) of the same Act.

Count three

That you, Balogun Olaitan being the Managing Director of Disok International Ltd and Disok International Ltd on 22nd July, 2010 at Kaduna in the Kaduna Judicial Division of the High Court of Kaduna State with intent to defraud obtained the sum of N20,000.00 (Twenty Thousand Naira) from one Suleiman Usman under the false pretence that you were going to invest it for him in Disok International Ltd and to pay him 100% interest of the principal amount after Eighteen working days which you knew is false and thereby committed an offence contrary to section 1(1) (a) of the Advance Fee Fraud and Other Fraud Related Offences Act 2006 and punishable under section 1(3) of the same Act.

Count four

That you, Balogun Olaitan being the Managing Director of Disok International Ltd and Disok International Ltd on 21st July, 2010 at Kaduna Judicial Division of the High Court of Kaduna State with intent to defraud obtained the sum of N10,000.00 (ten thousand naira) from one Suleiman Usman under the false pretence that you were going to invest it for him in Disok International Ltd and to pay him 100% interest of the principal amount after Eighteen working days which you knew is false and thereby committed an offence contrary to section 1(1) (a) of the Advance Fee Fraud and Other Fraud Related Offences Act 2006 and punishable under Section 1(3) of the same Act.

Count five

That you, Balogun Olaitan being the Managing Director of Disok International Ltd and Disok International Ltd a Limited Liability

Company, on 5th August, 2010 at Kaduna Judicial Division of the High Court of Kaduna State with intent to defraud obtained the sum of N50,000.00 (fifty thousand naira) from one Abdullahi Abdulrahman through one Mercy Johnson a marketer in Disok International Ltd under the false pretence that you were going to invest it for him in the said company and to pay him 100% interest of the principal sum after Eighteen working days which fact you knew is false and thereby committed an offence contrary to section 1 (1) (a) of the Advance Fee Fraud and Other Fraud Related Offences Act 2006 and punishable under section 1(3) of the same Act.

Count six

That you, Balogun Olaitan being the Managing Director of Disok International Ltd and Disok International Ltd on 23rd July, 2010 at Kaduna Judicial Division of the High Court of Kaduna State with intend to defraud obtained the sum of N100,000.00(one hundred thousand naira) from one Salome Paul through one Suleiman Usman a marketer in Disok International Ltd under the false pretence that you were going to invest it for her in the said company and to pay her 100% interest of the principal amount after Eighteen working days which you knew is false and thereby committed an offence contrary to section 1(1) (a) of the Advance Fee Fraud and Other Fraud Related Offences Act 2006 and punishable under Section 1(3) of the same Act".

The Appellant pleaded not guilty to all the counts. The 2nd Accused was not represented when the counts were read and did not cause an appearance to be entered on its behalf. A plea of Not Guilty was accordingly entered in its favour. Six witnesses testified for the prosecution, tendering 17 documents, in multiples, while the Appellant was the sole witness in his defence. Following conclusion of evidence and the exchange of written addresses, the lower Court, in a considered judgment, convicted the Appellant and the Company on Counts 1,2,3,4 and 6, while they were discharged on Count 5. The Appellant was sentenced to a prison term of eight years on each count, however to run concurrently. The 2nd accused was sentenced to pay a fine of N50,000.00 on each count.

Dissatisfied by this judgment, the Appellant appealed to this Court, by Notice of Appeal filed on 21/12/15. This Notice was subsequently amended with leave of this Court granted on 20/10/17 and later amended, the extant Notice of Appeal being the Further Amended Notice of Appeal filed on 11/12/17 but deemed by this Court as properly filed on 23/4/18, containing seven grounds of appeal.

In prosecution of the appeal, the Appellant filed an Appellant's Brief of Arguments dated 9/12/17 and filed on 11/12/17 but deemed by this Court as properly filed on 23/4/18, prepared by **Habeeb Oredola Esq** of **Habeeb Oredola & Associates**, in which five (5) issues for determination were distilled, as follows:

1. **Whether the learned trial Judge erred in law when he relied on the testimony of PW1, PW2 and PW4 in the absence of any evidence to corroborate their testimony before convicting the Appellant.**
2. **Whether having regard to the circumstances and from the totality of the evidence on record, the lower court was right in holding that the Appellant is personally and criminally liable for the Act of the 2nd Accused person, a distinct and separate legal entity.**
3. **Whether the conviction of the Appellant based on inconclusive investigation is sustainable.**
4. **Whether the decision of the trial court ought to be set aside in view of the failure of the trial court to properly evaluate the defence of the appellant of honest mistake.**
5. **Whether the Respondent proved the ingredients of the charge against the Appellant beyond reasonable doubt?**

In response, the Respondent's Counsel, **Joshua Saidi of the Economic and Financial Crimes Commission**, filed a Brief of arguments on 25/4/18 in which four (4) issues were formulated for this Court's determination, namely:

1. **Whether the prosecution has proved its case beyond reasonable doubt to warrant the conviction and sentence of the Appellant.**
2. **Whether the trial court failed to consider and evaluate any defence of the Appellant before arriving at its judgment.**
3. **Whether PW1, 2 and 4 are tainted witnesses whose evidence require corroboration.**
4. **Whether the Appellant is a mere employee of Disok International Ltd. and therefore cannot be criminally liable for the offence of his master (Disok International Ltd).**

The learned counsel to the Respondent also filed on 25/4/18, a **Notice of Preliminary Objection,** seeking the following:

"An Order to strike out the Further Amended Notice of Appeal of the Appellant/Respondent dated 9/12/17 and filed on 11/12/17 for being incompetent".

The Grounds upon which the Preliminary Objection is brought are the following:

1. **The Notice of Appeal of the Appellant dated 9th and filed on the 11th December, 2017 was not signed by the convict personally as required under Order 17 Rule (4) (1) of the Court of Appeal Rules 2016.**

2. **The Notice of Appeal of the Appeal dated 9th and filed on the 11th December, 2017 is incompetent in that it did not state the Names and the Addresses of the persons directly affected by the Appeal.**

3. **The grounds and their particulars as framed are therefore incompetent.**

Arguments of the Respondent in respect of the Notice of Preliminary Objection were contained in the Respondent's Brief of Arguments. To this, the Appellant filed a Reply Brief of Arguments, which also contained a response to arguments canvassed by the Respondent in respect of the substantive appeal. The Notice of Preliminary Objection shall, in consequence be taken first, as if successful, may determine this appeal.

Respondent's Counsel, distilled a sole issue for determination of the Preliminary Objection, as follows:-

Whether the Notice of Appeal having not been signed by the Appellant personally and also not containing the names and addresses of parties affected by the appeal as required by the rules is not incompetent.

Arguing this issue, learned Counsel to the Respondent submitted that a Notice of Appeal is an originating process, the spinal cord of an appeal and the foundation upon which it is based. Any defect in it will render the appeal incompetent and consequently rob the court of its jurisdiction. He cited the case of *A.G. Federation vs. Guardian Newspaper Ltd (1999) NWLR (Part 618) 187.*

Learned Counsel submitted further that in a Criminal Appeal, the personal signing of the Notice of Appeal by the Appellant is a condition precedent to the exercise of the Court's jurisdiction to hear and determine the appeal as required under Order 17 Rule (4) (1) of the Court of Appeal Rules 2016 except as provided under Rules (5) and (6) thereof. Pointing to Exhibit EFCC 1 attached to the Notice of

Preliminary, he stated that the Appellant did not personally sign the Notice of Appeal but his Counsel.

He contended that as the Appellant has not shown that he falls within the exceptions that are provided for under the rules, the same is accordingly defective and cannot give rise to any valid appeal.

He cited the cases of *Tanimu v Rabiu (2017) All FWLR Part 900 Page 391, Ikechukwu v. FRN (2015) 7 NWLR (Part 1035)1* and *Duru vs FRN (2013)6 NWLR (Part 1351)441.*

Learned Counsel submitted further that a valid Notice of Appeal must contain the names and addresses of persons directly affected by the appeal as provided in Order 6 Rule 2 of the Court of Appeal Rules 2016, which was lacking in this case.

Appellant's Counsel in the Appellant's Reply Brief insisted that the Appellant's Further Amended Notice of Appeal is competent and properly signed in accordance with Order 17 Rule 4 of the Court of Appeal Rules, 2016, citing the case of *Dr. Ajewumi Bili Raji v University of Ilorin & Ors. (2018) LPELR -44692 (SC).*

He submitted further that the Rules of this Court on criminal appeals do not specifically provide for the content and requirement of a Notice of Appeal or expressly state that names and addresses of the person to be affected by an appeal should be specified as done in a civil case. In any event, failure to so state has been held to be a mere irregularity that does not invalidate the appeal, he submitted, citing the case of *Eronini vs Eronini (2013) NWLR (Part 1373)32 at 48* and *Jailbit Ventures (Nig) Ltd v Almajir (2010) 7 NWLR Part 1193 Page 292 at 308.*

The importance of a valid Notice of Appeal to the competence of a case is no longer a matter for dispute. It has been held to be the spinal cord of an appeal and the foundation upon which an appeal is based. An appeal will collapse if the Notice of Appeal is defective. See ***Tanimu v Rabiu (2018) 4 NWLR Part 1610 Page 505 at 521 Para B-D; (2017) All FWLR Part 900 Page 391 at 409 Para C*** per ***Kekere-Ekun JSC; Okpe v Fan Milk Plc (2017) 2 NWLR Part 1549 Page 282 at 318-319 Para H-B*** *per* ***Ariwoola JSC; Allanah v. Kpolokwu (2016) 6 NWLR Part 1507 Page 1 at 41 Para B-D*** *per* ***Galadima JSC***

It thus remains to see whether the Notice of Appeal filed by the Appellant was defective.

The relevant rule that governs persons who may sign a Notice of Appeal, with respect to criminal appeals, is **Order 17 Rule 4 of the Court of Appeal Rules 2016**, which states as follows:

4. (1) Every notice of appeal or notice of application for leave to appeal or notice of application for extension of time within which such notice shall be given, shall be signed by the Appellant himself or by his legal representative except under the provision of sub-rules (5) and (6) of this Rule.

(2) Any other notice required or authorized to be given shall be in writing and signed by the person giving the same or by his legal representative. All notices required or authorized to be given shall be addressed to the registrar of the court below to be forwarded by him to the Registrar; Provided that, notwithstanding that the provisions of Rules 3(1) and (2) and 4 (1) of this Order have not been strictly complied with, the Court may, in the interest of justice and for good and sufficient cause shown, entertain an appeal if satisfied that that the intending appellant has exhibited a clear intention to appeal to the Court against the decision of the lower court.

(5) Where on the trial of a person entitled to appeal it has been contended that he was not responsible according to law for his actions on the ground that he was insane at the time the act was done or the omission made by him or that at the time of the trial he was of unsound mind and consequently incapable of making his defence, any notice required to be given and signed by the Appellant himself may be given and signed by his legal representative.

(6) In the case of a body corporate where any notice or other document is required to be signed by the Appellant himself, it shall be sufficient compliance therewith if such notice or other document is signed by the secretary, clerk, manager or legal representative of such body corporate.

Emphasis Mine

Order 7 Rule 2(1) of the Court of Appeal Rules *Supra* (and not Order 6(2) wrongly stated by the Respondent's Counsel) provides as follows:

All appeals shall be by way of rehearing and shall be brought by Notice (hereinafter called "the Notice of Appeal") to be filed in the registry of the court below which shall set forth the grounds of appeal stating whether the whole or part only of the decision of the court below is

complained of (in the latter case specifying such part) and shall state also the exact nature of the relief sought and the names and addresses of all parties directly affected by the appeal, which shall be accompanied by a sufficient number of copies for service on such parties

The initial Notice of Appeal in this case is contained at **Pages 189-191** of the Record of Appeal. This Notice, dated 21/12/15, filed on the same date, was signed by the Appellant and contained the Respondent's address for service, as **"Legal Prosecution Unit, Economic and Financial Crimes Commission, No. 5 Danube Close, Maitama, Abuja**, in compliance, I hold, with **Orders 17 Rule 4** and **Order 7 Rule 2(1) of the Court of Appeal Rules** *Supra.*

The Further Amended Notice of Appeal dated 9/12/17, filed on 11/12/17 but deemed with the leave of this Court as properly filed on 23/4/18 and which is the extant Notice of Appeal, is signed by **Habeeb Oredola Esq** of **Habeeb Oredola & Associates of 29A Araromi Street, Off Moloney Street, Lagos Island, Lagos, Nigeria.** It also contained the same address for service of the Respondent and also an "Address for service" on the Respondent "within jurisdiction" of **"No. 4 Wurno Road, Kaduna, Kaduna State".**

Order 17 Rule 4 (1) of the Court of Appeal Rules 2016 Supra, it is clear, gives the Appellant's legal representative the mandate to sign the Notice of Appeal.

With respect to the Respondent's contention on the Appellant's failure to state the names and addresses of all parties affected by the appeal, in compliance with **Order 7 Rule 2(1) of the Court of Appeal Rules** *Supra* (and not Order 6(2) wrongly stated by the Respondent's Counsel), I agree with the Appellant's Counsel that a similar provision as relate to Criminal Appeals, under **Order 17** above is absent. This notwithstanding, as shown above, both Notices of Appeal contained addresses for service and were thus in compliance with Order 7 (2) (1) above.

In any event, it has been held that the failure to state the names and addresses of the persons directly affected by an appeal in a Notice of Appeal is a mere irregularity that will not void or render the Notice of Appeal invalid or incompetent. See ***Eronini v Eronini (2013) 14 NWLR Part 1373 Page 32 at 48 Para B-C*** *per* ***Abba Aji JCA*** **and** ***Jailbait Ventures (Nig) Ltd v Almajir (2010) 7 NWLR Part 1193 Page 292 at 308 Para A-B*** *per* ***Orji-Abadua JCA.***

I note that the Respondent's Counsel has canvassed no arguments on his contention that the grounds and their particulars as framed are incompetent. I agree with the Appellant's Counsel that this failure connotes an abandonment of this ground of objection, for, as held by this Court, in the case of ***Ali v Albishir (2008) 3 NWLR Part 1073 94 at 135 Para D-E*** *per* ***Kekere-Ekun JCA*** *(as she then was):*

"Where no argument is advanced in the brief in support of a ground of preliminary objection, the ground will be deemed abandoned and accordingly struck out".

I find the Preliminary Objection to be entirely without merit and dismiss it.

Now, to the substantive appeal. The issues formulated by both Counsel, I note, are similar and are accordingly adopted by me, albeit with slight modifications for succinctness, as follows:

1. **Whether PW1, PW2 and PW4 are tainted witnesses whose evidence requires corroboration.**
2. **Whether in the circumstances of the case, the Appellant can be held criminally liable.**
3. **Whether the trial Court failed to consider and evaluate the defence of the Appellant**
4. **Whether the prosecution proved its case against the Appellant beyond reasonable doubt.**

The 1st issue for determination is:

Whether PW1, PW2 and PW4 are tainted witnesses whose evidence requires corroboration.

Testifying for the prosecution, as aforesaid were six witnesses. The witnesses regarded as "tainted" witnesses by the Appellant's Counsel are PW1, PW2 and PW4.

The evidence in chief of **PW1, Mercy Jonah**, described as a business woman, is at **Page 135-136** of the Record. Her cross-examination is at **Page 153**. Her evidence is that she got to know of the 2nd accused and went to the office of the Appellant to enquire what the company is all about. She met the Appellant and was told by him that if she invests for 15 days, her repayment will be 100%. Following confirmation of their reliability from a "white lady" whose number she was given by the Appellant to call, she invested the sum of N100,000.00 and got her mother and some of her friends also to invest. Her mother invested the sum of N200,000.00. However, a week before the maturity of her investment, she

went to the office of the Appellant and 2nd accused only to find it closed. The Appellant initially accepted their calls, only to tell them that he was at CBN having some problems, and after solving them would get back to them. Thereafter his lines went dead. He never returned, neither did he repay their money.

Under a brief cross examination, she insisted:

"I told this Court earlier that I gave 2nd accused N100,000.00 and a receipt was issued to me. I still maintain that story. I have the receipts with me."

The evidence of **PW2, Suleiman Usman**, a student at Nuhu Bamalli Polytechnic, contained at **Page 141** of the Record, is that he got to know of the 2nd accused through fliers about investment prospects yielding returns in 2-4 weeks. He went to the office of the 2nd accused to make enquiries and met the Appellant as Manager of the 2nd accused. He asked him questions, such as the registration of the company and was shown a copy of the certificate of registration. The Appellant told him that if he invests for more than a month, he will be given more than 100% but will be given 100% if he invests for 2-4 weeks. He wrote an application and paid the sums of N10,000.00, N50,000.00 and N10,000.00 in three batches. For the investment of N10,000.00 he would be paid N23,000.00; for the N50,000.00 he would be paid N115,000.00 principal and interest and for the N20,000.00 he would be paid N43,000.00, representing refund of the principal together with the interest accrued. He was issued receipts for these payments.

The witness further testified that he wrote an application for employment as a marketer to the 2nd accused, whose duty is to "advertise to people to come and invest". He secured some investors, which names he gave. On the date he was to reap his investment he found the office locked up and saw a crowd. The witness was not cross examined.

The evidence of **PW 4, Rabi Sule**, at Page **149** of the Record, is that while looking for a job, she saw an advertisement by the 2nd accused for "foreign investment". She was told by the Appellant to apply for the post of marketing representative. She was accepted by the Appellant. When she resumed, she enquired about the genuiness of the business and was reassured by the Appellant, who told her they have a partner in London. He informed her that investors get 100% of their investment after 15 days. She thereupon invested and got her sisters and others to invest varying amounts. After one week of the investment, she went to the office of the Appellant and found it closed. She met others there, complaining that they met the door locked. The telephone number

of the Appellant was not going through, in consequence of which they laid a complaint to the EFCC.

The cross examination of this witness revolved around whether the culpability was that of the Appellant and not the 2nd accused.

The learned Counsel to the Appellant has submitted that the trial Judge erred in law when he solely relied on the evidence of PW1, PW2 and PW4 in convicting the Appellant, as they are tainted witnesses whose evidence, in the absence of an independent and credible evidence in corroboration thereof, is grossly unsafe and cannot be relied upon by any court of law in convicting an accused person. He cited, for the definition of "tainted witness", the case of *Bassey vs. State (2016) LPELR, 42060, Page 10.*

He further submitted that PW1, PW2 and PW4 who were also the employees of the 2nd accused person and actively participated in the transactions which forms the subject matter of the charge herein by collecting funds from some person who claimed to have invested in the business of the 2nd Accused and indeed benefitted from the proceeds of the funds invested in 2nd Accused, are accomplices in law and ought to have been prosecuted along with the Appellant by the Respondent.

Learned Counsel further submitted that the Respondent, having failed to provide independent evidence to corroborate the evidence of the said witnesses, and the learned trial Judge having failed to warn himself before placing reliance on the evidence of the said witnesses has erred in law, occasioning a miscarriage of justice. Learned Counsel further contended that all the marketers of the 2nd Accused (Including the PW1, PW2 and PW4) were usually given 10% of the deposit/investment made by persons who they personally convinced to invest in the 2nd Accused business and are thus accomplices/accessories to the crime. He cited the case of *Utteh vs. State (1992)2 NWLR (Part* 223)257; *(1992) LPELR 6239, Page 12 Paras C-F* in defining an accomplice.

Learned Counsel cited the case of *Aikhedueki vs The State (2013) LPELR-20806* where the Supreme Court held that evidence of an accomplice requires corroboration and it is very unsafe to convict thereon. He submitted that the evidence of witnesses which by itself requires corroboration cannot be used to corroborate the evidence of the other witnesses.

The Respondent's Counsel, in his Brief of Arguments, defining who a tainted witness is, denied that these witnesses were tainted witnesses but that they were all victims of the crime perpetrated by the Appellant, notwithstanding the fact that PW2 and PW4 were in the employ of the Appellant and the 2nd accused

company. Their evidence, he submitted, was unassailable and the mere fact that the witnesses were the employees of the company charged alongside the appellant, does not render their evidence unreliable. He submitted further that this issue was not raised before the lower Court and cannot be raised before this Court for the first time, without the leave of this Court. He cited the cases of *Obidike v State (2014) 10 NWLR Part 1414 Page 53, Jatau Ahmed (2003) 4 NWLR Part 811 Page 498, Onuoha v State (1987) 4 NWLR Part 65 Page 331, Oteki v A/G Bendel State (1986) 2 NWLR Part 24 Page 648, Ezeuko v State (2016) 6 NWLR Part 1509 Page 599 F-G*

A tainted witness was defined by the ***Supreme Court*** in the case of ***Israel Pius V. The State (2015) 7 NWLR Part 1459 628 at 639 Para A-C; LPELR-24446(SC)*** *per* ***Rhodes-Vivour JSC*** as follows:

"A tainted witness should be limited to a witness who is either an accomplice or by the evidence he gave, whether as witness for the prosecution or defence, may and could be regarded as having some purpose of his own to serve.

Evidence of a witness categorized as tainted can only be admitted with extreme caution after the trial judge warns himself. There must be corroboration before evidence of an accomplice is admitted."

In ***Anthony Itu v The State (2016) 5 NWLR Part 1506 Page 443 at 468 Para C-H; (2016) LPELR-26063(SC)***, it was held, per ***Sanusi JSC***, as follows:

"My understanding of a "tainted witness" is that he is one witness who is either an accomplice or by the evidence he gives whether for the prosecution or for the defence may and could be regarded as having some purpose of his own to serve. See Omotola v. State (2009) 7 NWLR (Part 1391) 148 at 177. The appellant did not show that PW1 had any interest to serve besides giving the true account and real picture of what transpired between herself and the accused/appellant which led to the latter's death. In the above mentioned case of Omotola, this Court stated thus Ogbuagu JSC:-

"A case is not lost on the ground of those who are witnesses are members of the same family or community. What is important is their credibility and that they are not tainted witnesses. This is because the prosecution should not be encouraged to call hired witnesses especially in murder cases or capital offences. Justice will be defeated if the prosecution of any accused person can only commence when and only when the witnesses are neither related to the accused nor are non-

members of the same family. Thus evidence of a relation can be accepted if cogent enough to rule out the probability of deliberate falsehood and bias".

In ***Ezeuoko v State (2016) 6 NWLR Part 1509 Page 529 at 599 Para F-G,*** the ***Supreme Court***, per ***Peter-Odili JSC***, subsequent to defining a tainted witness, held:

"I believe it is taking it too far, that merely because the PW1 had a nasty encounter with the Appellant in the past she should be classified as a tainted witness even though she was a victim and an eye witness. This is because while a tainted witness needs his evidence corroborated, PW1 in her position of victim and an eye witness needs no corroboration to have her evidence accepted without discredit."

Defining who an accomplice is, the **Supreme Court**, in ***Utteh v State (1992) 2NWLR Part 223 Page 257 at 269 Para E-G,*** per ***Kawu JSC*** defined this term to include:

"(a) a participant in the actual crime charged (participis criminis);

(b) a receiver of the property in respect of which the accused is accused of stealing;

(c) "where a person is charged with a specific offence on a particular occasion, and evidence is admissible and has been admitted of having committed crimes of identical type on other occasions, as proving system or intent or negativing accident, parties to such other similar offences."

In the instant case, these witnesses were shown to have been drawn by the mouth-watering dividends offered and decided to invest in the business, tendering their receipts in proof. The fact that they were subsequently employed as marketers by the Appellant, on a commission basis to attract investors, without proof that they were party to the fraud, cannot, I hold, label them as accomplices to the crime, participants to the scam or receivers of the "invested" funds. None of the receipts issued for the investment were in their names, as to suggest the contrary but were in the name of the 2nd accused.

They can also not be regarded as having some purpose of their own to serve, besides giving the true account and real picture of what transpired between themselves, the Appellant and 2nd accused. They thus cannot, by the definitions

in the cases above, be termed tainted witnesses whose evidence needed corroboration.

On the contrary, the evidence of the witnesses show that they were victims of the fraud and, by the unchallenged evidence of PW4, it was when she and other investors discovered the fraud that they made a report to the EFCC.

Not being classified as tainted witnesses, their evidence did not require corroboration, I hold.

In any event, there was sufficient corroboration of their testimony by PW5, a similar investor, and PW3 and 6, operatives of the EFCC who investigated the crime and tendered receipts issued to similarly scammed investors.

Indeed, as rightly submitted by the Respondent's Counsel, this was not an issue raised by the Appellant before the lower Court and cannot be raised as an issue before this Court, without the leave of this Court first had and obtained. See ***Oforishe v Nigerian Gas Company Ltd (2018) 2 NWLR Part 1602 Page 35 at 57 Para F-G*** *per* ***Rhodes-Vivour JSC; Sogunro v Yeku (2017) 9 NWLR Part 1570 Page 290 at 311 Para C*** *per* ***Nweze JSC; Idufueko v. Pfizer Products Ltd (2014) 12 NWLR Part 1420 Page 96 at 122 Para A*** *per* ***Galadima JSC.***

The said witnesses, not being "tainted witnesses", the lower Court, I accordingly hold, was not in error in failing to have warned itself of the danger of relying on their evidence without corroboration.

I accordingly resolve the 1st issue for determination against the Appellant.

The 2nd 3rd and 4th issues for determination are inter-related and shall accordingly be treated together.

These issues, to recapitulate, are the following:

2. **Whether in the circumstances of the case, the Appellant can be held criminally liable.**
3. **Whether the trial Court failed to consider and evaluate the defence of the Appellant.**
4. **Whether the prosecution proved its case against the Appellant beyond reasonable doubt.**

Learned Counsel to the Appellant has submitted that the prosecution is saddled with the burden of proving all the elements of the offence an accused person is

charged with beyond reasonable doubt, citing *Richard vs The State (2013) LPELR 22137, Pages 14-15, Paras A-E* and *Nnajiofor vs People of Lagos State (2015) LPELR-24666, Page 24.*

He also cited *Aguba vs Federal Republic of Nigeria (2014) LPELR – 2321* and *Ugo-Ngadi vs Federal Republic of Nigeria (2015) LPELR 24824* on the elements to be established in proof of the offence of obtaining by false pretence, which elements, he submitted, were not proved, as the evidence given was unreliable and the investigation inconclusive. Instead, the burden of disproving his guilt was shifted to the Appellant, and was an abuse of his right to fair hearing as enshrined in Section 36(5) of the Constitution and Section 135 of the Evidence Act, 2011.

Learned Counsel to the Respondent conceded that in a criminal trial, the burden of proof rests solely on the prosecution to prove the offence beyond reasonable doubt. Proof beyond reasonable doubt does not however mean proof beyond all iota of doubt but that what is required is that the ingredients of the offence charged should be proved by the prosecution. The term should therefore not be stretched beyond reasonable limits, he submitted, citing the case of *Adekoya vs. State (2017) 7 NWLR (Part 1565) 343, Nwaturuocha vs. State (2011)6 NWLR (Part 1242)170* and *State vs. Ekenem (2017)4 NWLR (Part 1554)85.*

Respondent's Counsel, further citing the case of *Edo vs. FRN (2001)1 NWLR (Part 695)502* on the requirements for successful proof under *Section 1(1) (a) of the Advance Fee Fraud and other Fraud Related Offences, Act 2006,* pursuant to which the Appellant was charged, submitted that the requirements for this offence were satisfied, referring to the evidence of the prosecution witnesses especially PW1, 2, 4 and 5 and exhibits which were tendered without objection. He pointed to the admission in Exhibit 5, the statement of the Appellant, in which he admitted the collection of the investment from the marketers by the accountant and which he later handed over to the emissary sent by the directors.

Counsel contended that contrary to the submissions of the Appellant's Counsel, the trial court properly evaluated the defence of the Appellant before rejecting the same. The evidence of PW2 was not challenged, he submitted, as he was not cross examined, which evidence principally corroborated the evidence of PW1 and which evidence was also corroborated by PW4.

Learned Counsel to the Appellant in his Reply Brief, apart from restating arguments canvassed in the substantive brief contended that the arguments of the Respondent in this respect were speculative and was not borne out of evidence adduced on the record before the lower court. Citing the case of *Omidiora vs FCSC (2007)14 NWLR (Part 1053)17 @ 35* he submitted that Counsel's address cannot take the place of evidence.

It is settled law that the burden of proof in criminal cases, by **Section 135 of the Evidence Act 2011,** is on the prosecution and is by proof of the offence beyond reasonable doubt. See ***Busari v State (2015) 5 NWLR Part 1452 Page 343,*** **per** ***Muntaka-Coomasie JSC at Pages 365 Para F-G; Ani v State (2009) 16 NWLR Part 1168 Page 443 at 457-458 Para F-B,*** **per** ***Tobi JSC.***

Proof beyond reasonable doubt has been held not to mean proof beyond a shadow or iota of doubt or proof to the hilt, but proof with a high degree of probability that the offence was committed.

On this latter principle, the ***Supreme Court***, in the case of ***Nwaturuocha v State (2011) 6 NWLR Part 1242 Page 170 at 186 Para E-G,*** held, per ***Fabiyi JSC:***

"…. **proof beyond reasonable doubt as evolved by Lord Sankey, L. C. in Woolmington v. DPP (1935) AC 485 is not proof to the hilt' as stated by Denning, J., as he then was, in Miller v. Minister of Pensions (1947) 3 All ER 373. It is not proof beyond all iota of doubt as stated by Uwais, CJN in Nasiru v' The State (1999) 2 NWLR (Pt.589) 87 at 98. One thing that is certain is that where all the essential ingredients of the offence charged have been proved or established by the prosecution, as done in this matter, the charge is proved beyond reasonable doubt... Proof beyond reasonable doubt should not be stretched beyond reasonable limit."**

Rhodes-Vivour JSC, contributing, agreeing that proof beyond reasonable doubt does not mean proof beyond all doubt or all shadow of doubt, held, at ***Page 193-194 Para E-A***:

"It simply means establishing the guilt of the accused person with compelling and conclusive evidence. A degree of compulsion which is consistent with a high degree of probability"

See also ***Udo v State (2016) 12 NWLR Part 1525 Page 1 at 43 Para A-B,*** *per* ***Peter-Odili JSC*** and ***Adekoya v State (2017) 7 NWLR Part 1565 Page 343*** **at** ***361 Para B-C*** by the same learned jurist.

By **Sections 135(3), 136(1), 139(1)** of the **Evidence Act** *Supra*, this burden may shift, as the burden of proving reasonable doubt or that a particular fact brings the accused within any exemption or exception, shifts to the accused.

It is necessary, at this stage to set out the provisions of the Act under which the Appellant was charged and whether the requirements for the constitution of the offence had been satisfied.

Section 1(1)(a) of the Advance Fee Fraud and Other Fraud Related Offences Act 2006, provides as follows:

SECTION 1

1. **Notwithstanding anything contained in any other enactment or law, any person who by any false pretence, and with intent to defraud**

   (a) obtains, from any other person, in Nigeria or in any other country for himself or any other person; or

   (b) induces any other person, in Nigeria or in any other country, to deliver to any person; or

   (c) obtains any property, whether or not the property is obtained or its delivery is induced through the medium of a contract induced by the false pretence, commits an offence under this Act.

2. **A person who by false pretence, and with the intent to defraud, induces any other person, in Nigeria or in any other country, to confer a benefit on him or on any other person by doing or permitting a thing to be done on the understanding that the benefit has been or will be paid for commits an offence under this Act.**

3. **A person who commits an offence under subsection (1) or (2) of this section is liable on conviction to imprisonment for a term of not more than 20 years and not less than seven years without the option of a fine.**

The essential ingredients of the offence are accordingly the following:

(a) that there was a pretence;
(b) that the pretence emanated from the accused person;
(c) that the pretence was false;
(d) that the accused person knew of the falsity of the pretence, did not believe its truth;

(e) that there was an intention to defraud;
(f) that the property or thing is capable of being stolen;
(g) that the accused person induced the owner to transfer his whole interest in the property

See ***Onwudiwe v FRN (2006) 10 NWLR Part 988 Page 382 at 431-432 Para H-B per Tobi JSC; Aguba v FRN (2014) LPELR -2321,*** per ***Saulawa JCA***:

In ***Aguba v FRN Supra,*** further to restating these ingredients, this Court held, per ***Saulawa JCA***:

"The term false pretenses denotes the offence (crime) of knowingly obtaining title to another person's property by misrepresenting a fact with the intent to defraud that person. Also termed obtaining property by false pretenses; fraudulent pretenses; larceny by trick; embezzlement, et al. See BLACK'S LAW (Supra) @ 678.

The crime of obtaining money by false pretenses (pretence) has been aptly defined under the Advanced Fee Fraud and Fraud Related Offences Act, (Supra) thus:

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, either past or present which representation is false in fact or law, and which the person making it knows to be false or does not believe to be true."

By virtue of Section 418 of the Criminal Code Act CAP. C38 Laws of the Federation of Nigeria, 2006, the term false pretence has been defined thus:

"Any representation by words, writing, or conduct of a matter of fact either past or present, which representation is false in fact and which the person making it knows to be false or does not believe to be true is false pretence."

In the instant case, in addition to the evidence of PW1, 2 and 4, which I have given a summary of above, **PW5, Salome Paul Adamu**, similar to the evidence of the earlier witnesses, stated that she saw a flier with her colleague stating the percentage investors would earn within 15 days of their investment. On this flier were Nigerian and International numbers. She called the Nigerian number and one Suleiman was sent to her, who took her to the Appellant, introducing the Appellant as his "boss". The Appellant confirmed the statement made in the flier.

She invested N440,000.00 for herself and her siblings and was issued a receipt, which receipts were tendered in evidence as Exhibits 10-14. She stated that when the investment "was ripe", the Appellant was nowhere to be found.

In her brief cross examination, she stated that she gave the 2nd accused N100,000.00 and that a receipt was issued to her.

The investigators in the case from EFCC testified as PW3 and PW6. They gave evidence of the petition written to the EFCC which was assigned to them for investigation, giving the various roles they played, by going to the Corporate Affairs Commission to obtain copies of the incorporation documents of the 2nd accused. Also their efforts in tracing the Appellant, later locating another office at Mararaba in Nassarawa State in a different name, Trade Link Ltd, also run by the Appellant, which office was also locked. They mounted a surveillance on the office. One of the staff came to the office and was arrested. With the aid of a search warrant, they searched the office at Mararaba and recovered a large number of receipts of the 2nd accused in respect of payments made by investors. They also recovered the Certificate of Incorporation of the 2nd accused as well as that of Trade Link Nig Ltd. Also recovered were fliers of the 2nd accused as well as an ID card of the Appellant in which he described himself as the MD of Trade Link.

The 13 receipts recovered, including one issued in the name of PW5, were tendered in evidence as Exhibits 15A-15M. Also tendered was the flier of the 2nd accused. Further tendered were the incorporation documents of the 2nd accused obtained from the Corporate Affairs Commission. Though they were informed the Appellant had ceased coming to the office, they were able to apprehend some staff, one of whom gave them Appellant's account details. They wrote to the Bank to help them trace the Appellant through his transactions. The Appellant went to the bank at Gboko, from where he was arrested. The statements made by him were tendered in evidence as Exhibits 4,5 and 6.

The Appellant was the sole witness in his defence. His defence is that he is an employee of the 2nd accused and was employed by one Alhaji Hakeem and Alhaji Idris to manage an office in Kaduna. He denied that he is the Managing Director or a shareholder and does not know the name of the Managing Director. He also denied collecting money from the investors as this was done by the marketers who then handed the money over to the Accountant. His role was to know how much was collected each day. He also verified the receipts of the collection. He denied that he employed the marketers but that it was Mr. Williams, who works along the Accountant, who did this. He denied signing any of the receipts or obtaining money by false pretences.

Under cross examination he stated that he was once Manager of Trade Links. He denied employing PW1 and PW2. Even when faced with his admission in Exhibit 4, his initial statement to the Police, of his having employed them, he still denied the same. He denied that he was the company's representative but was the Manager, whose main role was to restructure the company. He agreed that there were "other existing companies of similar operations".

He stated further that, at **Page 163 of the Record**:

"Investors invested cash and after 22 days they get 100% return on their investment. That was how it was started. We had made return to some investors. It is not true that I represented the interest of the company here in Kaduna, at all material times I was not given any employment letter by 2nd accused. I was arrested in Benue State in a bank, Oceanic Bank. I left Kaduna in 2010 when problem in 2nd accused started with people wanting return of their investments...Though I did not sign Exhibits 1-15. It was the persons I employed that interface with the customers and signed the documents. I did not get anything out of the 10% kept for 2nd accused except my salary because the business lasted for one month....."

In his statement to the Police, **Exhibit 4**, he stated that **"any amount realized was paid into an account domiciled in Fidelity Bank Mararaba Branch in which there are 3 signatories viz Balogun Olaitan, Eniola Musibau and Suleiman Agaz. For easy accessibility to the account as an operational account hence the directors are non-signatory to the account."** He claimed that it was constant harassment by the Police that affected the business.

He stated further that **"the Directors of Disok International Ltd and Tradelink Investment Ltd are only known to me through proxy during my employment. They always send errands at the close of work to collect proceed of the day. Their names and addresses can be traced from the CAC form CO2 and CO7 since only the Certificate of Incorporation was given to me".**

In **Exhibit 5**, he stated:

"In addition to my previous statement, concerning the investment of fund with Disok International where I was employed as a manager by the Directors. The invested funds are paid through the marketers to the accountant and later all daily account will be calculated and deliver (sic) to an emissary sent by the Directors at the close of work every day. Even when payment commenced they also sent the due payment

through the same emissary which was later disbursed to the beneficiary through the accounts office. The Directors name were not known to me. But I can identify them in person if I see them. Their addresses were not known to me. We only meet in my hotel room at fajumali hotel in the course of our operation which lasted for 3 weeks"

The trial Judge, in a considered judgment, following a consideration of the facts before him and the elements constituting the offence for which the accused persons were arraigned, discharged them of the 5th Count. Taking each ingredient of the offence, he resolved them against the Appellant and the 2nd accused and convicted them, as aforesaid, on Counts, 1,2,3,4 and 6.

The question is thus whether the lower Court erred in so pronouncing.

I shall take each broad element of the offence, as did the lower Court.

1. **That the representation made by the Appellant was false and the Appellant knew it to be false**.

The evidence of PW1, PW2, PW4 and PW5 were all similar. To recapitulate, upon hearing about this very lucrative returns on investment, they went to the 2nd accused's office where they met the Appellant, who confirmed the 100% return after only 15 days of investment. The Appellant, in his bid to convince them, informed PW4 that they had partners in London and gave PW1 the number to call, which she did and spoke to one "white woman" who convinced her of the genuiness of the business. Following their investment and before the investment could ripen, the Appellant disappeared. The Appellant did not challenge any of these facts under cross examination.

The trial Judge reproduced excerpts of the Appellant's statement to the Respondent in which he confirmed the terms of the arrangement and the various payments made by "investors" of Four Million Nine Hundred and Ten Thousand to "be paid off with Nine Million Eight Hundred and Twenty Thousand Naira but that neither the deposit or interest was paid "due to Police harassment".

The lower Court also considered the Appellant's Additional Statement, **Exhibit 5** where he stated that at the end of the day, they sent the takings to the Directors through "an emissary". He stated "the directors names were not known to me. But I can identify them in person if I see them." He also does not know their address but that they only meet in his hotel room at "fajumali hotel", in the course of their operation which lasted three weeks. The Court disbelieved this story, stating:

"How convenient! The 1st accused only meets with the Directors of the 2nd accused in his Hotel room and doesn't know their names and addresses. Yet he was the Manager of the company who allows for huge sums of money belonging to innocent people to be handed over to some faceless messengers for onward transmission of same to other persons who he does not know their names and where they live. The question here is, how is the money collected from innocent people invested by the 2nd accused when even its sole Manager does not handle the money! All this, in my humble view, is evidence which prove beyond reasonable doubt that the representation is false and also that the accused person knew the representation to be false. Elements Nos. 1 and 3 above have been established and I so hold.

I have no reason to disagree with the lower Court's reasoning. The Appellant did not deny accepting any of the "investments", his only defence being that he is an employee. He also did not challenge PW1 and PW4 of his representation that they have a foreign partner in London, which PW1 called and confirmed.

The statement of the Appellant, **Exhibit 4,** shows that he is highly qualified. He wrote his own statement. He was born in 1966 and thus not a child or an illiterate. He attended Obafemi Awolowo University, graduating in 1985. He studied Russian at the Russian Cultural Centre in Victoria Island Lagos, where he obtained a Diploma in Russian Language. He worked with Lagos State Agricultural Development Project till 1993 and went into private agricultural practice and into consultancy with Governments. To say that he is working with a company in the position of Manager and does not know the names or addresses of the Directors who send emissaries to collect the profit at the end of the day, is an implausible story.

Indeed, in Exhibit 4, his statement, he admitted that he is a signatory to the account, which he attempted to deny under cross examination, until confronted with the same. His acceptance of the deposits only to disappear when the investments had ripened, is clear evidence that the representation made by the Appellant was false and that the Appellant knew it to be false.

<u>That the representation operated in the mind of the person from whom the money was obtained.</u>

This is also clear from the evidence of the witnesses. In addition, the flier of the 2nd accused containing this deception was tendered as Exhibit 16. The lower Court upon a review of the evidence of the witness held this ingredient proved and so also do I.

That the representation was made with intent to defraud.

The lower Court held, at **Page 184-185** of the Record of Appeal:

"My analysis of the evidence in this case in relation to the Element Nos. 1 and 3 of the offence exposes the fraudulent intention of the two accused persons. The accused persons exploited the greed of gullible persons who are eager to get rich quickly and without working for it. What kind of business would double your money in just two weeks time? The evidence in this case clearly shows that there was no business operated by the 2nd accused in which the money collected from Edmond Nuhu Akawu, Suleiman Usman, Salome Paul and others is invested. From the evidence of the 1st accused, the master mind of the fraud, moneys collected form the people is handed over to some faceless emissaries of the Directors of the 2nd accused, the PW3 who investigated the cases stated that the Directors of the 2nd accused could not be traced. After a lot of money was collected from so many people, the 1st accused disappeared. He had to concoct the story that he closed office because he was being harassed by the Police. He didn't tell us why the Police were harassing him. If it is true that the money collected from people is invested, what happened to the investments? There were no answers because the money collected from people was never invested in any business. On the whole, I am satisfied that the representation that money paid to the accused persons is invested in businesses of the 2nd accused is a fraud and Mr. Akawu, PW2 and PW5 were told that their investments would earn them 100% interest with intention to defraud them. I hold that the last Element of the offence has also been established."

I again find no reason do disagree with the lower Court. There has been no investment shown to have been made by the Appellant or the 2nd accused. No payments were made to these investors. After collection of the moneys, the Appellant closed the office and disappeared, until traced with the help of his bank. It is clear that the representation was made with intent to defraud.

I thus find the requirements above satisfied.

The Appellant's Counsel has accused the lower Court of convicting the Appellant when it was glaring that the Respondent failed in its duty to comprehensively investigate the petition written to it by PW1 and PW2 by not arresting or interrogating the Directors/Shareholders of the company, as disclosed in Exhibit 3, the incorporation documents, or make any attempt to arrest them or his employers, *Alhaji Hakeem* and one *Idris.*

Learned Counsel also pointed out that the Appellant in his extra-Judicial state mentioned the name of the accountant for the 2nd Accused company, one Williams, who by virtue of his position in the company was in custody of all 2nd Accused monies and that the Investigating Police Officers failed to carry out any investigation of the said witness or make any attempt whatsoever to arrest him, rather placing responsibility on the Appellant, by requesting him to produce the said witness before he could be completely exonerated of the charges. Reasonable doubt, he argued, had accordingly been created in the case of the Respondent, as the Appellant was wrongly held liable for the duties he carried out on behalf of the 2nd Accused, which duty he honestly believed was right at the time the act was done or carried out, citing the case of *Aighuokian vs State (2004) LPELR 296, Asinya vs State (2016) LPELR -40545 and State vs Olatunji (2003) 14 NWLR (Part 839) 138 LPELR-206/2001.*

This contention does not however avail the Appellant, for the question is how the Police is expected to interrogate or arrest the Directors of the company when even he, their employee, does not know their names or their addresses? If indeed such persons exist, it is the duty of the Appellant to give their names and address to the Police to enable them locate and invite them for questioning but which was not done.

Counsel also alleged that *Alhaji Idris* and *Alhaji Hakeem*, who, in Appellant's evidence before the Court he claimed employed him, were not investigated. This piece of evidence on these employers, however contradicts his statement in **Exhibit 5**, where he stated, **"I was employed as a Manager by the Directors"**.

The names of the Directors given in the incorporation documents are **"Charles Ndidi Eke"** and **"Isoken Kehinde Eke"** referred to as the Directors of the company. How then did his employers change from the Directors to **Alhaji Idris and Alhaji Hakeem?**

These new employers are clearly an afterthought. Indeed, under cross examination, at **Page 163** of the Record, he admitted that he did not mention their names in the three statements made by him.

His answer went thus:

"Alhaji Idris and Alhaji Hakeem paid my salary. They paid N40,000.00 per month. I met both my employers my first time in Kaduna at Fajumari Hotel Barnawa High Cost.

I made statements in 2011 at EFCC. At that time things were still very fresh in my mind. I mentioned the names of Alh. Idris and Alh. Hakeem

in my statements. I have read the statement exhibits 4, 5 and 6 given to me and the names of Alh. Idris Hakeem are not there."

Underlining Mine

If he failed to give their names to the Police, how can he be heard to accuse the Police of failing to interrogate them? Thus, though the duty placed on the prosecution in criminal cases is to prove the guilt of the accused beyond reasonable doubt, in cases where facts exist within the knowledge of the accused that casts doubt on the prosecution's case, the burden shifts on him to prove those facts. This is because, by **Sections 135(3), 136(1), 139(1) of the Evidence Act 2011**, the burden of proving reasonable doubt or that a particular fact brings the accused within any exemption or exception, shifts to the accused, for he who asserts must prove. See ***Emeka v State (2001) 14 NWLR Part 734 Page 666 at 680 Para B-D*** **per** ***Belgore JSC*** *(as he then was).*

Furthermore, as with the defence of alibi, the Appellant must, at the earliest opportunity, furnish the police with full details of his defence, to enable the police investigate the same. Failure of the accused to do this weakens the defence, as held in the case of ***Afolalu v State (2010) 16 NWLR Part 1220 Page 584 at 617 Para G, per Adekeye JSC.***

With regard to Appellant's allegation that they failed to investigate Williams, the accountant, the evidence of PW3, the EFCC operative, is as follows:

"In Exhibit 6 the accused mentioned one Williams. We investigated to find out who Williams is but we could not arrest him. The accused was released on bail and one of the conditions was that the accused will produce Williams he mentioned. He could not up to date. We could not trace Williams"

It is clear therefore that the Police investigated and sought to locate the one person mentioned by the Appellant but could not locate him. Due to the Appellant's failure to produce the name and address of the Directors of the company or name his purported employers, if any in fact existed, this defence does not avail the Appellant, I hold.

Learned Counsel further contended that the Appellant consistently maintained both in his extra judicial statement and during trial that he is merely an employee of the 2nd Accused, a corporate entity, referring the court to pages 38-39 and 160 of the record of Appellant. He submitted that an employer who acts within the scope of the authority given to him by his principal cannot and should not be held personally and criminally responsible for the acts or duties carried out on behalf of his employer where it was later discovered that the duty carried out by the said

Section 65 of the Companies and Allied Matters Act 1990 Cap C20 Laws of the Federation of Nigeria 2004, stipulates as follows:

SECTION 65

"[ACTS OF GENERAL MEETING, BOARD OF DIRECTORS, OR OF MANAGING DIRECTOR]

Any act of the members in general meeting, the board of directors, or of a managing director while carrying on in the usual way the business of the company, shall be treated as the act of the company itself and the company shall be criminally and civilly liable therefor to the same extent as if it were a natural person".

The case of ***Adeniji v State (1992) 4 NWLR Part 234 Page 248,*** by this Court, ***Lagos Division***, deliberated on the criminal responsibility of corporations for the conduct and accompanying mental state of its senior officers acting in the course of their employment. They held that as a company, being a corporate entity they can sue and be sued in the corporate name, as it bore a separate existence and identity from the brains, minds and hands of the persons operating it.

Tobi JCA *(as he then was)*, in distinguishing between the criminal liability of the Company as opposed to the individual, held, at ***Page 264 Para F-G:***

"...the burden of proof, like in other criminal cases is beyond reasonable doubt...And in discharging the burden, it is not enough to merely allege that the Appellant was the person involved in the transaction which resulted in the criminal conduct, but that he was in fact and in law the criminal. In other words, he committed the crime as an individual, as distinct and separate from the company"

In the instant case, the evidence is that the Appellant showed prospective investors the Certificate of Incorporation of the 2nd accused in his bid to convince them that the transaction was legitimate. The question however is, whether he was in fact and in law the criminal, or whether his acts were only as an agent of the company, rendering only the 2nd accused liable?

PW1 and PW4, as aforesaid, gave evidence of the representation by the Appellant of the genuineness of the business of the 2nd accused and that the company had foreign partners, which foreign partner, by the evidence of PW1, assured her of the genuineness of the business. This "white lady" also told her that the Appellant is the Managing Director of the company. This evidence of PW1 and PW4 was not challenged by the Appellant's Counsel under cross examination.

Indeed, under the cross examination of **PW4**, an investor and also a marketer employed by the Appellant, in response to a question put to her, said, as follows:

"I know the 1st accused not as staff of the 2nd accused but as the owner of the 2nd accused."

Thus, though the receipts issued were in the name of the 2nd accused company, it is patent that the Appellant was the alter ego of the company and its directing mind.

In ***Aminu Musa Oyebanji v The State (2015) 14 NWLR Part 1479 Page 270 (2015) LPELR-24751(SC)*** this term was defined by the ***Supreme Court***, per ***Fabiyi JSC*** at ***295 Para A-D;***, as follows:

"Alter ego' is said to mean 'second self'. Under the doctrine of 'alter ego', the court merely disregards corporate entity and holds individual responsible for act knowingly and intentionally done in the name of the corporation. Ivy v. Plyler 246 Cal. App. 2d 648. To establish the doctrine, it must be shown that the individual disregarded the entity of the corporation and made it a mere conduit for the transaction for his own private business. The doctrine simply fastens liability on the individual who uses the corporation merely as an instrumentality in conducting his own personal business. Liability springs from fraud perpetrated not on the corporation but on third persons dealing with corporation. Garvin v. Mathews 193 Wash. 152, 74 P. 2d 990, 994 (Black's Law Dictionary Sixth Edition pages 77-78)."

Not only was the Appellant operating from Kaduna, by the evidence of the witnesses and in particular PW6, he was also operating from Nassarawa State as the Managing Director under the name Trade Link Nig Ltd with the same modus operandi that after accepting deposits, he shuts down the office and absconds when it is time to pay. His inability to produce or give the names and addresses of the directors of the 2nd accused and also of his purported employers, is proof that he committed the crime as an individual, distinct from the company. In addition, after an earlier denial, he admitted that he was a signatory to the account of the company.

The Appellant, it is clear, intentionally and knowingly used the 2nd accused as an instrument to defraud gullible "investors".

Indeed, as held by this Court in the case of ***Dina v Daniel (2010) 11 NWLR Part 1204 Page137 at 158 Para D*** per ***Omage JCA***, **"there can be no agency in criminal conduct".**

The Appellant's Counsel has further submitted that the act of the Appellant was a mistake of fact, thereby exonerating him.

An honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the Appellant is charged an innocent act has always been held to be a good defence. See ***State v Olatunji (2003) 14 NWLR Part 839 Page 138 at 166 Para D-E*** per ***Kalgo JSC.***

There is, however, no mistake of fact shown by the Appellant, but a deliberate and calculated bid to deprive the public of their money under what is colloquially known as a "Ponzi scheme".

The Appellant's Counsel has again challenged the Counts under which the Appellant was convicted. He contended that there is no evidence on record to sustain the offence contained in Count 1, as there was no receipt or any documentary evidence to prove that the said money was actually paid or invested. With respect to Counts 2,3,4 and 6, he submitted that the said money allegedly invested and the receipts in respect thereof are fabricated for the purpose of this case. Counsel contended that the sum allegedly invested in Count 6 is N100,000 but that the witness PW2 did not however tender the receipt in respect thereof but tendered other receipts not connected to this suit.

Count 1, which has been reproduced above and on which count the Appellant was held guilty of by the lower Court, the Appellant, with intent to defraud, was said to have obtained the sum of N1,000,000.00 (One Million Naira from one Edmond Nuhu Akawu, through Suleiman Usman (PW2), a marketer in the 2nd accused, under the false pretence that he was going to invest it for him in the company and pay 100% interest. Even though the receipt for this money was tendered, Edmond Nuhu Akawu was not called, neither did PW2, mention the name of this investor in his evidence before the lower Court. I agree with the Appellant's Counsel that the offence in Count 1 was not proved beyond reasonable doubt.

I, however disagree with learned Counsel that Counts 2, 3 and 4 were not proved. PW2, Suleiman Usman, who tendered these receipts for the various sums of N10,000, N50,000 and N20,000 as Exhibits 1, 1A and 1B, without any objection from the Appellant's Counsel, testified that the moneys were paid by him to the Appellant as an investment which the Appellant said would yield 100% in a month. This evidence was not challenged and where evidence is not challenged, it is deemed to be true and the Court ought to accept same as proof. See ***Israel Pius v State (2015) 7 NWLR Part 1459 Page 628 at 640 Para F per Ngwuta JSC.***

With regard to Count 6, which is in respect of the sum of N100,000 paid by Salome Paul through PW2, the said marketer, it is true that the receipt for this sum, **Exhibit 15A** was not tendered by Salome Paul (PW5) but through the investigator, PW6. The evidence of PW5 is that she invested the sum of N440,000.00 of her money as well as that of her siblings. She also stated: "I was issued a receipt by my name and address"

She thereafter tendered **Exhibits 10-14** in the total sum of N360,000 in the names of her siblings. As aforesaid, Exhibit 15A, the receipt for the sum of N100,000 as stated in Count 6, was tendered through PW6. This was done without objection from the Appellant's Counsel.

It is trite law that a receipt does not have to be tendered through the recipient to be admissible and acted upon by the Court. The witness having stated that a receipt was issued in her name and a receipt to that effect having been tendered by the investigator without objection, was relevant to the charge and properly relied upon by the lower Court, I hold, in convicting the Appellant.

However, notwithstanding the fact that the lower Court has been held to be in error in convicting the Appellant of Count 1, the ultimate verdict is not affected, I hold, as the judgment of the lower Court was that the sentence on all the counts should run concurrently and not consecutively. In consequence, having found the Appellant guilty, which finding is upheld by this Court, the ultimate verdict of 8 years is not affected by this error, I hold.

I accordingly resolve issues Nos 2, 3 and 4 against the Appellant.

In conclusion, save as regard Count 1 above, this appeal is held to be without merit and is accordingly dismissed. The judgment of the lower Court, save, as aforesaid, for its decision with regard to Count 1, is hereby affirmed.

Oludotun Adebola Adefope-Okojie,
Justice, Court of Appeal.

APPEARANCES:
Tajudeen Oladoja, Olamide Oloje, Fausat Abdulsalam (Mrs) for Appellant.

Joshua Saidi Asst. Director Legal Dept, EFCC for Respondent.

CA/K/155/C/2016

JUDGMENT

(MASSOUD ABDULRAHMAN OREDOLA, JCA)

I have had the privilege of reading the lead judgment of my Lord, **JUSTICE OLUDOTUN ADEBOLA ADEFOPE-OKOJIE, JCA** which has just been delivered. I agree entirely with the said lead judgment. Thus, for the same reasons so brilliantly and lucidly set out therein and which I respectfully adopt as mine, I also find no merit in this appeal. I accordingly dismiss it and abide by the consequential orders made in the said lead judgment of my Lord, **Adefope-Okojie, JCA.**

MASSOUD ABDULRAHMAN OREDOLA
JUSTICE, COURT OF APPEAL.

CA/K/155/C/2016

JUDGMENT
(DELIVERED BY IBRAHIM SHATA BDLIYA, JCA)

I agree in 'toto' that the appeal lacks merit, and ought to be dismissed. My learned brother, **OLUDOTUN ADEBOLA ADEFOPE-OKOJIE, J.C.A** has had dealt with all the issues raised in the appeal, and resolved same creditably such that there is no more need for further elucidation. Consequently, I do hereby adopt my lord's reasoning in dismissing the appeal. I affirm the judgment of the lower Court, save the conviction on count 1.

IBRAHIM SHATA BDLIYA
JUSTICE, COURT OF APPEAL