

IN THE HIGH COURT OF JUSTICE OF KADUNA STATE OF NIGERIA
IN THE KADUNA JUDICIAL DIVISION
HOLDEN AT KADUNA
BEFORE: THE HON. JUSTICE M.T.M. ALIYUJUDGE
SUIT NO:KDH/KAD/1/EFCC/2012

BETWEEN:

FEDERAL REPUBLIC OF NIGERIACOMPLAINANT

AND

MADLION SHEDRACK & 1 ORDEFENDANT

16 - 11 - 2018

Defendants absent.

B.M. Buhari for prosecution.

I.I. Ozeogwu for 2nd defendant.

R U L I N G

Both defendants in this case pleaded not guilty to an amended charge filed by the prosecution on the 20th of February, 2013. That was on the 18th of April, 2013. Since then the prosecution has led evidence through three witnesses and several documents to establish the guilt of the two defendants that between May and August 2008 they dishonestly misappropriated that sum of ₦7,200,000.00 given to them by one Dr. Umar Mustapha to purchase bulls for him. The offence of criminal misappropriation as charged is punishable under section 309 of the penal code law 1991. At the end of the prosecution case the learned counsel for both defendants felt that the April, 2013. Since then the prosecution has led evidence through three

prosecution evidence has failed to make a prima facie case to require a defence from their clients. Consequently, they elected to make a No Case Submission and both sides of the litigation agreed to make submission orally.

Mr. I.K.Anyalewechi of learned counsel for the 1st defendant submitted that the prosecution has failed to make a prima facie against the 1st defendant. He agreed that the offence under section 308 of the penal code requires establishment of both the actus reus and means rea of the offence of criminal misappropriation. That conversion of property by the defendants of property to their own use dishonestly must be established. That the 3 witnesses called by the prosecution failed to establish the elements of the offence. He referred to the evidence of the PW1, PW2 and PW3 including exhibits 13, 14 and 15 which he said are evidence which establish that the contract for the supply of the bulls was executed by two corporate bodies, that the money was not paid into the account of the 1st defendant but into the accounts of the 2nd defendant and that the 1st defendant is not liable. The case of **ONAGORUWAS V. STATE** (1998)1 ACLR 435 at 462 was referred to in support of the submission that a company's property does not belong to the owner or directors of the company. That the prosecution has failed to prove that the amounts personally withdrawn from the account of the 2nd defendant by the 1st defendant in exhibits 14 and 15 were misappropriated by him. That

PW2 and PW3 could not say which money withdrawn from the accounts of the 2nd defendant were used for the purchase of the bulls and which money was traced to the personal accounts of the 1st defendant.

Learned counsel further submitted that prosecution also failed to establish that 1st defendant had intention to cheat or dishonestly misappropriate the funds of the nominal complainant. That 1st defendant did not admit guilt in his extra judicial statements exhibits 6 – 10. That in exhibit 8, the 1st defendant has explained that the funds were used for business of 2nd defendant. That sourcing the 4 cows from Adamawa state does not prove dishonesty on the part of 1st defendant because, counsel argued, the terms of the contract were not written down. Finally, that the facts in this case support a prima facie breach of a civil contract and not a criminal offence.

ONAGORUWA V. STATE at pp. 482 – 483 was referred to and I was urged to discharge the 1st defendant.

Mr. Ugo Udoji, the learned counsel for the 2nd defendant submitted that apart from establishing the existence of contract between the PW1's company and 2nd defendant, the fact that N8 million was paid to 2nd defendant to supply bulls only which 4 had been supplied, the prosecution has failed to establish the other term of the contract and the court should not be drawn into a guess work. That no particular withdrawal from the funds paid by the PW1 could be

traced to personal use of the 2nd defendant because, according to counsel, there was no dedicated account in respect of the transaction.

Learned counsel further submitted that the origin of the bulls or their specie is irrelevant to criminal misappropriation and also is not part of the agreed contract. That the e-mails which mentioned the origin and specie of the bulls were made after the contract had been entered.

That the exhibits tendered did not assist in proving the ingredients of the offence. Further that there is nothing in the statement of the 1st defendant to show that the funds were misappropriated – **HEMBE V. FRN** (2014) LPELR – 22705 was referred to in support. I was urged to hold that the constitutionally guaranteed right to innocence of the defendant cannot be eroded by the prosecution by presenting a breach of contract case and to discharge the 2nd defendant.

The prosecutor, Mr. B.M. Buhari submitted that prosecution has led evidence sufficient to require an answer from the defendants. That PW2 and PW3 had testified that defendants converted and misappropriated the ₦8 million. That exhibit 7 is confessional statement of the 1st defendant and it has established that the fund was misappropriated. Further that dishonest is also established when the 1st defendant misrepresented to PW1 that the cows would be

imported from abroad. The evidence of PW1, PW2 and PW3 including exhibit 19 were referred to in support. That exhibit 19 shows that no cows were imported. That the defendants have refunded N3.5 million and have failed to account the balance of the amount paid. I was urged to overrule the no case submission.

It is now settled that a no case submission could be upheld:-

1. When there has been no evidence to prove an essential demand of the offence with which the accused is charged;
2. When the evidence adduced by the prosecution has been so discredited as a result of cross examination or is so manifestly unreliable that no responsible tribunal could safely convict on it. See **IBEZIAKO VS C.O.P.** (1963) 1 SCNLR 99, **HEMBE V. FRN** (2014) LPELR- 22705 and **ONAGORUWA V. STATE** (Supra) at p. 464 and 465.

The Court of Appeal in the latter decision explained that proof of one of the two conditions is sufficient to uphold a no case submission. The court further stated that where a submission is made that there is no case to answer, the decision should depend not so much on whether the court would at that stage

convict or acquit but on whether the evidence is such that a reasonable tribunal might convict.

The essential elements of the offence of criminal misappropriation punishable under section 309 of the penal code law have been identified in the case of **HEMBE V. FRN** (2014) LPELR- 22705 (CA). The court of appeal stated at p. 17, 18 and 65 of the report that in order to prove an allegation of criminal misappropriation the prosecution has to prove beyond reasonable doubt the following:-

- a. That the property in question is moveable property.
- b. That the accused misappropriated or converted it to his own use.
- c. That he did so dishonestly.

It is important to note that the defendants were charged for misappropriating the funds paid by the PW1 on behalf of his company into the account of the 2nd defendant which fund was meant for purchase of 32 heads of cows. The allegation is not that the defendants converted the sums for their own use. In **HEMBE V. FRN** at p. 65 – 66 the court of appeal held that:-

“To sustain a conviction under section 309, a dishonest misappropriation or conversion must be

proved and the means that the relevant intention constituting dishonest is an essential ingredients of the offence.....

Note – On a charge of criminal misappropriation it is sufficient for the prosecution to establish that some of the property mentioned in the charge has been misappropriated by the accused even though it may be uncertain what is the exact amount so misappropriated.”

It is not in contention in this case that the sum of ₦7.2 million in the charge allegedly misappropriated by the defendants is moveable property. The contention is whether the evidence has disclosed dishonest misappropriation or conversion of the said funds or a portion of it.

I have carefully studied the various pieces of evidence in this case together with the submission of counsel for and it is my most humble opinion that the oral testimony of the PW1 and the other prosecution witnesses including the various documents tendered in this case and specifically exhibits 6,7,8,9,10, the statement of account attached to exhibits 14 and 15 and also the e-mails (Exhibits 21 and 22). In both exhibits 6 and 7 the 1st defendant who is the

Managing Director of the 2nd defendant stated the cows were to be imported.

In exhibit 7 he stated:-

"I can't say what the fund paid in was used for at that time all payment made in company was for use for many things in company which include....."

Earlier in exhibit 6 the 1st defendant stated to the effect that the delay in the supply of the cows was due to the late application of veterinary record of the bulls from the country of origin which is South Africa and that he did not secure approval for the importation because of new rule in livestock importation to Nigeria from August, 2009. There's also the e-mails exhibits 21 and 22 which explained the reason for the delay in the supply of the cows from abroad. I have considered that these pieces of evidence sufficiently establish a prima facie case of criminal misappropriation against the 2 defendants in this case. Having formed this opinion, it is important that I refrain from making further pronouncement on the evidence in the case. I am satisfied that the prosecution has adduced sufficient evidence to enter their defence. I so hold.

Signed

HON. JUSTICE M.T.M. ALIYU – JUDGE

16/11/18

BUHARI – I apply for a date for defence.

OZEOGWU – We apply for a date for defence.

COURT – Adjourned to 16/01/19 for defence.

Signed

HON. JUSTICE M.T.M. ALIYU – JUDGE

16/11/18