IN THE FEDERAL HIGH COURT OF NIGERIA IN THE KADUNA JUDICIAL DIVISION HOLDEN AT KADUNA

ON THURSDAY THE 16TH DAY OF MAY, 2019 BEFORE HIS LORDSHIP, THE HONOURABLE JUSTICE Z. B. ABUBAKAR JUDGE

CHARGE NO: FHC/KD/57°/2018

BETWEEN:

FEDERAL REPUBLIC OF NIGERIA

COMPLAINANT

AND

- 1. VINCENT ONOGWU
- 2. JONATHAN DAVID

ACCUSED PERSONS

RULING

The Defendants were arraigned before this Hohourable Court on the 14th December, 2018 on a three (3) Counts charge for conspiracy and obtaining money by false pretence contrary to Section 8 (a) and 1 (1) (a) of the Advance Fee Fraud and Other Fraud Related offences Act, 2006 and punishable under Section 1 (3) of the said Act and dealing with Counterfeit Currency contrary to Section 4 (1) of the

Counterfeit Currency (Special Provisions) Act, Laws of the Federation of Nigeria 2004.

The Defendants pleaded not guilty to the three (3) counts of the charge and in proof of the said charge, the Prosecution called three (3) witnesses who gave evidence as PW1, PW2 and PW respectively.

At the close of the Prosecution's case, the Defence filed a No-Case Submission on the 20th February, 2019 which process is dated 18th February, 2019.

The Prosecution filed a reply to the No-Case Submission on the 15th March, 2019 which is dated 14th March, 2019 to which the Defendants filed a reply on points of law on the 19th March, 2019, and the process is dated 18th March, 2019. The said written addresses of Counsel were adopted on the 26th March, 2019.

In his written address Counsel for the Defendants **AUTA MAISAMARI ESQ**, formulated two issues for determination as follows:

1. Whether from the evidence before the Honourable Court especially the testimony of the PW1, PW2 and the

documentary evidence relied upon by the Prosecution, particularly the Extra Judicial Statements of the 1st Defendant, the prosecution has made out a *prima facie* case for which this Honourable Court would call upon the Defendants to testify or answer to?

2. Whether the evidence adduced by the Prosecution have not been substantially discredited to make it unsafe for this Honourable Court or any reasonable Tribunal to convict thereon?

Starting with the offence of conspiracy in Count 1 of the Charge, Counsel referred to the meaning of conspiracy as defined in the case of **OBASI V. STATE (2015) 12 NWLR (PT.1473) 213** at **240**, paragraphs A-E.

Counsel submitted that PW1 in his evidence told different stories on very fundamental issues that have adversely affected the case of the Prosecution. He said it is the law that, where the evidence adduced in a case contradicts itself in so many material aspects, the Court has a duty to resolve the contradictions in favour of the Accused person(s). That the contradictions lie in PW 's solicitor's letter to

the EFCC, his statement to the EFCC and his viva voce testimony in Court which Counsel enumerated principally having to do with how the 1st Defendant was introduced to the PW1 and whether the 1st Defendant identified himself to the PW1 as an officer of the Nigeria Security and Civil Defence Corps (NSCDC) by his Uniform or Identity card.

Counsel submitted that, there is no how it can be ascertained whether there was an agreement between the Defendants to commit the crimes alleged from the fundamentally flawed pieces of evidence adduced by the Prosecution going by the definition of the offence of Criminal Conspiracy in the case of **OBASI V. STATE** (supra) at **240**, paragraphs A-E.

On the offence alleged in Count 2 of the charge, Counsel submitted that, the 1st Defendant in his Extra Judicial Statement to the EFCC, told the investigating officer (PW2) that, when PW1 reported the incidence to the Police, the Police had arrested people who confessed to committing the offence and they even offered to repay the money. That PW2 conceded in his evidence under cross-examination that his investigation revealed so. Counsel said, the

Prosecution trivialized this weighty material piece of evidence. He submitted that PW1 and the Prosecution have so many things to hide in this case including their deliberate withholding of the purported letter of withdrawal of this case from the Police by PW1, and he prayed the Court to adopt the presumption in Section 167 (d) of the Evidence Act, 2011. He referred to the case of KADA V. THE STATE (1991) 8 NWLR (PT.208) 134 at 163 paragraphs. F-G and GAVA CORPORATION V. FRN (2015) 2 CAR 306 at 331, paragraph G.

It was further submitted by Counsel that, the 1st Defendant took extra effort on his own to track the phone numbers of the real conspirators and perpetrators of the crime and gave same to the Police which led to the arrest of one Baba Naira, who was arrested and detained in connection to the crime and who promised to repay the money. That the EFCC ignored this grievous pieces of information and refused to investigate it. That there is a presumption that PW1 might have collected his money from the said Baba Naira and decided to close the case with the Police only to come to the EFCC to initiate fresh case so that he can get

another money again from the Defendants which the law will not allow.

Counsel submitted that, PW2 deliberately glossed over the weighty facts supplied by the 1st Defendant in his Extra Judicial Statement like the issue of Juli who the 1st Defendant stated had threw the Counterfeit Dollars at him (1st Defendant) and ran away with the N 1, 000, 000:00 (One Million Naira) and was later arrested and that PW2 said nothing to explain why he did not further his investigation about the arrest of the said Juli and what his findings are since he said in his evidence before this Court under cross-examination that, the purpose of his embarking on the investigation was to find out if a crime had been perpetrated and who the perpetrators are.

On Count 3 of the charge by which the Defendants were alleged to have dealt in Counterfeit Currency, Counsel referred to the case of IGRI V. STATE (2012) 16 NWLR (PT.1327) 522 at 541, paragraphs B-C, where the three ways of proving a crime have been stated. He referred to the evidence of the PW1 in chief and submitted that, there is no where the said PW1 stated in his viva

voce evidence before this Court that the 1st Defendant returned the pieces of the fake US Dollars to him. That the PW1 got the 17 pieces of \$100 bills which he gave to the EFCC is questionable and has not been proved. That also the examination of the said fake Dollars by the Nigerian Immigration Service has no foundational base upon which to be predicated.

Counsel finally urged the Court to discharge the Defendants, order PW1 to refund to the 1st Defendant the Sum of N100, 000:00 (One Hundred Thousand Naira) which the PW1 collected from him at the Nigerian Police Force and order that the Defendants be compensated in the Sum of N10, 000, 000:00 (Ten Million Naira) as well as apology unto them by the Prosecution and PW1 in line with the provisions of Section 35 (6) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

In his written address Counsel for the Prosecution; **S.H. SA'AD ESQ**, formulated a sole issue for determination, to wit;

Whether the Prosecution's discloses a prima facie case to warrant the Defendants being called upon to enter their defence?

In his arguments regarding offence of conspiracy in count 1 of the charge, Counsel referred to the meaning of conspiracy as an offence as defined in the case of IKEMSON V. STATE (1989) 3 NWLR (PT.110) 455 at 477, paragraphs A. OBIAKO V. STATE (2000) 10 NSCQR 27 at 38, paragraphs B-D and ERIM V. STATE (1994) 5 NWLR (PT. 346) 522 at 534, paragraphs A-B, 535, paragraphs D-F.

It was submitted by Counsel that, to prove the offence of conspiracy, the prosecution need not establish direct communication between or among the conspirators or how they connected to commit the offence that what is important is the common design among the conspirators. He again referred to the case of **ERIM V. STATE** (supra) at **533**, paragraphs C-D.

Counsel also referred to the evidence of the PW1 in chief which established that he knows the Defendants. That after enquiring the exchange rate of the Dollars by the 2nd Defendant, after two days, the two Defendants came to the office of the PW1 at Hamdala Hotel with a \$100 USD note and in exchange PW1 gave them N35, 700:00. That later the Defendants instead of bringing their money

for exchange of PW1's office as they did initially with the \$100 USD, they deceived PW1 to come along with N1, 000,000:00 (One Million Naira) to their own office for exchange and subsequently the 2nd Defendant told the PW1 to follow the 1st Defendant who took him to a secluded place where in concent between them, his N1, 000, 000:00 (One Million Naira) was collected by them and 17 pieces of counterfeit \$100 notes were given to him in exchange by the same manipulation of the Defendants. He also referred to the Extra Judicial statement of the 1st Defendant; Exhibits FRN2, 2A, 2B and 2C respectively and also that of the 2nd Defendant (Exhibit FRN3).

Counsel submitted that the evidence adduced by the Prosecution through PW 1 and the statements of the Defendants confirmed that the Defendants know each other as far as the commission of lifting PW1 from Hamdala Hotel to where the criminal design of collecting his N1, 000, 000:00 in exchange for the 17 pieces of counterfeit \$100 USD is common to all of them and therefore discloses sufficient prima facie case against them to warrant this Court to

call on them to enter their defence in Count 1 of the charge for the offence of conspiracy.

Counsel said, the insinuation by the Defence Counsel in his written address that PW1 stated that the Defendants were wearing uniform or showed him an ID card is not part of the charge and not material to the ingredients of the offences charged. He said that is mere technicality that should be ignored by the Court.

With regards to the offence in Count 2 of the charge which is obtaining money by false pretence, Counsel referred to the case of **STATE V. OSCER (1991) 6 NWLR (PT.199) 567** at **590**, paragraphs B-D where the ingredients of the offence were stated. He also referred to the Section 20 of the Advance Fee Fraud and Other Fraud Related Offences Act, 2006.

Counsel further referred to the evidence of PW1 where he stated that the Defendants took him from his office (Hamdala Hotel) with his N1, 000, 000:00 to their own office and subsequently to an unknown place which is only known to them and collected his N1, 000, 000:00 in concent by the 1st Defendant and handed over to

him 17 pieces of Counterfeit were **\$100** notes which he told the 1st Defendant were fake but, was asked to leave the area.

Counsel therefore, submitted that, it was the Defendants in concent that moved PW1 from his office to meet people only known to the Defendants at a secluded place and made the false presentation of the 17 pieces of Counterfeit \$100 notes to PW1 which were analysed by PW3 and were found out to be Counterfeit. Counsel referred to the testimony of PW1, PW2, PW3, and Exhibit 4, 4B, 4C1-17 respectively.

Counsel finally submitted on this issue that, from the evidence adduced by the Prosecution, there is sufficient evidence establishing that the N1, 000, 000:00 belonging to PW1 was obtained by the Defendants through false pretence by presenting him with 17 pieces of \$100 NOTES Counterfeit Currency and thereby disclosing a prima facie case to warrant the Court to call on the said Defendants to enter their Defence in Count 2 to offer explanation as to who were the people they look PW1 to meet at Marabar Jos and how they knew them.

With respect to Count 3 of the charge by which the Defendants were charged for dealing in 17 pieces of United State of America Counterfeit Currency notes, Counsel submitted that from the evidence of PW1, it was the Defendants who in concent pulled the PW1 from his office by Hamdala Hotel, Kaduna and look him to an unknown destination for the ultimate purpose of dealing in United State Dollars which were presented to him by the Defendants and later found out to be fake by the forensic analysis of PW3. Counsel referred to the testimonies of PW1 and PW3 and the statement of the Defendants as in Exhibits FRN 2, 2A, 2B, 2C and FRN 3 respectively.

Counsel urged the Court to hold that, there is a prima facie case against the Defendants in Count 3 to warrant them being called upon to enter their defence. On what constitutes a prima facie case, Counsel referred to the case of FEDELIS UBANATU V. C.O.P (2000) 1 S.C. 31 at 37 LINES 15-29.

That the entire basis of a No-Case Submission by the Defendants in this case has been misplaced. That also there is no any material contradiction in the case of the Prosecution linking to the charge prepared against the Defendants.

Counsel said for contradictions in the evidence of the Prosecution to be fatal, it must go to the root of entire charge. That the Defence had failed to demonstrate to this Court how the alleged contradiction touches on the root of the charge. That mere minor discrepancies or miniature contradiction as to whether the Defendants were wearing uniforms of Nigeria Security and Civil Defence Corp when they met PW1, or whether an ID Card was shown to PW1 by the Defendants or whether the Defendants told PW1 that he had \$3000 USD, or whether PW1's money was collected at Marabar Jos or Gadan Gaya after Marabar Jos, which merely scratches the surface points, are not fatal to the case of the Prosecution as same are not part of the ingredients to be proven by the Prosecution. He referred to the case of KWAGSHIR V. STATE (1991) 2 NWLR (PT.328) 592-596 and IBEH V. STATE (1997) 1 NWLR (PT.484) 632 and ESANGBEDO V. STATE (1989) 7 S.C. 310.

Counsel also submitted that the case of **KADA V. STATE** (supra) cited by the Defence is inapplicable in the circumstances of this case.

With regards to the monetary demand made by the Defence, Counsel submitted that he who comes to equity must come with clean hands and he who seek equity must do equity. That the Defendants falsely induced and collected **\mathbb{M1}**, **000,000:00** from PW1 and instead of offering explanations they want the Honourable Court to give them more of the Prosecution when they have not demonstrate to the Honourable Court how they are entitled to the money they are demanding.

Counsel finally urged the Court to dismiss the No-Case Submission for lacking in merit and call upon the Defendants to enter their defence having regards to the evidence of PW1, PW2, PW3 and Exhibits FRN1-4 respectively.

In his reply on points of law, Counsel for the Defendants submitted that, the Defendants cannot be called upon to give any explanation because what they will testify in their defence is what is contained in their Extra Judicial Statements. Counsel said, going by the judicial authorities cited by the Prosecution the offence of conspiracy is not always made overtly but from the surrounding circumstances of each case.

Counsel submitted that the investigation of this case is inchoative as there are rooms for suspecting that someone or some persons other than the Defendants perpetrated the alleged offence. That the Defendants denied the allegations in their Extra Judicial Statements and even did their personal investigation of tracking the numbers of criminals which led to the arrest of one of them. That how then will the Prosecution attribute commission of the offences to the Defendants?

Counsel finally prayed this Court to ignore the submissions of the Prosecution and uphold the No-Case Submission.

Now, the issue for determination in my view, is:

Whether the Prosecution has by the evidence adduced so far in this case, made out a prima facie case against the Defendants requiring them to enter a defence to the charge? Now, a No-Case Submission simply means that there is no evidence on which the Court or Tribunal could reasonably base a conviction even if the evidence was believed by the Court or Tribunal. In other words, the Prosecution, has not made out a case against the Defendant(s) sufficiently, to warrant the continuation of trial, thereby requiring the said Defendant(s) to enter a defence. See the case of STATE V. NWACHINEKE (2008) All FWLR (PT. 398) 204 at 320, paragraphs C-D and MUMUNI & ORS V. THE STATE (1975) 6 S.C. 79.

Now, it is important to state that, the position of law is, when a No-case Submission is made, the Court is not at that stage called upon to evaluate the evidence adduced by the prosecution, but to consider whether there is any admissible evidence before it to warrant the Defendant(s) to be called upon to answer to the charge, and so enter a defence thus, it is not proper at this stage for the Court to consider the credibility of the witnesses for the purpose of deciding whether there is a case to answer, all that is required is for the Court to look at the evidence adduced by the prosecution in support of the charge and then find out if a prima facie case

appears requiring the Defendants to be called upon to explain their own side of the matter, in the absence of which a conviction could safely be entered. See again the case of STATE Vr NWACHINEKE (supra) at 320, paragraphs D-H.

Guided by the above decision, I have considered the evidence adduced by the prosecution and adverted to the submissions of Counsel for the respective parties and the authorities they cited and relied upon. Starting with Count 1 of the charge by which the Defendants were alleged to have conspired among themselves to obtained the sum of N1,000,000:00 (One Million Naira) from the PW1 by giving him in exchange \$1,700 Counterfeit United States Dollars as rightly submitted by Counsel for the Prosecution, the offence of conspiracy is not always made overtly, but determined from the surrounding circumstances of each case. This has been made very clear by the Supreme Court in the case of ERIM V. STATE (1994) 5 NWLR (PT.346) 522 at 533, paragraphs C-D where it held:

"In order to prove conspiracy it is not necessary that there should be direct communication between each conspirator and

every other. All that need be established is that the criminal design alleged is common to all of them. Proof of how they connected with or amongst themselves on that the connection was made is not necessary for there could even be cases where one conspirator may be in one town and the other in another town and they may never have seen each other but there would be acts on both sides which would lead the trial Court to the inference".

Thus, the actual fact of conspiracy may be gleaned from the collateral circumstances in a case.

Now, from the evidence of PW1 it is very clear that, the 1st and 2nd Defendants went to his office at Hamdala Hotel to exchange \$100 USD bill being that PW1 engages in the business of Bureau de change. PW1 exchanged the \$100 USD and gave the Defendants the Naira Equivalent of N35, 700:00 (Thirty Five Thousand Seven Hundred Naira). Two days after the Defendants came back to the office of PW1 and pleaded with him to follow them to the 2nd Defendant's office and also take along with him N1, 000, 000:00 (One Million Naira) which PW1 did. At his office, the 2nd Defendant

told PW1 to follow the 1st Defendant who will give him (PW1) United States Dollars in exchange for his **N1**, 000, 000:00 (One Million Naira). PW1 followed the 1st Defendant who took him to a location at Marabar Jos where the 1st Defendant asked PW1 to give him the **N1**, 000, 000:00 which PW1 did and the 1st Defendant entered a house with the money and came out later with 17 pieces of \$100 USD bills and gave to PW1 which turned out to be Counterfeit Currency.

The above evidence of PW1 was corroborated by the Exhibits FRN 2 an FRN 3 respectively which are the Extra-Judicial Statements of the Defendants. In exhibit FRN 3, the 2nd Defendant had stated as follows:

"Vincent Onogwu (1st Defendant) called me one evening after he left Kaduna to Abuja and ask if I know where they used to change dollars, then I answered him yes".

In exhibit FRN 2, the Defendant stated thus:

"I came into Kaduna and the next day I took the dollar to Hamdala Hotel in company of my Assistant Coach Jonathan David. We meet Alhaji Dan Asabe who is also Bureau De Change Operator. I gave him the dollar and he checked and changed it confirming it was real".

The 1st Defendant further stated as follows:

"They insisted they want to see the money we brought. When we gave Suleiman the money, to Count, the other man threw the dollar to me and gave it to Dan Asabe who proclaimed that it was fake, and the two of them bolted into the bush with the money which amounted to one Million Naira."

Prom the above pieces of evidence it is not in doubt that the 1st and 2nd Defendants preparing the ground to commit the crimes alleged went to the office of the PW1 at Hamdala Hotel to exchange Currency, and two days later the Defendants went back together to the office of the PW1 and convinced him to take his N1, 000, 000:00 (One Million Naira) and follow them to the office of the 2nd Defendant, which he did. At his office, the 2nd Defendant told PW1 to follow the 1st Defendant who took him to a location where his N1, 000, 000:00 was taken by the 1st Defendant and he gave him in exchange 17 pieces of \$100 USD bills which turned out to be fake.

Clearly by the actions of the Defendants of going to PW 1 together and convincing him to take his **N1**, **000**, **000:00** to the office of the 2nd Defendant where in furtherance of their plan or agreement, the 2nd Defendant convinced PW1 to follow the 1st Defendant, so that the said 1st Defendant can complete the act, it is not difficult for this Court to infer conspiracy between the two Defendants. Thus, the evidence as disclosed and highlighted above requires the Defendants to enter a defence in respect of this Count of the charge and I so hold.

With regards to Count 2 of the charge by which the Defendants were alleged to have obtained the sum of N1, 000, 000:00 (One Million Naira) from the PW1 by false pretence, again from the evidence of PW1, it is very clear that, the Defendants convinced the said PW1 to leave his office at Hamdala Hotel and take along with him N1, 000, 000:00 to the office of the 2nd Defendant under the pretext that they had American dollars, they needed to exchange for the equivalent of the N1, 000, 000:00. From the office of the 2nd Defendant the PW1 was again to convinced to follow the 1st Defendant to another destination where the 1st Defendant collected

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\$100 bill denomination that are Counterfeit and which the Defendants knew to be Counterfeit Currency. Thus, the presentation made by the Defendants to PW1 was false to their knowledge and it is the said false presentation that induced PW1 to part with his N1, 000, 000:00. The action of the Defendants as highlighted above has established the ingredients of the offence of obtained by false pretence alleged as Count 2 of the charge against the Defendants. For this reason I agree with the submission of Counsel for the Prosecution that the evidence they have adduced in respect of this Count requires the Defendants to enter a defence and I so hold.

Count 3 of the charge in alleging that the Defendants have dealt in 17 pieces of United State Dollars that are Counterfeit.

Yet again from the evidence of PW1 it is very clear that the Defendants through the 1st Defendant presented to the PW1 the Counterfeit Currency and the presentation was undoubtedly made to defraud.

Further, the 17 pieces of the United State Dollars have been established to be Counterfeit by the evidence of the PW3 whose qualification or expertise in the field of forensic analysis is not in doubt.

Therefore, I hold that, the ingredients constituting the offence in Count 3 has been proved by the Prosecution to the extent of requiring the Defendants to enter a defence to the said Count of the charge.

In paragraphs 3.19 and 3.20 of his written address, Counsel for the Defendants had submitted that there is nowhere that PW1 stated in his viva voce evidence before this Court that the 1st Defendant returned the 17 pieces of the fake dollars to him. That how the said PW1 got the 17 pieces of \$100 bills which he gave to the EFCC is questionable and has not been proved. I think it is necessary to recall the evidence of PW1 rendered before this Court. In his evidence in chief, PW1 deposed as follows:

"The 1st Defendant asked me to give him the **N1**, 000, 000:00.

He entered the house and came out with 17 pieces of \$100

USD, that is **USD 1**, 700. It is American Dollars. I looked at the

Dollars properly and told him the Dollars he gave me are fake Dollars 1st Defendant asked me, how did I know that the Dollars are fake. I told the 1st Defendant that the American dollars has 15 securities. He ask me to show him the securities and I told him that I will tell him only two. I told him if he raises the American dollars up, he will see American Dollars on the body, and the fake dollars he gave me has no American Dollars written on it. The 1st Defendant told me to hold the dollars that he will go and tell the people that gave him the dollars to give me back my money. As soon as the 1st Defendant came out, I saw two people with him who had a gun and a knife. Then the 1st Defendant came and told me to go".

Under cross-examination PW1 deposed thus:

"When the 1st Defendant gave me the fake dollars, I did not return them to him. I gave them to the EFCC. No, I did not give him the dollars back. I also did not give the Police the dollars".

In view of the above evidence, I do not know where Counsel for the Defendant got his facts. The evidence he attributed to PW1 in paragraph 3.19 of his written address is not correct.

It appears to me that Counsel for the Defendants grossly misconceived the essence of a No-Case Submission. Counsel completely ignored and refused to address the real evidence adduced by the Prosecution and was scratching the surface, dwelling on trivial issues that can hardly affect the substance of the charge. Like the manner the 1st Defendant was introduced to the PW1. Whether the 1st Defendant was identified to the PW1 by his Uniform or I D Card of the NSCDC. All these discrepancies or minor contradictions if you like, do not in my view, discredited or affect the evidence adduced by the Prosecution.

Counsel for the defence also resorted to using very had or foul language calling the investigation of the EFCC thrash and PW1 a liar. That is most unfortunate coming from a senior member of the Bar. I condemn the use of language in strong terms.

As I have stated earlier in this ruling, the law is settled that, credibility of witness is not in issue in deciding whether a Defendant(s) have a case to answer. The proceedings is just for the Court to ascertain based on the evidence adduced, if the

Prosecution has made out a prima facie case warranting the Defendants to enter a defence to the charge.

Perhaps it is apt at this juncture to recall the definition of the phrase "prima facie" case offered by the Supreme Court in the case of SUBERU V. STATE (2010) 8 NWLR (PT.1197) 586 at 610, paragraphs C-E, where it held:

"A prima facie case must be distinguished from proof of guilt of an Accused which is determined at the end of the case when the Court has to find out whether such an Accused is guilty or not guilty of the offence charged. In No-Case Submission therefore, whether or not the evidence of the Prosecution is believed is, at that stage of the proceedings irrelevant and immaterial as the credibility of the witness is neither an issue then or does it arise".

See also the case of UBANTU V. C.O.P (supra) at 37, Lines 15-29.

Therefore, having considered the evidence of the Prosecution so far adduced in relation to the charge against the Defendants as I have highlighted above, I hold that a prima facie case has been made out by the Prosecution against the Defendants requiring them to enter a defence to the charge and they are so ordered.

JUSTICE Z.B. ABUBAKAR
JULIGE!
16/05/2019