IN THE COURT OF APPEAL
AKURE JUDICIAL DIVISION
HOLDEN AT AKURE

ON FRIDAY THE 17TH DAY OF MARCH, 2017

BEFORE THEIR LORDSHIPS

MOHAMMED A. DANJUMA — **JUSTICE, COURT OF APPEAL**

OBANDE FESTUS OGBUINYA — **JUSTICE, COURT OF APPEAL**

RIDWAN M. ABDULAHI — **JUSTICE, COURT OF APPEAL**

APPEAL NO: CA/AK/67C/2014

BETWEEN:

LEYE ADEJUYIGBE ---------- **APPELLANT**

VS

FEDERAL REPUBLIC OF NIGERIA ---------- **RESPONDENT**

JUDGMENT

(DELIVERED BY OBANDE FESTUS OGBUINYA, (JCA)

This appeal queries the correctness of the decision of the High Court of Ondo State, holden at Akure (hereinafter called "the lower court"), *coram judice:* T. O. Osoba, J., in charge No. AK/33C/2006, delivered on 28th June, 2014. Before the lower court, the appellant and the respondent were the accused person and the complainant respectively.

The facts of the case, which transformed into the appeal, are amenable to brevity and easy appreciation. The Department of State

Service (DSS, for short), petitioned the respondent, via an audit report, alleging financial improprieties against the Planning Committee set up by the Chairman of Akure North Local Government Council to oversee and organise the official visit of the erstwhile Governor of Ondo State, Dr. Olusegun Agagu, to the Council on 9th September, 2004. The appellant, a career civil servant and the Head of the personal management of the council was the secretary of the Committee whilst Mr. Gbenga Ojo, a political office holders, the Vice – Chairman of the council was its chairman. The sum of ₦1.3 Million was voted and released to the Committee for the execution of its assignment. It was alleged that the sum of ₦90, 000. 00, budgeted for the purchase of Ankara materials, was used by the appellant and the chairman who was the first accused in the lower count. After investigation, the respondent arraigned the appellant, with the chairman, in a two – count information of conspiracy and making false statement contrary to sections 16 and 26 (1) of the Corrupt Practices and other Related Offences Act, 2000 (hereunder abridged to "the Act"). The appellant, on 13th November, 2006 pleaded not guilty to the two counts.

Sequel to that, the lower court proceeded to a full – scale trial of the case. In proof of the case, the respondent fielded eight (8) witnesses, PW1 – PW8, and tendered documentary evidence. In disproof of the charge, the appellant called three witnesses, the

second set of DW1 – DW3, and tendered documentary evidence. At the closure of evidence, the parties, *qua* counsel, addressed the lower court. In a considered judgment, delivered on 28th January, 2014, found at pages 140 – 194 of the record, the lower court found the appellant guilty on the two counts, convicted and sentenced him to five (5) years on each count with an option of fine of ₦2 million for each count and "The sentences are to run concurrently that is 5 years in all but the option fine shall be cumulative".

The appellant was dissatisfied with the judgment. Hence, on 17th February, 2014, the appellant lodged an 8 – ground notice of appeal, seen at pages 195 – 201 of the record, and prayed this court for:"AN ORDER to overrule the lower court by setting aside the judgment of the lower court and discharge and acquit the Accused Person/Appellant". Thereafter, the parties filed and exchanged their briefs of argument in line with the rules governing the hearing of criminal appeals in this court. The appeal was heard on 18th January, 2017.

During its hearing, learned counsel for the appellant, F. Omotosho Esq., adopted the appellant's brief of argument, filed on 25th November, 2014 and deemed properly filed on 15th June, 2015, and the appellant's reply brief filed on 11th May, 2016 and deemed properly filed on 7th June, 2016, as representing his arguments for the appeal. He urged the court to allow it. Similarly, learned counsel

for the respondent, G. O. Igbadume, Esq., adopted the respondent's brief of argument filed on 15th June, 2015 and deemed properly filed on 11th February, 2016, as forming his reactions against the appeal. He urged the court to dismiss it.

In the appellant's brief of argument, he distilled five issues for determination to wit:

3.1 **Whether the short summary of the case as given by the trial court which was not borne out of proven evidence is prejudicial to the Appellant.**

3.2 **Whether the lower court was right in finding the Appellant guilty of the offences as charged when the prosecution failed to prove beyond reasonable doubt the essential elements of the offences.**

3.3 **Whether failure of the prosecution to call the chairperson of the Local Government, Mrs. Adeola Fagoriola as a witness is fatal to the case of the prosecution.**

3.4 **Whether the lower court was right in imposing a fine of N4 million on the Appellant in the alternative to a term of imprisonment instead of "a penalty sum**

which is equivalent to the amount of gratification i.e ₦90, 000. 00 in the opinion of the court the value of the gratification received by the accused"

3.5 Whether the conviction and sentence of the Appellant can in anyway be justified from the totality of the evidence adduced.

3.6 Whether the trial court was right in its failure to consider the cross – examination of DW8, a co – accused person before reaching its decision in the judgment.

The respondent, in its brief of argument, crafted a solitary issue for determination viz:

1. **Whether the prosecution led evidence in prove (sic) of the two counts of the information against the appellant beyond reasonable doubts as to merit and justify the finding of guilt against the appellant.**

A close look at the two sets of issues shows that they are identical in substance. The respondent's singular issue can be, conveniently, subsumed under the appellant's. For this reason, I will decide the appeal on the issues formulated by the appellant: the undisputed owner of the appeal.

Arguments on the issues:

Issue one.

Learned counsel for the appellant submitted that the lower court's recording in the brief summary of the facts of the case, that the appellant sourced and filled the blank receipt of Mama Twins Boutique, exhibit C24, was prejudicial to him since no evidence showed that he did that. He drew the court's attention to some pieces of evidence on record. He described the summing up as defective which deprived the substance of fair hearing and accasioned a miscarriage of justice. He relied on ***Onuaha v. State*** **(1988) 3 NWLR (Pt. 83) 460** for the submission.

On behalf of the respondent, learned counsel argued that there were evidence to show that the appellant sourced and filled exhibit C24.

Issue two.

Learned counsel for the appellant submitted that the lower court wrongly relied on the evidence of PW3 as proof of conspiracy against the appellant. He enumerated the ingredients of conspiracy as noted in ***Yakubu v. State*** **(2014) 8 NWLR (Pt. 1408) 123**. He stated that it must proved by irresistible circumstantial evidence. He posited that the lower court did not narrowly examine the evidence of PW 3 which was fabricated to save the chairman, first accused. He **referred** ***Mariagbe v. State*** **(1977) 2 SC 89;** ***Egbirika v. State*** **(2004) 4**

NWLR (Pt. 1398) 558; *Onunuya v. State* (2014) 8 NWLR (pt. 1409) 345. He added that PW5 contradicted PW3's evidence which caused doubt. He relied on ***Igbi v. State* (2006) 6 SC. J. E. 36.** He described PW3 as at audited witness, citing ***Olaiya v. State* (2010) 3 NWLR (pt. 1181) 437.** He noted that the defence of an accused must be considered. He relied on ***Kin v. State* (1992) 4 NWLR (Pt. 233) 17.** He stated that the circumstantial evidence relied on by the lower court was not cogent, compelling and conclusive. He referred to Lori v. State (1980) 8 – 11 SC 86. He noted that the false statement on a document would not make it forged. He cited ***higali v. Queen* (1959) 4 FSC 7 f**or the point. He insisted that the lower court never compared exhibits O and C24. He reasoned that absence of evidence of stealing material shortage negated intent of fraud. He relied on ***Odunsi v. State* (1969) 1 ALL NLR 460.**

On behalf of the respondent, learned counsel contended that agreement, the essential ingredient of conspiracy, was proved. He relied on ***Yakubu v. FRN* (2009) 14 NWLR (Pt. 1160) 151; *Sule v. State* (2009) 7 NWLR (Pt. 1169) 33.** He stated that it was proved from the evidence of sourcing or relationship between the appellant and first accused and their involvement in exhibit C24. He referred to the evidence of the respondent's witnesses. He noted that PW3 was not a tainted witness. He observed, in the alternative, that even if she was, her evidence was admissible and relevant. He relied on

Olalekan v. State* (2001) 18 NWLR (Pt. 746) 793.** He stated that the appellant's weak assertion that exhibit C24 was brought to him by the first accused could not stand in the face of exhibit O showing that he signed the former. He posited that the issue had been laid to rest in ***Gbenga Ojo v. FRN in Appeal No. CA/AK/67^{CA}/2014 (unreported).

Issue three.

Learned counsel for the appellant contended that Mrs. Fagoriola was a vital witness that was not called and the failure was fatal to the respondent's case. He cited ***Emeka v. Queen* (1959) WRLR 77/1SC. J. E. 57**; ***Opeyemi v. State* (1985) 2 NSC 921**; ***State v. Nnolim* (1994) 5 NWLR (Pt. 345) 394**; ***Akono v. Nigerian Army* (2000) FWLR (Pt. 28) 2212**; ***State v. Ajie* 6 SC. J. E. 207** for the contention. He explained that she should state what happened between her and the appellant in exhibit C24. He insisted that the lower court did not evaluate exhibits H4 and N and urge the court to do so. He cited ***UTC (Nig.) Plc. V. Lawal* (2014) 5 NWLR (Pt. 1400) 221** for the view.

On behalf of the respondent, learned counsel submitted that the ingredients of the offences were proved without Mrs. Fagoriola. He insisted that the respondent was not bound to call a host of witnesses. H e relied on ***Olayinka v. State* (2008) 6 ACLR 194**. H e explained that Mrs. Fagoriola was neither a member of the

committee nor did she give exhibit C24 as the purchase of Ankara was not from any other source.

Issue four.

Learned counsel for the appellant submitted that the lower court refused to give ordinary meaning to section 47 (2) of the Act on the option of fine. He cited ***Duke v. Govt. C. R. S.* (2013) 1 – 2 SC (Pt. IV) 34.** He explained that the amount involved was ₦90, 000. 00. He conceded that a trial court had the discretion in sentencing which must be exercised judicially and judicious. He urged the court to interfere in the exercise as it was not within the provisions of the Act. He relied **on *Egunjobi v. FRN* (2002) FWLR (Pt. 105) 896.** He persisted that the option should have come first before the terms of imprisonment. He cited ***Ogunbayo v. State* (2007) 8 NWLR (Pt. 1035) 157** for the point. He urged the court to grant option of fine notwithstanding that mandatory sentence of imprisonment and fine. He referred to price ***Control Board v. Ezema* (1982) 1 NCR 71**. He postulated that a court had the discretion to impose fine without any specific authority to do so. He relied on ***Kwabe v. State* (2003) FWLR (pt. 159) 15045; *Thomas v. State* (1994) 4 NWLR (Pt. 337) 129.**

On the side of the respondent, learned counsel contended that section 16 of the Act, under which the appellant was charged, had provision for option of fine. He noted that the lower court graciously

gave it. He explained that the discretion could not be fettered by law otherwise, it would be non – existent. He maintained that the discretion could only be interfered with if it was exercised arbitrarily. He relied on ***Hamza v. Kure*** **NCC 5.** He asserted that section 47 (2) of the Act was inapplicable as it applied to conviction of forfective of property. He stated that the appellant was convicted under sections 26 (c) and 16 of the Act.

Issue five.

Learned counsel for the appellant submitted that the burden of proof beyond reasonable doubt of the offences was on the respondent which must be discharged before conviction. He referred to section 135 of the Evidence Act, 2011, ***Alomu v. State*** **(2009) 10 NWLR (pt. 1148) 31;** ***Afolabi v. State*** **(2010) 16 NWLR (Pt. 1220) 584** for the submission. He asserted that where it failed then the doubt would be resolved in favour of an accused based on presumption of innocence under section 36 (4) of the Constitution, as amended. He cited ***Madu v. State*** **(2012) 15 NWLR (Pt. 1324) 405** for the view. He maintained that appellant's consistent evidence should be preferred to the inconsistent evidence of PW3.

Learned counsel for the respondent analysed respondent's evidence and maintained that offences were proved beyond reasonable doubt.

Issue six.

Learned counsel for the appellant argued that the cross – examination of DW8 was not in the record. He noted the importance of cross – examination as stated in ***Ayan v. State*** **(2014) ALL FWLR (Pt. 740) 1409.** He took the view that the omission led to denial of the appellant's right to fair hearing and fair trial. He cited ***Daniel v. FRN*** **(2014) ALL FWLR (Pt. 735) 319** on the point.

For the respondent, learned counsel submitted, *per contra*, that the lower court recorded the cross – examination of DW 8, as shown in the additional record, and made use of same. H e posited that the appellant's right to fair hearing was not trampled on as he was given the opportunity to call and cross – examine witnesses.

Resolution of the issues.

In the interest of orderliness, I will attend to the issues *seriatim* as presented by the parties. To this end, I will kick off with the settlement of issue one. It falls within a very narrow compass. It quarrels with the lower court's recording which disclosed that the appellant sourced and filled exhibit C24: the receipt of Mama Twins Butik.

Indisputably, the lower court, at the cradle of its judgment, precisely towards the tail end of page 141 of the record, so recorded. However, at the foot of that page, in the selfsame judgment, it concluded: "This in short is the summary of the facts established by

the prosecution and the defence in this matter". It flows from this conclusion, that the recording formed part and parcel of the synopses of the cases of the parties. Many a jurists adopt this pattern of judgment that highlights the resume' of the case at the cradle of the judgment. It gives an insight into the judgment and enables to appreciate its purport *abinitio*. The law gives the trial court the licence to, at this stage, "briefly summaries the case of either party," Stephen v. State (1986) 5 WLR (Pt. 46) 978 at 1003 per Oputa JSC. It, therefore, qualifies as one of the essential elements of judgment writing. Judgment writing has been, aptly, described as an art and so long as it hosts the necessary elements, the method, deployed by Judge is immaterial, see ***Ezeuko v. State* (2016) 6 NWLR (Pt. 1509) 529.** Even if a trial Judge reverses the order of consideration of the cases, *id est,* taking the defence first, case – law has declared it an irregularity, ***see Ezeuko v. State*** (supra). The style of judgment presentation is personal to a Judge. To my mind, the lower court did not defile the law in judgment writing by the recording in its summary of the facts of the case. On this score, the recording did not erode the appellant's right to fair hearing as entrenched in section 36 of the Constitution, as amended.

The appellant brandishes a miscarriage of justice as a by – product of the recording. A miscarriage of justice is failure on the part of court to dish out justice in a case, see ***Adeyemi v. State***

(2014) 13 NWLR (pt. 1423) 132; *Itu v. State* (2016) 5 NWLR (pt. 1506) 446. The law displayed above, with due respect, exposes the poverty of this allegation as well as demolishes it. In sum, the record does not smell of any miscarriage of justice and, *ipso facto*, none is inflicted on the appellant. In the result, I resolve issue one against the appellant and in favour of the respondent.

That takes me to a consideration of issue two. It is the heart of this appeal. It questions the lower court's conviction of the appellant without proof of the essential elements of the offences beyond reasonable doubt. The ingredients of the substantive offence, making false statement, preferred against the appellant under section 16 of the Act are: (a) The accused must be an officer. (b) He must be charged with receipt, custody, use or management of public revenue. (c) He must knowingly furnish any false statement or return. Being a criminal offence, it is incumbent on the respondent, as the prosecution, to prove all the ingredients beyond reasonable doubt, see section 135 of the Evidence Act 2011, ***Sakari v. FRN*** (2016) 3 NWLR (Pt. 1500) 531; ***Itu v. State*** (2016) 5 NWLR (pt. 1506) 443; ***Ezeuko v. State*** (supra); ***Smart v. State*** (2016) 9 NWLR (pt. 1518) 447; ***Abokokuyanro v. State*** (2016) 9 NWLR (Pt. 1518) 520. It is germane to place on record, that bags of documentary evidence formd the *corpus* of the case. Interestingly, the law, in order to repel injustice, donates concurrent jurisdiction to this court and the lower

court on evaluation of documentary evidence, **see *Ezeuko v State* (supra); *FRN v. Sanni* (2014) 16 NWLR (Pt. 1433) 299**. I will reap from this coextensive jurisdiction in the appraisal of the galaxy of documentary evidence in this appeal.

One of the appellant's chief grievances is that the offence of conspiracy, levelled against him, under section 26 (1) (c) of the Act was not proved by the respondent. Conspiracy is a confederacy or an agreement between at least two persons with the aim of committing unlawful or criminal act or doing a lawful act by an illegitimate means. Being an agreement, express or implied, it takes at least two persons to conspire, *id est,* one person cannot be guilty of conspiracy. The actual agreement by the conspirators, owing to the fact that it is, invariably, shrouded in secrecy, constitutes the offence without any necessity to prove that the criminal act has been committed. Due to its usual clandestine nature, it is not always proven by direct evidence, but by circumstantial and inferential evidence deducible from the proved acts of the conspirators in evidence. Such circumstantial evidence, often as good as direct evidence, must be cogent, consistent and irresistibly point to the guilt of the conspirators. In other words, the offence can be committed by the action, inaction, conduct or concert of the conspirators. To secure a conviction against an accused person on a charge of conspiracy, it must be established, beyond reasonable doubt by the

prosecution, that there is a meeting of the minds of the criminal actors with a joint or communal understanding and effort at committing a crime, see ***Ojo v. FRN*** **(2009) ALL FWLR (Pt. 494) 161;** ***Mohammed v. State*** **(1991) 5 NWLR (Pt. 192) 438/(2007) ALL FWLR (Pt. 366) 668;** ***Clark v. State*** **(1986) 4 NWLR (Pt. 35) 381;** ***Oduneye v. State*** **(2001) 1 SC (Pt.1) 6;** ***Okeke v. State*** **(1992) 2 NWLR (Pt. 590) 246;** ***Oyakhire v. State*** **(supra);** ***Njovens v. The State*** **(supra);** ***Obiakor v. State*** **(2002) 10 NWLR (pt. 776) 612;** ***Kaza v. State*** **(2008) 7 NWLR (Pt. 1085) 125;** ***Abdullahi v. State*** **(2008) 17 NWLR (Pt. 1115) 203;** ***Omotola v. State*** **(2009) 7 NWLR (pt. 1139) 148;** ***Sule v. State*** **(supra);** ***Posu v. State*** **(2011) 2 NWLR (Pt. 1234) 393;** ***Shodiya v. State*** **(2013) 14 NWLR (Pt. 1373) 147.**

I have paid an expected visit to the record, the spinal cord of the appeal, in the domain of the respondent's evidence occupying pages 46 – 71 of the main record and pages 1 – 3 of the additional record. I have perused them with a fine tooth comb. Admirably, they are obedient to clarity. The blank Mama Twins Butik receipt, exhibit C24, a recurring decimal in the case, was given to PW3 by its owner, PW5. PW3 testified that she handed it over to the appellant who claimed it was misplaced. It can be gleaned from the above, that the first accused, Gbenga Ojo, with whom the appellant stood trial in the lower court, played no role in the procurement and filling of exhibit

C24. Thus, there is no patent evidence of *consensus ad idem* between the first accused and the appellant regarding presentation of false statement in exhibit C24. The appellant was alleged to have conspired with the said Gbenga Ojo. Since Gbenga Ojo was not a *dramatis personae* in sourcing of exhibit C24, evidence of agreement to conspire cannot be justifiably inferred in law. The reason is not far – fetched. Just like it takes two to tango, it takes at least two to conspire. I concede that conspirators need not know themselves nor seen together coming out from the *locus criminis* like those who murdered Julius Caesar, see ***Njovens v. State* (1973) 5 SC 17/(1973) 1 NMLR 331/(1975) LPELR – 2042 (SC); *Ndozie v. State* (2016) 8 NWLR (Pt. 1513) 1.** However, there is no *nexus* between the appellant's co – accused with the exhibit C24. On this score, there is no circumstantial evidence, parol or documentary, which will propel me to draw inferences of conspiracy against the appellant *vis – a – vis* the charge of conspiracy. The lower court's finding to the contrary flies in the face of the law as displayed above. The finding being hostile to the law is liable to vacation by this court.

Not done, the appellant castigated the lower court's reliance on the evidence of PW3 when she was a tainted witness. A tainted witness has been described as one who is either an accomplice or one who by his evidence could be regarded as having some purposes of his own to serve, see ***Olaiya v. State* (2010) 3 NWLR**

(pt. 1181) 428; *Moses v. State* (2006) 11 NWLR (Pt. 992) 458; *Akindipe v. State* (2012) 16 NWLR (pt. 1325) 94; *Egwumi v. State* (2013) 13 NWLR (pt. 1372) 525; *Odogwu v. State* (2013) 14 NWLR (pt. 1373) 74; *Ehirika v. State* (2014) 4 NWLR (pt. 1398) 558; *Ononuju v. State* (2014) 8 NLWR (pt. 1409) 345. A court of law is enjoined to scrupulously examine evidence of a tainted witness and exercise restraint in convicting, based on it, without corroboration.

An accomplice, in the eyes of the law, is one who partook in the actual commission of the crime charged either as a principal actor or accessory before or after the fact, see ***Ezeuko v. State*** (supra). There is drought of evidence that PW3, not a public officer, was *participes criminis* or an accessory to the offence. On this premise, she did not come within the realm/purview of an accomplice to be classified as one. No evidence on record signified that she nursed some private purposes or ends to achieve by offering her evidence. No doubt, PW3 was/is the spouse of the first accused person: depicting conjugal relationship. Nonetheless, in the view of the law, the existence of such relationship, between witnesses and victims of crimes or culprits, without more, is insufficient to style a witness as tainted, see ***Ogunbayo v. State*** (2007) 8 NWLR (Pt. 1035) 157; ***Egwumi v. State*** (supra). By law, PW 3 wears the title of a percipient witness. It is, therefore, clear to me that PW3 was a disinterested witness, totally, divorced from being tainted. I have no

justification in law to accord her the appellation of a tainted witness, invented by the appellant, with its attendant negative consequences on the respondent's case. The lower court was right not to have treated her as one.

The appellant chastised the evidence of PW3 and PW5 as being contradictory. Etymologically, contradiction traces its lexical descent to Latin language. It is an amalgam of *"contra" and "dictum", id est, contradictum* which means "to say the opposite". Two pieces of evidence of a witness or witnesses are contradictory when they are diametrically opposed and one affirms the opposite of the other. For contradiction to vitiate a decision or a case, it must be material and cast doubts in a party's case, see ***Eke v. State*** (supra); ***Babarinde v. State*** **(2011) 3 NWLR (Pt. 1235) 568;** ***Olatinwo v. State*** **(2013) 8 NWLR (Pt. 1355) 126;** ***Mohammed v. State*** **(2014) 12 NWLR (pt. 1421) 387;** ***Emeka v. State*** **(2014) 13 NWLR (Pt. 1425) 614.**

I have given a microscopic examination to the *viva voce* testimonies of both witnesses, PW3 and PW5, both in the examination – in – chief and under the crucible of examination. The kernel of the evidence of PW3 is plain: that she did not fill exhibit C24 but gave it to the appellant who claimed its misplacement on her request for its production. The meat of the testimony of PW5 is that she owned exhibit C24 which she gave to PW3 in its blank state. A

juxtaposition of these pieces of evidence does not showcase any inconsistency in the case of the respondent. They rather disclose the chain of events which metamorphosed into the commission of the offence by dint of exhibit C24. The evidence are incompatible in the domain of adjectival law. They are, totally, divorced from contradiction that will ruin the case of the respondent. I, therefore, dishonour the appellant's enticing invitation to crucify the pungent evidence of PW3 and PW5 on the undeserved altar of contradiction for want of legal justification.

Moreover, the evidence of PW3 were that she gave the exhibit C24, Mama Twins Butik receipt, in its empty form, to the appellant who claimed, twice, that it got lost. That it was in respect of exhibit C24 that she had dealings with the appellant. PW3 was not cross-examined on the crucial evidence of the allegation that the appellant claimed that it was lost. First, it can be inferred that the appellant nursed the intention to make the false claim. In law, intention is "willingness to bring about something planned or foreseen; the state of being set to do something", see ***Afolabi v. State*** (2016) 11 NWLR (Pt. 1524) 497 at 519, per Okoro, JSC. The law gives the court the unbridled latitude to draw the inference, see ***Babatunde v. State*** (2014)2 NWLR (Pt. 1391) 298. The PW3 was not cross-examined on the critical evidence of misplacement. It is trite law, that failure to cross-examine a witness on crucial areas of

evidence is akin to admission of the evidence-in-chief, see ***Egwumi v. State*** (2013) 13 NWLR (Pt. 1372) 525; ***Ikaria v. State*** (2004) 1 NWLR (Pt. 1389) 639. The appellant ignored the imperativeness of cross-examination in our adversarial system of adjudication. Cross-examination has been described as the "noble art" which "constitutes a lethal weapon in the hands of the adversary to enable him effect the demolition of the case of the opposing party", ***Oferlete v. State*** (2000) 3 NSCQR 243 at 268, per Achike, JSC. Cross-examination "if rightly employed, is potent tool for perforating falsehood", ***Ayan v. State*** (2013) 15 NWLR (Pt. 1376) 34 at 36, *per* Fabiyi, JSC. Thus, cross-examination occupies an Olympian position in the adjectival law. It is the yardstick with which to gauge the truth in evidence-in-chief of witnesses. The veracity of a witness under examination-in-chief is tested by the evidence elicited from him in the furnace of cross-examination. Alas, the appellant disarmed himself of the necessary "lethal weapon", in the form of cross-examination, which he would have harnessed, through the advocative prowess and dexterity of counsel, to neutralise the evidential credit of PW3's incriminating evidence. The undiluted admission constitutes a serious dent on the potency of the appellant's defence of denial in the bowel of the lower court.

Besides, I have situated exhibit C24 with exhibit O: the appellant's hand writing extracted from him in the course of his evidence. The law gives this court the nod to make the comparison, see section 101 (1) of the Evidence Act, 2011 (then section 108 (1) of the defunct Evidence Act, 2004); ***Ndoma-Egba v. ACB Plc*** (2005) 14 NWLR (Pt. 944) 79; ***Odutola v. Mabogunje*** (2013) 7 NWLR (Pt. 1354) 522. The handing writing in both are so identical leading to the inference that it was the appellant that filled exhibit C24. This court so found in a sister appeal, *id est*, Appeal No. CA/AK/167CA/2014: ***Gbenga Ojo v. FRN*** (unreported) delivered on 17th April, 2015. This court is bound by its previous decision, see ***Aladinma Medicare Ltd. v. Regd. Trustee. O.C.M.*** (2012) 5 NWLR (Pt. 1294) 441. *A fortiori* when both appeals trace their paternity to a common decision of the lower court. I will, therefore, follow that finding.

The appellant branded the lower court's finding on the point as occasioning a miscarriage of justice. A miscarriage of justice is: "A grossly unfair outcome in judicial proceedings. As when a defendant is connubial despite lack of evidence on an essential elements of crime", see ***Adeyemi v. State*** (supra). It connotes failure of justice, see ***Itu v. State*** (supra). In the light of the above legal anatomy, garnished with *ex cathedra* authorities, the allegation of miscarriage

of justice takes to flight. There were abundant, credible and concrete evidence upon which the lower court hinged its finding regarding the offence of furnishing false claim. In all, the finding does not smell of any miscarriage of justice and the appellant was not smeared with any of its negative elements.

For completeness, there are myriads of evidence on record showing that the appellant was culpable of the alleged offence – knowingly furnishing false statement/return in respect of the ₦90, 000. 00 meant for the purchase of Ankara materials. In other words, the respondent proved its ingredients against him beyond reasonable doubt as ordained by section 138 of the Evidence Act, 2004, section 135 (1) of the Evidence Act, 2011. After all, proof beyond reasonable doubt does not evince proof beyond all iota of doubt, se ***Banjo v. State*** **(2013) 16 NWLR (Pt. 1331) 455;** ***Umar v. State*** **(2014) 13 NWLR (Pt. 1425) 497.** In the view of the law, it is attained when the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with a sentence "of course it is possible but not in the least probable", see ***Maigari v. State*** **(2013) 17 NWLR (Pt. 1384) 425.** It implies that the solemn finding of the lower court on the second offence (count three) is unassailable. Due to its unimpeachable status, this court is robbed of the jurisdiction to tinker with it, see ***Olatuobosun v. State*** **(2013) 17 NWLR (Pt. 1382) 167.** I am least prepared to annoy the law for

fear of its wrath. In the end, this issue two is partly resolved against the appellant and in favour of the respondent and *vice versa.*

Having dispensed with issue two, I will proceed to handle issue three. The gravamen of the issue is that the respondent's failure to call Mrs. Adeola Fagoriola was fatal its case. It is trite law, that the prosecution, the respondent herein, is not required to call a host of witnesses to prove ingredients of an offence. But, the law compels it to call a vital witness: a witness whose evidence will prove a vital point or ingredient of an offence either way the prosecution defaults in calling such a vital/material witness, the failure will be fatal to its case which must be proved beyond reasonable doubt, see ***Sule v. State* (2016) 3 NWLR (Pt. 1499) 392; *Itu v. State* (2016) 5 NWLR (Pt. 1506) 443; *Pius v. State* (2016) NWLR (Pt. 1517) ; *Smart v. State* (2016) 9 NWLR (Pt. 1518) 447; *Abokokiyanro v. State* (2016) 9 NWLR (Pt. 1518) 520; *Ayeni v. State* (2016) 12 NWLR (Pt. 1525) 51.**

Now, the appellant's contention is that Mrs. Adeola Fagoriola, the wife of the Chairman of Akure North Local Government Council, was the person who signed the ₦90, 000. 00 for the purchaser of Ankara as shown in exhibits H5 and N and her evidence would have favoured him. This appears sterling. Nevertheless, it is tainted with a serious flaw. It overlooks the plinth of the charge that "did knowingly furnish false statement...claiming that the sum of ₦90,

000. 00 was used to purchase Ankara at Mama Butik, when no such purchase was made from Mama Butik." Thus, the allegation is specific: a false claim that the ₦90, 000. 00 was utilised to buy Ankara materials from Mama Twins Butik. PW5 gave unchallenged evidence, that though she possessed exhibit C24, but never used it to sell Ankara materials to the Committee. In the sight of the law, an unchallenged evidence should be acted upon by a court, see ***Ayeni v. State*** (supra). It stems from this, that the presence of Adeola Fagoriola as a witness would not have cleansed exhibit C24 of the falsity that plagued it. Put simply, even if she had testified that she collected the ₦90, 000. 00 and supplied the Ankara materials, exhibit C24 would still have been marooned in the intractable votex of falsity. The exhibit C24 having been filled and used to retire ₦90, 000. 00, allocated for the purchase of Ankara materials, by the appellant, without PW5 being the seller, is already stained with indelible falsity. On account of the foregoing, I am unable to accord Mrs. Adeola Fagoriola the appellation of a vital witness. Put bluntly, her failure to proffer evidence did not constitute *a coup de grace* in the respondent's case. The respondent presented sufficient oral and document any evidence in proof of the ingredients of the offence. In sum, I have no option than to resolve issue three against the appellant and in favour of the respondent.

I proceed to deal with issue four. It probes into the legality of the lower court's grant of option of fine beyond the sum of ₦90, 000. 00 that was allotted for the purchase of Ankara materials. The appellant weaved his complaint around the provision of section 47 (2) of the Act which enjoins the lower court to order a penalty equivalent to the amount of gratification where property cannot be traced or has been disposed of. A dispassionate consideration of this issue, necessarily, turns on the provision of section 16 of the Act under which the appellant was hauled before the lower court. It reads:

> **Any person who being an officer charged with the receipt, custody, use or management of any part of the public revenue or property knowingly furnishes any false statement or return in respect of any money or property received by him or entrusted to his care or any balance of money or property in his possession or under his control is guilty of an reference and shall on conviction be liable to seven (7) years imprisonment.**

This provision is comprehension – friendly and divorced from ambiguity. In this regard, the law commands the court to give it its ordinary grammatical meaning without any embellishments, see ***Amoshima v. State* (2011) 14 NWLR (Pt. 1268) 530.** The crime in

question is not a capital offence that attracts the highest magnitude of punishment of death. From the punishment, reserved for it in the provision, it is a felony. In ***Tanko v. State*** **(2009) 1 – 2 (SC (Pt. 1) 198/(2009) 4 NWLR (Pt. 1131) 430 at 219,** Aderemi, JSC, confirmed:

> **Where t he sentence prescribed upon conviction in a criminal charge is a term of years of imprisonment, then some extenuating factors such as the age of the convict, whether is a first offender etc, can be taken into consideration by the trial judge in passing the sentence on the convict. Indeed, the trial judge, in my humble view, has the discretion to employ these factors to reduce the years of sentence.**

See, also, ***Amoshima v. State*** **(supra);** ***State v. John*** (2013) 12 NWLR (Pt. 1368) 337. It is decipherable from this magisterial pronouncement, in the *ex cathedra* authority, that the law gives the lower court the latitude to sentence the appellant to a term of five (5) years imprisonment which is, invariably, below the seven (7) years donated by the provision. It follows that the lower court did not transgress the law on the term of punishment. Perhaps, it was

persuaded/influenced by the *allocutus* availed it by the appellant, *qua* counsel.

The Appellant questioned the method of sentencing: the pronouncement of term of imprisonment coming before that of option of fine instead of *vice versa*. He relied on ***Ogunbayo v. State (supra)*** where Ogbuagu, JSC observed that: " The fine comes first and in default, imprisonment takes effect and not the other way round". In the first place, that observation was an *obiter dictum* which did not form the *ratio decendedi* of that decision. The reason is obvious. The appeal was, despite the unorthodox mode of sentencing employed by the trial court, was, unanimously, dismissed. In other words, the apex court treated the mistake as a minor error which would not upset an appeal, see ***Azabada v. State (2014) 12 NWLR (Pt. 1420) 40.*** That is not all. The law has inched to the point that: "The omission to pronounce the sentence after conviction *per se* which comes after the pronouncement of a valid verdict cannot retrospectively affect the validity of a properly conducted proceedings", see ***Ejilikwu v. State (1993) 7 NWLR (Pt. 307) 554 at 583,*** per Karibi Whyte, JSC; ***Azabada v. State (supra).*** It follows, that the law pardons a default in pronouncing sentence; *a fortiori* a swap in the mode of sentencing. In paying obeisance to these positions of the law, I classify the lower court's reversal in the orders

of sentencing as an irregularity which does not infest its proceeding with any invalidity.

It cannot be gainsaid that the provision is devoid of any provision for option of fine which the lower court favoured the appellant. The provision of section 47 (2) of the Act, which the appellant implored the court to deploy in his favour, is inapplicable to case. The reason is clear. It is not a case of forfeiture of property nor did the lower court make such order as to warrant the invocation of the provision. There is nothing in the provision to fetch the appellant the option of fine even if a whopping sum. However, there is no appeal against that portion of the decision by the respondent. In effect, it acquires the status of an unappealed finding which is binding on the parties. The appellant is complaining of a favour which the lower court dashed and dished out to him in contempt of the law. What a paradox! In all, I resolve issue four against the appellant and in favour of the respondent.

My next assignment is to treat issue five. The issue derides the lower court's evaluation of evidence which occasioned the conviction and sentence. From the tenor of the issue, it exhibits interwoven relationship with the second issue already determined. The resolution in that issue two dovetails with this. Given this intertwined relationship, I will not duplicate my effort under issue two in order not to waste the scarce juridical time. It will be recalled, that I had found

on that issue that the offence of conspiracy was unproved whilst that of furnishing false statement was proved beyond reasonable doubt. There are no extenuating circumstances, available before this court, to disturb that solemn finding reached after due consultation with the law. Contrariwise, I will import the finding and adopt it here on this issue. In effect, this issue is partly resolved against the appellant and partly in favour of the respondent and *vice versa*.

It remains to thrash out issue six. It decries the lower court's omission to record the cross – examination of DW8, the first accused, which led to denial of the appellant's right to fair hearing. I endorse, *in toto,* the appellant's viewpoint on the significance of cross – examination in our criminal justice system of adjudication. I had dissected its importance, in *extenso*, under issue two.

Incontestably, a court is bound by the record so that all proceedings must be reproduced in it, see ***State v. John*** (2013) 12 NWLR (pt. 1368) 337. The cross – examination of DW8 is not wrapped in the main record. It is rather encapsulated between pages 1 – 3 of the additional record. It stems from this, that the lower court did not omit to record the cross – examination of DW8 otherwise it would not have formed the *corpus* of the additional record. If follows, that all the strictures the appellant rained on the lower court on the omission pale into insignificance in the face of its presence in the additional record. Put the other way, the appellant's

*in*alienable/inviolable right to fair hearing was/is not eroded to warrant the interference of this court. Accordingly, this issue is resolved against the appellant and in favour of the respondent.

There is need to assemble the resolutions of the issues. I had resolved issues 1, 3, 4 and 6 against the appellant and in favour of the respondent. I had resolved issues two and five, the meat of the appeal, partly against and in favour of the appellant and *vice versa*. The portion resolved in favour of the appellant touches on the count of conspiracy whilst the part resolved against him is that which borders on knowingly making false claim. Both relate to counts two and three of the charge respectively.

On the whole, on the account of these resolutions, the destiny of the appeal is plain. It succeeds in part. Consequently, I allow the appeal in part. Accordingly, the portion of the lower court's judgment on count two, conspiracy, and the conviction and sentence based on it are set aside and the appellant discharged and acquitted of that offence. The part of the lower court's judgment on count three, knowingly making false claim, and the conviction and sentence based on it are affirmed.

OBANDE FESTUS OGBUINYA,
JUSTICE, COURT OF APPEAL

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MOHAMMED AMBI-USI DANJUMA, JCA

Having read in draft the lead Judgment of my learned brother, **Obande Festus Ogbuinya, JCA** allowing this appeal in part only, I wholly subscribe to the reasoning and conclusion arrived thereat.

I must say, that his Lordship had so clearly, adroitly and with profundity of scholarship articulated the position of the law applicable, such that I can possibly add nothing except, embark on a paraphrase. Since there is no need for that, I concur.

MOHAMMED AMBI-USI DANJUMA
JUSTICE, COURT OF APPEAL

APPEAL NO: CA/AK/67^{C}/2014
RIDWAN MAIWADA ABDULLAHI
JUSTICE, COURT OF APPEAL

Having read in draft the lead judgment of my learned brother, ***OBANDE FESTUS OGBUINYA, JCA (CON),*** I became convinced with the determination of the five issues formulated by the Appellant in this appeal. The reasoning and conclusion reached by my lord is agreed by me as judicious way of resolution of the Appellant's grudge.

I too found the appeal only succeeding in part and partially allowed same as decided in the lead judgment.

RIDWAN MAIWADA ABDULLAHI
JUSTICE, COURT OF APPEAL