11/3/19

Official

IN THE COURT OF APPEAL, NIGERIA
IBADAN JUDICIAL DIVISION
HOLDEN AT IBADAN

COURT OF APPEAL
Date 11/3/19
Sign
CASHIER
IBADAN

ON FRIDAY THE 1ST DAY OF MARCH, 2019

BEFORE THEIR LORDSHIPS:

JIMI OLUKAYODE BADA	-	**JUSTICE, COURT OF APPEAL**
HARUNA SIMON TSAMMANI	-	**JUSTICE, COURT OF APPEAL**
ABUBARKAR MAHMUD TALBA	-	**JUSTICE, COURT OF APPEAL**

APPEAL NO: CA/IB/374C/2018

BETWEEN:

MUTIAT OMOBOLA ADIO .... APPELLANT

AND

FEDERAL REPUBLIC OF NIGERIA .... RESPONDENT

JUDGMENT

(DELIVERED BY JIMI OLUKAYODE BADA, JCA)

This appeal emanated from the Judgment of High Court of Justice Oyo State sitting at Ibadan in charge **No: I/3EFCC/2017, BETWEEN: FEDERAL REPUBLIC OF NIGERIA VS MUTIAT OMOBOLA ADIO** delivered on the 18th day of May, 2018.

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SALAKO C. O.
11/3/19
REGISTRAR
COURT OF APPEAL, IBADAN

Briefly the facts of the case are that the Appellant who was the Defendant at the lower Court was arraigned on a two counts amended information filed on 20th day of April 2017 which was subsequently amended on the 22nd May 2017, for obtaining money under false pretence contrary to **Section 1 (2) of the Advance Fee Fraud and other Related Offences Act 2006 and punishable under Section 1 (3) of the same Act and stealing contrary to Section 390 of the Criminal Code Law, Cap 38, Laws of Oyo State 2000.**

The Respondent who was the Prosecutor at the lower Court opened its case by calling 4 witnesses and tendered in evidence **7 Exhibits** while the Appellant opened her defence by testifying for herself and thereafter closed her defence. Written addresses were filed exchanged and adopted by Counsel for the parties.

In a considered Judgment delivered on the 18th of May 2018, the Appellant was convicted and sentenced to 7 years imprisonment without an option of fine.

The Appellant who is dissatisfied with the Judgment of the lower Court appealed to this Court.

The learned Counsel for the Appellant formulated five issues for the determination of the appeal. The said issues are set out as follows:-

(1) Whether the Prosecution proved all the necessary ingredients of the offence of obtaining money under false pretence under **Section 1 (2) of the Advance Fee fraud and other related offences Act, 2006** against the Appellant beyond reasonable doubt to justify her conviction for the said offence. (Distilled from Grounds 1, 2 and 6 of the Grounds of Appeal).

(2) Whether the learned trial Judge was duty bound, to consider the motion on notice filed on 17th May 2018 seeking to withdraw the charge against the Appellant and consider same before delivering Judgment convicting and sentencing the Appellant on the 18th May, 2018. (Distilled from Ground 3 of the notice of appeal).

(3) Whether the learned trial Judge after reviewing the evidence of the Prosecution and the defence in the Judgment of the Court went ahead to evaluate the said evidence and make findings borne out of the said evaluation and gave reasons for the

decision in the said Judgment before convicting and sentencing the Appellant. (Distilled from Ground 4 of the grounds of Appeal).

(4) Whether the arrest and the subsequent trial and conviction of the Appellant is not contrary to **part 2 Section 8 (2) of the Administration of Criminal Justice Act 2015** (This issue relates to Ground 5 of the Grounds of Appeal).

(5) Whether the continuation of the trial of the Appellant on 6th day of October, 2017 in the absence of her Counsel is not a breach of the Constitutional right of the appellant under Section 36 (4), (6)(c) of the Constitution of the Federal Republic of Nigeria 1999 (as Amended) Distilled from Ground 7 of the grounds of Appeal).

On the other hand the learned Counsel for the Respondent also formulated six issues for the determination of the appeal.

The issues are set out as follows:-

(1) Whether the Prosecution/Respondent proved all the necessary ingredients of the case of obtaining money under false pretence made against the Appellant beyond reasonable doubt.

(2) Whether the trial Judge was duty bound to consider the motion on Notice filed by the Counsel watching brief, dated 17th May 2018, seeking to withdraw the charges against the Appellant before delivering Judgment on 18th May 2018.

(3) Whether the trial Judge's findings and decision was borne out of the proper evaluation of the evidence led by the Prosecution and the defence at the trial.

(4) Whether the act of the Appellant in the transaction for which the Appellant was convicted discloses a criminal Act.

(5) Whether the arrest and subsequent trial and conviction of the Appellant is not contrary to part 2 Section 8(2) of the Administration of Criminal Justice Act 2015.

(6) Whether the continuation of the trial of the Appellant on the 6th day of October 2017 in the absence of her Counsel is not a breach of the Constitutional right of the Appellant under Section 36(4) and 6(c) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

At the hearing of this appeal on 15/1/2019 the learned Counsel for the Appellant stated that the appeal is against the Judgment of Oyo State High court delivered on 18/5/18. The notice of appeal was filed on 13/6/18. The record of appeal was transmitted on 7/9/2018 and it was deemed as properly transmitted on 29/10/18. The notice of appeal was also amended by an order of the Court made on 29/10/18.

It was also stated that the Appellant's brief of argument filed on 22/10/18 was deemed as properly filed on 29/10/18. There is also the Appellant's Reply brief of argument filed on 27/11/2018.

The learned Counsel for the appellant adopted and relied on the Appellant's brief of argument as well as the Appellant's reply brief of argument as his argument in urging that the appeal be allowed.

The learned Counsel for the Respondent in his own case also referred to the Respondent's brief of argument filed on 13/11/2018 and deemed properly filed on 22/11/2018. He adopted and relied on the said Respondent's brief of argument as his argument in urging that this appeal be dismissed.

I have perused the issues formulated for determination of this appeal by Counsel for the parties. The issues formulated on behalf of the Appellant are more or less the same with the issues formulated on behalf of the respondent. Also the issues formulated on behalf of the Appellant are tied to the grounds of appeal.

In view of the foregoing I will therefore rely on the issues formulated on behalf of the Appellant in the determination of this appeal.

ISSUE NO: 1

Whether the Prosecution proved all the necessary ingredients of the offence of obtaining money under false pretence under Section 1 (2) of the Advance Fee Fraud and other Related Offences Act, 2006, against the Appellant beyond reasonable doubt to justify her conviction for the said offence. (This issue is

Distilled from Grounds 1, 2 and 6 of the Grounds of Appeal).

The learned Counsel for the Appellant submitted that in this case the burden is on this Prosecution to prove the ingredients of the alleged offence beyond reasonable doubt. He referred to the following cases-

KAYODE VS FRN (2017) LPELR- 41865 (CA) PAGE 15 PARAGRAPHS A-D, PAGE 17 PARAGRAPHS: A-D.

TAMBUWAL VS FRN (2018) 27 WRN PAGE 158 AT 168-169.

MADU & OTHERS VS FRN (2016) LPELR – 40315 (CA).

CHARITY LUBA CONSULTANCY VS FRN (2016) ALL FWLR PART 817 PAGE 696 AT 718 PARAGRAPHS C-E.

The learned Counsel for the Appellant argued that the particulars of the offence of obtaining by false pretence against the Appellant in the Amended information are that the appellant with intent to defraud obtained the sum of N9,200,000.00 (**Nine Million and Two Hundred Naira Only**) from one Abiodun Rasheed Olonade through Kunle Abimbola by falsely pretending that it was part payment of the cost price of a building and land situate, lying and being at Plot 10, Block XXIV, Bashorun Estate, Lagelu Local

Government Area, Ibadan which she purported to have sold to him.

Learned Counsel for the Appellant also referred to the evidence of PW1, PW2, PW3 PW4 and that of the Appellant and submitted that the following are not in dispute:

(1). That there is property at Plot 10, Block XXIV, Bashorun Estate, Lagelu Local Government Ibadan.

(2). That the owner instructed the Appellant to sell the property.

(3) That the Appellant offered the property for sale through Kunle Abimbola.

(4). That Abiodun Rasheed Olonade paid a sum of **₦9,200,000.00 (Nine Million and Two Hundred Naira Only)** as part payment of the purchase price of the property through Kunle Abimbola to the Appellant.

(5). That the initial agreement was a total purchase price of **₦15,000,000.00 (Fifteen Million)** between the Appellant and the Purchaser.

It was submitted on behalf of the Appellant that the cost price in the particulars of the offence and that in evidence before the Court was left to speculation.

He relied on the case of:-

ABIDOYE VS. FRN (2014) 2 WRN PAGE 1 AT 25 PARAGRAPH 20 PAGE 22 PARAGRAPHS 10 TO 15.

The learned Counsel for the Appellant submitted that the prosecution having failed to include the cost price in the particulars of the offence charged therefore cannot offer proof of that essential ingredient omitted from particulars of the offence.

He relied on the cases of:-

ABIDOYE VS. FRN (Supra).

ALAKE VS. STATE (1991) PART 205 PAGE 567.

ONWUDIWE VS. F.R.N. (2006) ALL FWLR PART 319 PAGE 774 AT 812-813 PARAGRAPHS G-B.

ADEGBITE VS. STATE (2018) ALL FWLR PART 951 PAGE 1855 AT 1876 PARAGRAPHS B-F.

ABDULLAHI VS. STATE (2005) ALL FWLR PART 26 PAGE 698 AT 713 PARAGRAPHS B-D.

It was also submitted that the evidence of PW1, PW2, PW3 and PW4 about what the owner of the property in question said are hearsay evidence and inadmissible. The learned Counsel for the Appellant relied on the case of –

BUKOLA VS. STATE (2018) ALL FWLR PART 943 PAGE 543 AT 583-584 PARAGRAPHS A-B.

The learned Counsel for the Appellant finally submitted on this issue that failure to prove the said essential ingredients in the particulars of the offence with which the Appellant was charged means that the prosecution failed to prove the offence beyond reasonable doubt. And also that there was a pretense and that the pretense which emanated from the accused person, that the accused knew of its falsity or did not believe in its truth and that there was an intention to defraud on the part of the Appellant.

The learned Counsel for the Respondent in his response stated that for the prosecution to sustain the counts of obtaining money by false pretenses against the Appellant, it must be shown that all the ingredients of the offence are proved.

He relied on the following cases:-

ALAKE VS. STATE (supra) AT 592 PARAGRAPHS G-F.

NWANKWO VS. F.R.N. (2003) 4 NWLR PART 809 PAGE 1 AT 37-38 PARAGRAPHS H-B.

CHARITY LUBS CONSULTANCY VS. F.R.N (supra)718 PARAGRAPHS C-E.

He contended that all the ingredients of the offence under which the Appellant was charged had been proved.

The learned Counsel for the Respondent referred to the testimony of PW1, PW2, PW3 and PW4 and the defence of the Appellant. He also referred to the extra-judicial statement i.e. **Exhibit 6** made by the Appellant that she received the sum of **₦9,200,000.00** (**Nine Million and Two Hundred Naira Only**) out of the **₦10Million** deposit from the victim through her agent Mr. Abimbola Kunle i.e. PW2 for the purchase of the house.

He then submitted that the trial Court can convict the Appellant based upon her Confessional Statement which he stated that is direct, positive and unequivocal.

He relied on the following cases:

OMOJU VS. F.R.N. (2006) VOL. 2 MSJC, PAGE 173 PARAGRAPHS C-D.

EBOGHNOME VS. THE STATE (1993) 7 NWLR PART 306 PAGE 38.

GAJI VS. PAYE (2003) 8 NWLR PART 823 PAGE 583 AT PAGE 605 PARAGRAPHS A-C.

Learned Counsel for the Respondent therefore submitted that all the essential elements of the offence of

obtaining money by false pretense contrary to **Section 1(3) of the Advance Fee Fraud and Other Related Offences Act No. 13 of 1995** as amended by Act No. 62 of 1999 against the Appellant have been proved.

He also relied on the following cases:-

EDE VS. F.R.N. (2001) 1 NWLR PART 695 PAGE 502 AT 515.

AYUB KHANU VS. STATE (1991) 1 NWLR PART 172 PAGE 127.

ADIGUN VS. A. G. OYO STATE (1987) 1 NWLR PART 53 PAGE 678.

Section 1(2) of the Advanced Fee Fraud and Other Related Offences Act 2006 states that:-

> "A person who by false pretense, and with intent to defraud, induces any other person in Nigeria or 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."

The law is settled that in Criminal prosecution that standard of proof required is that of proof beyond reasonable doubt.

Under **section 135(1) of the Evidence Act 2011**, if the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.

But proof beyond reasonable doubt does not mean that the prosecution must prove its case with mathematical exactitude nor does it mean proof beyond any shadow of doubt.

The Prosecution is said to have proved its case beyond reasonable doubt when it has proved all the essential elements of the offence the accused is charged with.

In **ONAGORUWA VS STATE (1993) 1 NWLR PART 303 PAGE 49 AT 85 PARAGRAPHS C-D**, it was held among others that:-

> ".....an essential element without which the offence cannot be sustained in law. It is an inevitable indispensable and important element of the offence."

In order to succeed in a charge of obtaining by false pretences, the Prosecution must prove the following.

(a) That there is a pretence;

(b) That the pretence emanated from the accused person;

(c) That it was false;

(d) That the accused person knew the falsity or did not believe in its truth;

(e) That there was an intention to defraud;

(f) That the thing is capable of being stolen;

(g) That the accused person induced the owner to transfer his whole interest in the property.

The offence of false pretences could be committed by oral communication, or in writing, or even by conduct of the accused person. However, an honest belief in the truth of the statement on the part of the accused which later turns out to be false, cannot found a conviction on false pretence.

See the following cases:-

ALAKE VS STATE (supra) AT 597 PARAGRAPHS G-H.

ONWUDIWE VS F.R.N. (2006) 10 NWLR PART 988 PAGE 382.

It was argued on behalf of the Appellant that the Prosecution having failed to include the cost price of the property in the particulars of the offence charged, that the

Prosecution cannot be said to have proved the essential ingredient of the offence.

In proof of the essential ingredients of the offence, the Prosecution called 4 witnesses.

The PW3 ASP Sarumi Idris Adejumo testified on pages 167-178 of the Record of Appeal. He stated among others under cross-examination that:-

> ".....I did not meet the owner of the property because he was not in the country when the case was reported.... What I found from the owner of the property through phone conversation... he wanted to sell the property he did not instruct the defendant but his lawyer to sell....." (see pages 175 to 176 of the record of appeal).

On the other hand, the defendant during examination in chief stated among other that:-

> ".....my sister's cousin Babatunde Junaid who lives outside Nigeria called me that he wanted to dispose his uncompleted building ..... he instructed me to sell.....He said his lawyer had been unable to sell the house for a long time

....." (see page 191 of the record of appeal).

In this appeal, the testimony of the Appellant corroborates the testimony of PW3 to the extent that the property, owner at a point handed over the property to his lawyer to market for him.

In her defence at the lower Court the Appellant corroborated the testimonies of the prosecution, witnesses to the effect that she engaged the services of Mr. Abimbola Kunle to help her market the property under consideration which belonged to her distant Cousin Mr. Junaid who lives abroad in Dublin and who instructed her via a phone call to dispose of his landed property situate lying and being at Plot 10 Block XXIV, Bashorun Estate, Akobo in Lagelu Lacal Government Area of Oyo State.

A careful perusal of the record of appeal showed that the Appellant made two extra judicial statements i.e Exhibits 5 and 6.

In Exhibit 5 the Appellant wrote among others that-

".....I know Barrister Abimbola, he is a lawyer whom I told to help me market a property at Akobo. The value of the property was **₦20million**.....I told

> Barrister Abimbola to sell it for N20million and nothing less .....Barrister Abimbola informed me that there is an interested buyer in the person of Rasheed Olonade Abiodun who agreed to pay **₦15million** and nothing more. I authorized him to collect the **₦10million** deposit after which they promised to pay the **₦5million** in three months being the balance.....
> ....."
> (see pages 26-27 of the record of appeal).

In her testimony at the lower Court the Appellant acknowledged receipt of the sum of **N9.2million** from Mr. Abimbola Kunle after upon her instruction, Mr. Abimbola Kunle had deducted his commission of **₦700,000.00** from the deposited sum and another **N100,000.00** for the agent who brought the buyer of the property.

In Exhibit 6 the second extra judicial statement made by the Appellant, she catalogued the ways she utilized the money she obtained from PW2 Mr. Abimbola Kunle as follows:-

> ".....I collected the sum of **₦9,200,000.00 (Nine million and Two hundred thousand Naira)** only from Barrister Abimbola because the owner of the property approved of the transaction..... I allocated it for safe keeping because of my illness to the following people (i) Omoniyi Abiola, is a relation to my aunty Mrs. Fadeke Alatue (ii) Tajudeen Alabi (iii) Abdullahi Yusuf ..... are my direct distant relation. I spent my own professional fee of **N700,000.00**. I share the remaining **N8.5million** among the three people mentioned above." (See pages 28-29 of the record of appeal).

As could be seen from the excerpts set out above from Exhibits 5 and 6, they are Confessional Statements made by the Appellant.

A confession is an admission made by an accused person. The commission of a crime could be proved by any of the following means:

(1). By Confessional Statement.

(2). By evidence of eye witness.

(3). By circumstantial evidence where direct or Confessional Statements are lacking.

It is the law that a Confessional Statement once admitted becomes part of the case for the prosecution which the lower Court was duty bound to consider in determining the probative value of the totality of the evidence adduced by the prosecution.

Once a Confessional Statement is admitted, the prosecution need not prove the case against the accused person beyond reasonable doubt, as the Confessional Statement ends the need to prove the guilt of the accused.

In effect if an accused says that he committed the offence and the Court comes to the conclusion that he made the statement in a stable mind and not under duress, the accused must be convicted.

See the following cases:-

SOLOLA VS. THE STATE (2005) ALL FWLR PART 269 PAGE 1751 AT 1782 PARAGRAPHS B-E.

ADEBAYO VS. A. G. OGUN STATE (2008) 7 NWLR PART 1055 PAGE 201.

NWACHUKWU VS. STATE (2007) 17 NWLR PART 1062 PAGE 31.

ODEH VS. F.R.N. (2008) 13 NWLR PART 1103 PAGE 1.

DIBIE VS. THE STATE (2007) 9 NWLR PART 1038 PAGE 30.

FRIDAY SMART VS. THE STATE (2016) LPELR-40827 (SC).

The confession in Exhibit 5 was against the Appellant's admission before the trial Court that her principal told her to sell the property for a price higher than she offered to the complainant. (See **page 191** of the record of appeal).

The evidence of PW1 to PW4 and the testimony of the Appellant in this case before the lower Court showed that the Appellant obtained the sum of **₦10Million** as deposit of purchase price of **₦15Million** from the victim i.e. PW4 in the believe that the money was for a property his son will own in Nigeria.

The buyers representative kept to their own part of the agreement but the Appellant reneged.

Appellant stated on page 28 of the record thus:-

> "I was supposed to give the buyer Rasheed Olonade, a Memorandum of understanding upon the payment of the **₦10,000,000.00n** (**Ten Million Naira**). I could not give them because I was very sick at that time." See Exhibit 6.

The false pretence by the Appellant was the reason why she failed and or neglected to inform the owner of the property about the sale as well as neglected to transmit the money paid by the complainant to the owner. This was admitted in both Exhibit 5 and during Appellant's Cross Examination before the lower Court.

The essential requirements of the offence the Appellant was charged with was proved by the evidence of the prosecution witnesses in that the Appellant misrepresented to the victims the actual price the owner wants to sell the property. She also informed the victim that she would enter into a memorandum of understanding with the buyer once the buyer made a deposit of **₦10,000,000.00** (**Ten Million Naira**) out of the selling price of **₦15,000,000.00** (**Fifteen Million Naira**) but she reneged.

It is therefore clear from the foregoing that the Appellant fraudulently obtained the sum of (**₦9,200,000.00**) **Nine Million and Two Hundred thousand Naira** by false pretence from the victim through her agent Mr.Abimbola Kunle.

Furthermore as shown earlier in this Judgment the Appellant stated in her extra-judicial statement Exhibit 6 the way she utilized the money she obtained fraudulently.

Consequent upon the foregoing I am of the view that the prosecution proved all the necessary ingredients of the case of obtaining money under false pretence against the Appellant beyond reasonable doubt.

This issue No. 1 is resolved against the Appellant and in favour of the Respondent.

ISSUE NO: 2

Whether the learned trial Judge was duty bound to consider the motion on notice filed on 17th May, 2018 seeking to withdraw the charge against the Appellant and to consider same before delivering Judgment, convicting and sentencing the Appellant on the 18th May, 2018. (Distilled from Ground 3 of the Grounds of appeal).

The learned Counsel for the Appellant stated that at pages 230-234 of the record of appeal there is a pending application dated 17th May 2018 and filed on the same 17th May 2018 filed by Counsel for the complainant. The said

application sought for the order to allow the complainant to humbly request for the discontinuance and withdrawal of the charge before the learned trial Judge and strike out the said charge.

He went further that the affidavit in support of the application was deposed to by Alhaji Yekeen Olonade, the PW4 at the trial and the complainant. He contended that the learned trial Judge did not ascertain whether or not the said pending motion had been dealt with one way or the other before proceeding to give judgment against the defendant.

He relied on the following cases:-

M. A. ABIARA VS REGISTERED TRUSTEES OF THE METHODIST CHURCH OF NIGERIA (2000) LPELR- 8736.

EFCC VS DADA (2014) LPELR-24256 PAGE 68-71 PARAGRAPHS F-B.

EFCC VS. AKINGBOLA (2015) LPELR-24546 (CA) PAGES 40-43 PARAGRAPHS F-C.

ONYEAKARUS VS. NWADIOGO (2016) LPELR-40932 (CA) PAGES 7-9 PARAGRAPH E.

SANUSI & OTHERS VS. ALHAJI MOHAMMED BELLO GIDIYA & OTHERS (2006) LPELR-9808 CA PAGE 12 PARAGRAPHS B-E.

The learned Counsel for the Appellant submitted that the failure to hear the said application is an error in law and impacts negatively on the Appellant's right to fair hearing.

He urged that this issue be resolved in favour of the Appellant.

In his response, the learned Counsel for the Respondent stated that it was the Counsel on watching brief that filed a motion on notice dated 17/5/18 praying the Court for discontinuance and withdrawal of charge No:- **I/3EFCC/2017** and strike out same.

It was also stated on behalf of the Respondent that the charge against the Appellant was instituted by Federal Government of Nigeria through its agency the Economic and Financial Crimes Commission as the prosecuting Agency.

The learned Counsel for the Respondent submitted that it is the law that it is only at the instance of the Federal or State Government that the charges can be discontinued, either by the Attorney General or an officer in his Chambers entering a ***Nolle prosequi***. He argued further that a Counsel watching brief for the victim of the crime can only be seen

and not heard since it is the responsibility of the state to prosecute crime which is the subject matter of this charge.

It was also submitted on behalf of the Respondent that the cases cited by Counsel for the Appellant in relation to this issue are distinguishable from the facts in issue. Those cases apply to situations where there are proper applications before the Court. In the instant case he argued that the application was not properly before the Court and as at the material time the application was not before the Court and neither was it served on the Counsel charged with the prosecution of the case.

He urged that this issue No. 2 be resolved in favour of the Respondent.

In his reply on point at law the learned Counsel for the Appellant submitted that under the **Administration of Criminal Justice Law 2016 Oyo State** relied upon by the learned Counsel for the Respondent, under Part 1 Preliminary **Section 2** of the said law, a complainant is defined as including the victim, any informant or prosecutor in any case relating to criminal trial.

He went further that under **Section 356 of Administration of Criminal Justice Law 2016 Oyo State**, if a

complainant at any time before a final order is made in a case, satisfies the Court that there are sufficient grounds for permitting him to withdraw his complaint, the Court may permit him to withdraw his complaint and shall thereupon acquit the Defendant.

He finally submitted that the victim in this case can properly bring an application to withdraw the said complaint.

As rightly submitted by Counsel for the Respondent the charge against the Appellant was instituted by the Federal Government of Nigeria through its Agency, the Economic and Financial Crimes Commission (EFCC). And by law, it is only at the instance of the Federal Government or State that the charges can be discontinued, either by the Attorney General or an officer in his chambers entering a ***Nolle Prosequi***.

The present application being complained about was nether filed by the prosecution nor the defence Counsel. And under Section 108 of the Administration of Justice Law of Oyo State 2016 there was no application before the lower Court to terminate the Criminal case in **Charge No-1/3EFCC/2017** against the appellant.

Apart from the fact that the Counsel watching brief for the victim of the case can only be seen and not heard, it is the responsibility of the Government to prosecute or grant leave to prosecute crime which is the subject matter of this charge.

The above position of the law notwithstanding, I am of the view that the nominal complainant can only be heard during the trial of the case as a witness. If the nominal complainant has any other thing to do in respect of the case he would need to seek for leave of the Court.

It is clear that no such leave was obtained neither was any application for such leave filed before the Court prior to the filing of the said motion on notice under consideration which was to arrest the Judgment of the lower Court and discontinue the case. The law does not anticipate any situation where the Counsel watching brief will bring an application seeking plea bargain or arrest the judgment on behalf of the Appellant. Even where plea, bargain was the intention of the nominal complainant same cannot be given effect without the concurrence of the prosecuting Counsel and/or the Respondent. See **Section 269 (1) of the**

Administration of Criminal Justice Law 2016 Laws of Oyo state which states that-

> "Notwithstanding in this law or any other law, the prosecution may – (a) receive and consider a plea bargain from a defendant charged with an offence either directly from the defendant or on his behalf..."

I am of the view that the complainant in this case is the **Federal Republic of Nigeria and Section 356 of the Administration of Criminal Justice, Laws of Oyo State 2016** allows on the complainant i.e the Federal government of Nigeria to exercise such powers of seeking to have the case discontinued provided it is not a felony.

I am also of the view that application aimed at arresting judgment of Court is not known to our Criminal jurisprudence and neither does our own rules of Court make provision for such an application. As I stated earlier that the prosecuting Counsel must be carried along if there is going to be any such application but in this case he was not carried along. Therefore the application was not properly brought before the Court.

The lower Court was therefore right when it refused to hear the application. See the case of:-

DICKSON OGUNSEINDE & ANOTHER VS SOCIETY GENERALE BANK LTD & 2 OTHERS (2018) 9 NWLR PART 234 PAGES 241 – 242 PARAGRAPHS H-A.

This issue No. 2 is therefore resolved in favour of the Respondent and against the Appellant.

ISSUE NO: 3

> **Whether the learned trial Judge after reviewing the evidence of the prosecution and the Defence in the Judgment of the Court went ahead to evaluate the said evidence and make findings borne out of the said evaluation and gave reasons for the decision in the said judgment before convicting and sentencing the Appellant. (Distilled from Ground 4 of the Grounds of appeal).**

The learned Counsel for the Appellant submitted that the learned trial judge started to make findings of law and facts without setting out the point or points for determination and without evaluating the evidence of the prosecution and the defence and or give reasons for the decision. He referred to part 31 Section 308 (1) of the

Administration of Criminal Justice Act 2015 which states as follows:-

> "The Judge or Magistrate shall record his judgment in writing and every judgment shall contain the point or points for determination, reasons for the decision and shall be dated and signed by the Judge or Magistrate at the time of pronouncing it."

He relied on the case of:- **STATE VS ATOKI (2015) 15 WRN PAGE 65 AT 97 PARAGRAPH 45, PAGES 124-125 PARAGRAPHS 30-20.**

He submitted that **part 31 Section 308 of the Administration of Criminal Justice Act 2015** is an enactment specifically and expressly provided for the essentials of a judgment in a Criminal case. He went further that the learned trial Judge ought to have evaluated all the evidence adduced in respect of the point or points for determination in the case and to have anchored the Court's decision in respect of the point or points on findings of witnesses whose evidence he believed and to which he ascribed probative value.

He referred to the following cases:-

MUSA ISA VS STATE (2014) LPELR 23627 (CA) PAGE 39 PARARAPHS D-F.

STATE VS IBRAHIM 2014 LPELR-23468 (CA) PAGE 16 PARAGRAPH F.

AWOPEJO VS STATE (2001) LPELR – 656 (SC) PAGE 12 PARAGRAPHS B-D.

Learned Counsel for the Appellant submitted that failure to evaluate evidence is a denial of Justice. He relied on the case of – **EHIKWE VS. STATE (2018) LPELR-44753 PAGE 22 PARAGRAPHS D-G**.

He finally urged that this issue No. 3 be resolved in favour of the Appellant.

In his response, the learned Counsel for the Respondent submitted that the findings and subsequent decision of the trial Court was borne out of the proper evaluation of the evidence led at trial.

He submitted that the attitude of the Appellate Courts towards finding of fact by the lower Court is as captured by the Supreme Court in the case of **ALAO VS STATE (2015) 17 NWLR PART 1488 PAGES 270-271 PARAGRAPHS D-A** where it was held among others as follows:-

"....in the first instance, the Court of Appeal will not disturb the findings of the trial Court except on the showing of the Appellant that the trial Court in performance of its primary duty to appraise the evidence before it and ascribe probative value to same made improper use of the opportunity of hearing and seeing witnesses....."

He also relied on the following cases:-

KALE VS COKER (1982) 12 SC PAGE 252 AT 271.

IBISANYA VS NWOKO (1974) 6 SC PAGE 69.

EFE VS STATE (1976) 11 SC PAGE 75.

OLORUNTOBA-OJU & OTHERS VS ABDUL-RAHEEM & OTHERS (2009) 13 NWLR PART 1157 PAGE 83 AT 141-142 PARAGRAPHS H-A.

He finally submitted that the learned trial Judge has complied with the requirements of the law and he argued that this issue No. 3 be resolved in favour of the Respondent.

The learned Counsel for the Appellant contended that the learned trial Judge made findings of law and facts without evaluating the evidence of the prosecution and defence and or giving reasons for the decision.

The Supreme Court and indeed this court have held in a number of decisions that the appraisal of oral evidence and the ascription of probative value to such evidence is the primary duty of the Court of trial and a Court of Appeal will not ordinarily interfere with that duty unless there has been an erroneous appraisal of such evidence. See the following cases:-

FASHANU VS ADEKOYA (1974) 1 ALL NLR PART 1 PAGE 35 AT 41

EKI VS GIWA (1977) 11 NSCC PAGE 96.

BALOGUN VS LABIRAN (1988) 19 NSCC PART 1 PAGE 1056 AT 1064 PARAGRAPH1, (1988) 3 NWLR PART 80 PAGE 66.

Nevertheless, where it is alleged on appeal as in this case that the trial Court failed to adequately evaluate the evidence given before it in a case, the details of any specific evidence the trial Court failed to evaluate must be given. See **EJOH VS WILCOX (2003) 13 NWLR PART 838 PAGE 488 AT 510 PARAGRAPHS C-D**.

A careful perusal of the Judgment of the trial Court revealed that the evidence led by both the Respondent and appellant were properly evaluated and a decision was rendered in line with the evidence led.

Concerning the issue of Judgment writing, this has received the attention from the Supreme Court in so many cases but I will refer to one of them i.e the decision in **USIOBAIFO VS USIOBAIFO (2005) 1 S.C PART 11 PAGE 60 AT 77 PARAGRAPH 4** where **TOBI JSC** (of blessed memory) held among others as follows:-

> "Judgment writing is not an arithmetical or geometrical exercise which must answer exactly to laid down rules in the field of mathematics. A Judge is not bound to follow the method or methodology stated by Counsel in the brief, once a Judgment of a trial Judge states the claim or relief of the Plaintiff, the relevant facts and counter facts leading to the claim or relief, argument of Counsel if Counsel are in the matter, reactions of the Judge to the arguments and the final order, an appellate Court cannot hold that the Judgment is not properly written."

As I stated earlier in this Judgment, the learned trial Judge considered the evidence led by both the Respondent and Appellant and it was properly evaluated and a decision was rendered in line with the evidence led. Therefore without equivocation I am of the view that the Judgment of

the trial Court has complied with the requirements of the law as contained in Sections 308 and 309 of the Administration of Criminal Justice Law, Laws of Oyo State of Nigeria 2016, and this Court is not in a position to set it aside.

In the circumstance this issue No. 3 is resolved in favour of the Respondent and against the Appellant.

ISSUE NO. 4

Whether the arrest and subsequent trial and conviction of the Appellant is not contrary to part 2 Section 8(2) of the Administration of Criminal Justice Act 2015 (Distilled from Ground 5 of the Grounds of Appeal).

The learned Counsel for the Appellant referred to **Section 8(2) of the Administration of Criminal Justice Act 2015**, which states that a suspect shall not be arrested merely on a civil wrong or breach of contract.

He stated that the evidence of PW1, PW2, PW4 and the defence that the Defendant was instructed by the owner of the property to sell which makes the Defendant the agent of the owner of the property in respect of the sale of the said property to the complainant and the owner is the principal and he is bound by the acts of his agent.

It was submitted on behalf of the Appellant that Agency can be created orally, by conduct or in writing.

He relied on the case of:-

MTN NIGERIA VS. BARRISTER EMEGANO (2016) LPELR-41090.

He stated that the **₦9,200,000.00** received by the Defendant was received as part payment for the sale of the property although yet to be given to the owner of the property. He referred to page 181 of the record of Appeal where PW4 testified that the owner of the property was ready to sell the property in question for **₦25Million**.

The learned Counsel for the Appellant submitted that it was the issue of price differences that led to the Criminal complaint lodged by the purchaser of the property. He went further that what transpired between the Appellant and the complainant was entirely a breach of contract which is civil in nature.

He referred to the case of:-

NELSON AMADI & 1 OTHER VS. COMMISSIONER OF POLICE (2000) FWLR PART 2 PAGE 329 AT 332.

The learned Counsel for the Appellant concluded his submission on this issue that if the transaction between the Appellant and the complainant is found to be civil in nature, the Appellant's eventual trial conviction and sentencing will be a nullity. He relied on the case of:-

DIAMOND BANK VS. OPARA & OTHERS (2018) LPELR-43907 (SC) PAGES 18-39 PARAGRAPH B.

The learned Counsel for the Respondent in his response referred to **Section 1(1)(b) of the Advance Fee Fraud and Other Related Offences Act 2006**. He submitted that the transaction between the Appellant and the victim that cumulated into prosecution of the Appellant was tainted with criminality despite appearing initially to be predicated upon the medium of contract. Having been induced by fraud, an offence therefore was made out.

He submitted that the subsequent trial and conviction of the Appellant was not contrary to **part 2 Section 8(2) of the Administration of Criminal Justice Act, 2015**.

He urged that this issue be resolved in favour of the Respondent.

The issue under consideration here is whether the arrest and subsequent trial and conviction of the Appellant

is not contrary to part 2 Section 8(2) of the Administration of Criminal Justice Act, 2015 which state that a suspect shall not be arrested merely on a civil wrong or breach of contract.

Section 1(1)(b)(c) of the Advance Fee Fraud and other Fraud related (offences) Act 2006 provides thus:-

> ".....A person who by any false pretence, and with the intent to defraud induces any other person in Nigeria or in any other Country, to deliver to any person, any property, whether or not the property is obtained or its delivery is induced through the medium of a contract induced by false pretence, commits an offence under this Act...."

In this case the conscious act of the Appellant when she neglected to disclose the actual sum for which the owner of the property had put on it for sale but rather misrepresented to the victim a price below the selling price.

The Appellant in Exhibit 5 stated among others that:-

> "I know Mr. Abimbola (PW2) he is a lawyer whom I told to help me market a property at Akobo. The value of the property was

N20million I told Barrister Abimbola to sell it for N20million and nothing less."

Appellant also stated further that –

"Barrister Abimbola informed me that there is an interested buyer in the person of Rasheed Olonode Abiodun who agreed to pay N15million and nothing more. I authorized him to collect N10million deposit."

The Appellant in her testimony at the lower Court admitted that her principal told her to sell the property for a higher price than she offered to the victim and his representatives.

There is no doubt that the Appellant had the authority to sell the property but she did not have the authority to sell at the price she sold the property to the victim.

The Appellant had the intent to defraud the victim that was why she breached the understanding she had with the victim when she said she will send to the owner the memorandum of understanding for his signature once they make payment of **₦10million** deposit. But the Appellant reneged.

The main problem in this case is that the Appellant induced the victim to transfer money to her but upon receipt of the money, she refused to execute deed of assignment and did not transfer the property to the victim.

The conclusion to be drawn from the foregoing is that the Appellant's act of false pretence was criminal in nature. The Appellant being a former Deputy Chief Registrar of Oyo State High Court ought to have avoided putting herself in this type of embarrassing situation.

This issue No. 4 is resolved in favour of the Respondent and against the Appellant.

ISSUE NO. 5

Whether the continuation of the trial of the Appellant on the 6th day of October, 2017 in the absence of her Counsel is not a breach of the Constitutional Right of the Appellant under Section 36(4) (6) (c) of the Constitution of the Federal Republic of Nigeria 1999 (Distilled from Ground 7 of the Amended Grounds of Appeal).

The learned Counsel for the Appellant stated that on 6th day of October, 2017 when the proceedings at the lower Court was for continuation, the Appellant was present in

Court and she informed the Court that her Counsel was diagnosed with typhoid fever but that the Court said that there is no medical report about the health condition of the Counsel for the Appellant, that the case should therefore proceed to hearing.

He submitted that **Section 36 (4) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)** provided that whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time. Learned Counsel also referred to **Section 36 (6) (c)** of the same Constitution which states that every person who is charged with a criminal offence shall be entitled to defend himself in person or by, a legal Practitioner of his own choice.

It was submitted on behalf of the Appellant that having elected to be defended by a legal Practitioner of his own choice, the trial conducted by the learned trial Judge in the absence of the Appellant's Counsel on the 6th day of October, 2017 is in breach of the Constitutional right of the Appellant to fair hearing and to defend herself by a legal Practitioner of her own choice.

He relied on the following cases:-

UMARU VS STATE (2009) LPELR – 3360 (SC) PAGES 9-11 PARAGRAPHS E-A.

UDO VS STATE (1988) LPELR – 3299 (SC) PAGES 12-13 PARAGRAPH B

Learned Counsel finally submitted that the effect of non-compliance with the Constitutional provisions on the right of an accused person to Counsel in a criminal case is to render the trial a nullity.

He urged that the issue be resolved in favour of the Appellant.

In his own response the learned Counsel for the Respondent submitted that the Appellant as a Defendant and her Counsel adopted frivolous antics aimed at filibustering the trial and or annoying the Court by giving frivolous excuses at almost every session of the Court when the case is slated for trial. He referred to page 137 when the Counsel claimed not to have been properly briefed on the day of trial.

Pages 151 - When Counsel for Appellant asked for adjournment on the ground 9of ill-health.

Page 152-153 - Adjournment on the ground of settlement out of Court.

Page 179 - When the Defendant was absent from Court on grounds of going to NYSC Camp to pick her daughter who is a graduate. And page 189 etc of the record of appeal.

He submitted that a Court should protect its integrity and prevent abuse of its process.

He relied on the following cases:-

OBIESIE VS OBIESIE (2007) 16 NWLR PART 1060 PAGE 223, (2007) LPELR – 5093 (CA).

OKON UDO AKPA VS STATE (1991) 5 SCNJ PAGE 1 AT 13.

ZEKAN VS ALHASSAN (2003) FWLR PART 177 PAGE 777 AT 793-794

It was contended on behalf of the Appellant that the provisions of the **Administration of Justice Law, 2016 Laws of Oyo State of Nigeria** came to re-iterate the importance of the provisions of the **Economic and Financial crimes Commission (Establishment) Act 2004** which makes provision for speedy dispensation of Justice. Thus it provided in Section 397 (3) as follows:-

"Upon arraignment, the trial of the defendant shall proceed from day to day until the conclusion of the trial.

Section 397 (4) provides that:- "Where day-to-day trial is impracticable after arraignment no party shall be entitled to more than five adjournments from arraignment to final judgment provided that the interval between each adjournment shall not exceed 14 working days".

He finally urged that this issue be resolved in favour of the Respondent.

In the Appellant's Reply brief of argument, he referred to **Sections 349 (2) (e) of the Administration of Criminal Justice Act 2015, and Section 350 (2) & (3) of the Administration of Criminal Justice Law 2016, Oyo State** and submitted that the law permits the absence of a Defendant's Counsel in Court on two consecutive sessions of the Court and the Court shall enquire from the Defendant whether she wishes to engage the service of another legal Practitioner, and where he wishes to do so, the Court shall allow him a reasonable time but not exceeding 30days to do so.

He therefore submitted that the continuation of the Appellant's trial in the 6th day of October 2017, in the absence of her Counsel is in breach of the right of the Appellant to fair hearing.

He urged that this appeal be allowed.

A careful perusal of the Record of Appeal in this case would reveal that on some occasions both the Appellant and her Counsel have used all sorts of delay tactics to frustrate hearing in this case leading to adjournment each time.

In this appeal I agree with the submission of the learned Counsel for the Respondent that when a Court finds itself in this type of situation, the position of the law is that a court should protect its integrity and prevent the abuse of its process see **pages 137, 151-152-153 and 179** of the record of appeal where appellant has asked for adjournment with frivolous excuses knowing that this is a criminal trial in which hearing must go on from day to day.

In **OBIESIE VS OBIESIE (2007) 16 NWLR PART 1060 PAGE 223 AT 230 PARAGRAPH H.** It was held among others by Bada JCA as follows:-

> "It is clear from the record that the learned Counsel for the Respondent

used all sorts of delay tactics in frustrating the trial Court. This attitude of the learned Counsel for the Respondent at the Magistrates' Court is highly condemnable. A party cannot stay on the alter of fair hearing or natural justice crying foul when he had ample opportunities to put in his defence.

It is trite that frivolous applications tend to make the wheel of justice move at a snail speed and that does not make the progress of law dynamic in growing society like ours".

See also the case of:-

OKON UDO AKPA VS STATE (1991) 5 SCNJ PAGE 1 AT PAGE 13.

Also in **ZEKAN VS ALHASSAN (2003) FWLR PART 177 PAGE 777 AT 793-794**. Muntaka Coomasie , JCA as he then was (of blessed memory) stated thus:-

"The only thing he is required by law to do was to give the Appellant opportunity to present his case. This opportunity should not be abused. No Court worth its salt would allow the proceeding before it to be unduly abused under the guise of fair hearing. A situation where a party or

Counsel employs the issue of fair hearing to irritate or annoy the other party or Court, the Court is duly bound to protect its process and integrity. Such act of annoyance or irritation amounts to or tantamount to abuse of Court process and Court would definitely take step to prevent its process from being abused".

By virtue of **Section 19 (1) (2) (b) and (c) of the Economic and Financial Crimes Commission (Establishment) Act 2004,** I am of the view that every criminal matter brought to the High Court for prosecution by the Economic and Financial Crimes Commission must be heard and given expedited hearing and there should be no form of delay in the dispensation of justice.

In the instant case under consideration, the matter was fixed for further hearing on 6/10/2017 when the Appellant who was the defendant at the lower Court informed the Court that her Counsel was diagnosed with typhoid fever. But there was no medical report to support that diagnosis. The lower Court then proceeded as earlier fixed for further hearing.

I am of the view that learned trial Judge was right when he proceeded with hearing as earlier fixed. Every Judge of

a Court of law in this Country, Nigeria has a responsibility to control proceedings in his Court and should not entertain or accommodate any act by a litigant or his Counsel aimed at delaying or preventing expeditious trials.

Consequent upon the foregoing this issue No. 5 is resolved in favour of the Respondent and against the Appellant.

In the result, with the resolution all the five issues in this appeal in favour of the Respondent and against the Appellant, it is my view that this appeal lacks merit and it is hereby dismissed.

The Judgment of the lower Court in charge **NO:- 1/3EFCC/2017 BETWEEN – FEDERAL REPUBLIC OF NIGERIA VS MUTIAT OMOBOLA ADIO** delivered on the 18th day of May 2018 is hereby affirmed.

Appeal Dismissed.

JIMI OLUKAYODE BADA
JUSTICE, COURT OF APPEAL

CERTIFIED TRUE COPY
SALAKO C. O.
11/3/19
REGISTRAR
COURT OF APPEAL. IBADAN

COUNSEL:

MR OLAKUNLE FAOKUNLA with him are B. T. HABIB, ADEYINKA BINUYO AND H. E. OSAGIE for the Appellant.

DR. BENEDICT UBI with him is A. L. SULEMAN for the Respondent.

CERTIFIED TRUE COPY
SALAKO
11/3/19
REGISTRAR
COURT OF APPEAL, IBADAN

APPEAL NO: CA/IB/374C/2018

HARUNA SIMON TSAMMANI, JCA

My learned brother **Jimi Olukayode Bada, JCA** gave me the benefit of reading in advance the judgment just delivered. My learned brother exhaustively considered all the issues that came up for determination in this appeal. I therefore agree with his reasoning and conclusion thereon.

It is beyond dispute that the Appellant breached the provision of Section 1 (2) of the Advance Fee Fraud and Other Related Offences Act, 2006. Though the facts that led to the prosecution of the Appellant on a criminal charge took root from a contract of sale of landed property, the subsequent conduct of the Appellant betrayed her criminal intent. In what could have ended as a simple contractual relationship between the Appellant and the nominal complainant, the conduct of the Appellant was however, heavily laced with criminality.

I therefore agree with my learned brother that this appeal lacks merit. It is accordingly dismissed. The judgment of the Court below delivered on the 18th day of May, 2018 is hereby affirmed.

HARUNA SIMON TSAMMANI
JUSTICE, COURT OF APPEAL.

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11/8/19
REGISTRAR
COURT OF APPEAL. IBADAN

CA/IB/374^{C}/2018

ABUBAKAR MAHMUD TALBA JCA

I have read in draft, the lead Judgment just delivered by my learned brother **Jimi Olukayode Bada JCA**. He has very carefully and meticulously delved in great detail into all the salient issues involved in this appeal.

I am in total agreement with his reasoning and conclusion having resolved all the issues therein in favour of the Respondent and against the Appellant, that this appeal lacks merit and it is dismissed. The Judgment of the lower court in charge **No: I/3EFCC/2017 BETWEEN: FEDERAL REPUBLIC OF NIGERIA V. MUTIAT OMOBOLA ADIO** delivered on the 18th day of May, 2018 is hereby affirmed.

ABUBAKAR MAHMUD TALBA
JUSTICE COURT OF APPEAL,

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11/3/19
REGISTRAR
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