IN THE COURT OF APPEAL

IN THE LAGOS JUDICIAL DIVISION

HOLDEN AT LAGOS

ON FRIDAY THE 24TH DAY OF JULY, 2020

BEFORE THEIR LORDSHIPS

MOHAMMED LAWAL GARBA - JUSTICE, COURT OF APPEAL
GABRIEL OMONIYI KOLAWOLE - JUSTICE, COURT OF APPEAL
BALKISU BELLO ALIYU - JUSTICE, COURT OF APPEAL

APPEAL NO: CA/L/CR/883/2019

BETWEEN:

MARTINA USHIE AMOSU - APPELLANT

AND

FEDERAL REPUBLIC OF NIGERIA - RESPONDENT

JUDGMENT

(DELIVERED BY GABRIEL OMONIYI KOLAWOLE, JCA)

This appeal is against the judgment of the High Court of Lagos State, in its Ikeja Division delivered on 3/5/2019 by Dada, J., in Charge No: **ID /5906C/17** wherein the Appellant as the Defendant in the lower court was convicted for the offence of stealing contrary to Section 285(8) of the Criminal Law of Lagos State, 2011, and was sentenced to Seven (7) years imprisonment.

Being aggrieved by the said judgment, the Appellant filed her Notice of Appeal dated 14/5/2019 with six (6) grounds upon which the appeal is premised. In compliance with the Rules of this court, the Appellant's

counsel on 30/7/2019 filed the Appellant's Brief of Argument dated 29/7/2019. In the said brief, settled by Temitope Elusogbon, Esq., four (4) issues for determination of the appeal were set down by the Appellant's learned counsel. The issues are as follows:

1. ***Whether the Lower court ought not to have discharged and acquitted the defendant of all the counts of stealing on account of the totality of the evidence before her when the prosecution failed to prove the charges beyond reasonable doubt.***
2. ***Whether the trial judge has carried out proper and sufficient evaluation of evidence before her in arriving at the decision to convict the Appellant of the offence of stealing in count 2.***
3. ***Whether the Lower Court was right to have convicted the Defendant on the state of the evidence before her.***
4. ***Whether the trial judge exercise her discretion judiciously, judicially and in accordance with the guiding principle of punishment by sentencing the Appellant, a first offender to a term of 7 years imprisonment for count two.***

On its part however, the Respondent did not file any Brief of Argument within the time stipulated by the Court of Appeal Rules, sequel

to this, the Appellant brought a Motion on Notice dated 3/9/2019 and filed on 4/9/2019 wherein this court was prayed for an order to hear and determine the Appeal on the Appellant's Brief alone. At the hearing of the appeal on 3/6/2020, the application was heard by this court and the Appellant's prayer was granted, thus foreclosing the right of filing of the Respondent's Brief of Argument.

It is however important to note, as this court has often stated that the circumstance in which Respondent(s) in an appeal, failed or neglected to file a Respondent's brief of argument in opposition to the Appellant's submissions, does not make the determination of the appeal, a "walk over game" for such Appellant, neither will the success in the determination of an appeal falls on such Appellant's lap as a matter of course because, it had long been settled that an Appellant will either swim or sink on the strength of the arguments in the Appellant's brief which, of course, must be borne out of the merit of his case based on the facts, evidence and the findings and determination thereat by the lower court in coming to its decision being challenged on appeal as no undue advantage avail such Appellant notwithstanding that the appeal was heard and determined on his brief alone. He, as a matter of duty, is required to show that the

decision of the lower court, being appealed against, was wrong. See: **CAMEROON AIRLINE V OTUTUIZU** (2011) 4 NWLR (Pt 1238) 512 and **OYELOLA V ADELEKE** (2004) 13 NWLR (Pt 890) 307.

It is expedient to look at the facts leading to the matter in the lower court that birthed this Appeal.

The Appellant, an employee and the Senior Account Officer of the Dangote Oil Refinery Company Limited with designated functions, amongst others, of payment of employees' salaries from money deposited into her personal Accounts from the company's Account, from time to time. The Appellant was accused by a petition written on 19/05/17 to the Economic and Financial Crimes Commission of stealing the company's money in various sums, which cumulatively stood at N130,445,020.00 in all. The petition was to the effect that the company as the nominal complainant, through its internal control unit that audited the account of the company, discovered huge amounts of money traced to the account of the Appellant by various staffs' accounts. The Respondent subsequently initiated the Appellant's arrest and investigation was conducted into the complaint, prior to the arraignment of the Appellant before the lower Court.

The Appellant was arraigned on an amended information dated 10/10/2017 with 23 counts of stealing various sums of money contrary to section 285(8) of Criminal Law of Lagos State, 2011 and to which she pleaded not guilty.

At the trial in the lower court, the prosecution called 11 witnesses and tendered several documentary exhibits to establish its case against the Appellant. The Appellant testified personally and subpoenaed several documents for her defence. During the trial in the lower court, a total of 46 documentary exhibits were tendered and admitted.

At the end of the trial, the learned trial judge discharged the Appellant on 22 out of the 23 counts, *to wit*: Counts 1, 3 – 33, but convicted her on count 2 and sentenced her to 7 years imprisonment. The present appeal is the reaction of the Appellant to the said decision of the learned trial judge.

SUBMISSIONS OF THE APPELLANT ON THE ISSUES FOR DETERMINATION

On issue one, the learned Appellant's Counsel stated that from the summary of the lower court's decision, the prosecution has failed to prove the charges against the Appellant beyond reasonable doubt and ought to have discharged and acquitted her of the remaining count.

The learned Counsel argued that from the evidence, the prosecution failed to establish any offence of conversion of any money by the Defendant. He contended that the oral testimony of PW 10, one Edeki Abraham, or any of the prosecution's witnesses failed to take away or add anything contained in the bank statements. It was contended that the learned trial judge discredited most of the documentary exhibits tendered at trial by the Respondent. Whilst relying on the decision in **AG BENDEL STATE V UBA LTD** (1986) 4 NWLR (Pt 337) 547, it was submitted that the holding of the learned trial judge that the evidence of the prosecution were *"worthless documents for the establishment of any criminal liability"*, ought to have entitled the Appellant to an acquittal. Whilst relying on the decision in **UKANA V COP** (1995) 8 NWLT (Pt 416) 705 @ 733, it was submitted that the evidence before the lower court shows that the prosecution has failed to establish the essential elements of stealing by conversion against the Appellant.

The Appellant's Counsel further contended that the trial court, having found that the exact figure against the Appellant can only be ascertained after a *"proper account reconciliation" is done*, ought not to have convicted the Appellant on the count 2 as it did, and it was submitted that reasonable

doubt has been cast on the proof of the entire offences with which the Appellant was charged. The learned counsel noted that the "Reconciliation of Accounts" was never carried out, relying on the provision of Section 36 (5) of the Constitution of Federal Republic of Nigeria, 1999 (as amended) and the decision in **SYNDER V MASSACHUSETTS** 291 U.S 97, 122 (1934), learned counsel submitted that the prosecution, in the lower court, has failed to prove its case against the Appellant beyond reasonable doubt and ought to have entitled the Appellant with the legal consequence of a *"deserved acquittal"*. The court was urged to allow the appeal.

RESOLUTION OF ISSUE 1

The issue under contention herein is premised on the quality of the case of the prosecution, now the Respondent, at the trial as the Appellant is contending that the settled standard of proof in criminal adjudication, which is a proof beyond reasonable doubt, was not complied with by the Respondent in the lower court. It was the opinion of the learned counsel that the learned trial judge had only one option, once the alleged offence was not proved beyond reasonable doubt, it is to discharge and acquit the Appellant of the unproved offences.

However, from the record of appeal from the court's processes filed in the lower court by the Respondent, it could be gleaned that it was the submission of the Respondent as the prosecution in the lower court, whilst relying on decision in **MILLER V MINISTER OF PENSIONS** (1974) 2 ALL E.R 372 @ 373, that it was able to establish the guilt of the Appellant at the trial. The learned trial judge, having framed a sole issue for determination, which is "*whether the Prosecution has proved any or all of the 23 counts preferred against the Defendant*", held that the prosecution had proved its case on count 2 against the Appellant beyond reasonable doubt, consequent to which the Appellant was convicted and sentenced to a seven (7) year jail term. The appropriate question is what in essence, does the requirement of a proof beyond reasonable doubt entails in a criminal trial?

The issue of proof beyond reasonable doubt, as the measure of standard with which alleged commission of a criminal offence is to be established against a defendant, is no longer open to a lengthy, perhaps needless judicial rhetoric. It has been long settled by our courts and it is indeed the essence of the provision of Section 135 (1) of the **Evidence Act, 2011** in respect of trial conducted on indictments on criminal charges.

This court, on the age-long concept of proof beyond reasonable doubt, held in its decision in **CA/L/1326C/2019 (FRN V OLAWUNMI AKINYANJUOLA OLATORO)** (Unreported), delivered on 31/7/2019, thus:

> *"The need to prove any criminal case or indictment against an accused person beyond reasonable doubt, is an integral part of the adversarial system of administration of criminal justice system we inherited from the British Colonial Masters, wherein an accused person is presumed, by the sheer force of the Constitution, (See: Section 36(5) of the Constitution of Federal Republic of Nigeria, 1999, as amended) to be innocent, unless and until the reverse is proved by the prosecution. An accused person is not under any obligation to establish his innocence, rather it is the prosecution that has the statutory obligation of establishing the guilt of the accused person before the court, beyond reasonable doubt. See: IDEH V. STATE (2019) 6 NWLR (Pt. 1669) 479 @ 498 SC.*
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> *In view of the nature of the Nigerian Criminal Justice System, which basically is accusatorial rather than being inquisitorial, (except where the law under which the indictment is made, places the burden on the Defendant to prove a particular fact, in consonance with the provisions of Sections 137 and 139 (1) of the Evidence Act, supra), a person charged with or accused of committing an offence in law is presumed to be innocent*

thereby leaving the prosecution to establish the charge against the Defendant. By the provision of Section 36 (5) of the Constitution of Federal Republic of Nigeria, 1999 (as amended), it is clear that an accused person has no obligation to prove his innocence. It is already presumed by the operation of the law.

The Supreme Court in OFORDIKE V. STATE (2019) 5 NWLR (Pt. 1666) 395 @ 413, re-stated that this burden which law places on the prosecution to prove the guilt of an accused person, must be through a proof beyond reasonable doubt. See also, OGIE V. STATE (2017) 16 NWLR (Pt. 1591) 287 @ 298.

This statutory requirement involves a scale of evidence adduced at the trial which is consistent with a high degree of probability in order to establish the guilt of the accused person. See: NWATURUOCHA V. STATE (2011) 6 NWLR (pt. 1242) 170.

The apex court emphasized that the burden on the prosecution to prove the guilt of the accused person, remains with the prosecution throughout the subsistence of the trial, as the law places the onus on the prosecution to discharge the burden by proving beyond reasonable doubt, the guilt of the accused person.

This court then surmised on the on the opinion expressed herein, as follows:

Having stated the foregoing, I am of the respectful opinion that whatever makes this statutory obligation un-discharged, would

without much ado, result in the accused being discharged and acquitted from the charges preferred against him.

The obligation on the prosecution is to prove the essential elements of the crime as alleged in the indictments, which may include the possible defences which may be in issue; .... STATE V. AZEES & ORS (2008) LPELR -3215 (SC).

Once an accused person pleads not guilty upon his arraignment on a criminal charge, the duty of the prosecution immediately crystallizes, and could only be discharged with proof beyond reasonable doubt of all the elements of the charge, in order to establish the guilt of the accused. See the decisions in ADISA V. STATE (1991) 1 NWLR (PT. 168) 90, and perhaps, the locus classicus of the old English decision in WOOLMINGTON V. DPP (1935) AC 462.

I have looked closely into the submissions of Temitope Elusogbon, Esq. counsel representing the Appellant in this appeal, I have also carefully juxtaposed same with the processes filed by the Respondent in the lower court, which falls within the competence of this court, to look into any or all documents contained in its record, even where same was not made a part of the processes in issue before it, provided such will meet the ends of justice between the parties therein. See: **FUMUDOH V AGORO** (1991) 9 NWLR (Pt 214) 210 and **AGBAISI V EBIKOREFE** (1997) 4 NWLR (Pt 502). And as I have briefly reflected, the facts in the case, as could be

gleaned from record before the court, indicated that the Appellant was tried on a 23 count indictments of stealing various sums of money contrary to Section 285 (8) of the Criminal Law of Lagos State, 2011, and that the Appellant pleaded not guilty to all the 23 counts.

A brief summary of the evidence of the prosecution against the Appellant on count 2, to which the Appellant was convicted, relates to a loan given to *PW 1*, one Ashaolu Stella Kelechi by the complainant-company sometime in December 2015. It was the evidence of PW 1 that the Appellant used to be the company's head of Accounts. She further stated as follows:

> ***That sometimes in December 2015, I applied for land loan....***
>
> ***So on the 11/12/15, the money was credited into my account in the sum of N3M. After some days the Defendant (the Appellant) contacted me that I needed to send the money back to her. ...that I would get another land loan and will have to it (sic) returned to her so can replace the money from her imprest Account. When I got the second credit alert which was N3M, I sent it back to her and it was electronic transfer..... she explained to me that she took it from her imprest. She also explained to me that when I get another alert that***

I should transferred (sic) back to her that it is for her imprest account.

See: pages 1102-1103 of the record of appeal.

It was necessary to reproduce excerpts of relevant evidence adduced at the trial by the parties, as it relates to count 2 in the information upon which the Appellant was convicted. This became expedient in view of the Appellant's contention that the prosecution failed to prove its case against her, beyond reasonable doubt. The lower court in its decision delivered on 3/5/19 had this to say:

"I find myself unable to convict her on any other count not only because the relevant statement of Accounts are inadmissible in law, though admitted, they are worthless documents for the establishment of any criminal liability, but because even if the statement had been properly certified, I am in agreement that the exact figure outstanding against the defendant can only be ascertained after a proper account reconciliation which the Defendant always harped upon. It should be pointed out that Reconciliation of account is not the duty of the court, neither, is auditing or accounting".

(See Page 1557 of the Record of Appeal)

The Appellant's counsel had vigorously contended that by the established tradition in the employer, i.e the Complainant company, the company's own monies were paid into staffs' personal accounts for official purposes and that the N3Million in contention had been remitted back into the company coffers by the Appellant. It was the Appellant's contention that if a proper reconciliation of accounts had been carried out, all contending issues would have been resolved.

It is obvious from the testimonies of some of the prosecution's witnesses, especially PW3, PW5, PW8 and PW10 that payments of the company's money into the company to staffs' accounts was not an unusual practice in the company's financial system. See pages 1127, 1140, 1151 and 1162 of the record respectively. It was also established at the trial, by some of the witnesses called by the Respondent that the Appellant was always available to bail out staff and heads of units whenever there was cash short fall in such unit. It can be observed that much of these facts were largely unchallenged by the prosecution, hence this made it to be deemed as established at the trial and upon which this court could validly draw reasonable inference. See: **MAGAJI V NIGERIA ARMY** (2008) 8 NWLR

(Pt 1089) 338; **OFORLETE V THE STATE** (2007) 7 SCNJ 162 @ 179 and **UBANI & ORS V THE STATE** (2003) 12 SCNJ 111 @ 130.

It is clear from the facts on the record of appeal, that official and personal accounts were not well delineated in the company. It could then be expected that there would be likelihood of interference between the two shades of funds in the staff's accounts in such situation. I will refrain as the court has no jurisdiction to render advisory opinions, from passing definite remarks on what appears as the wholesomeness or otherwise of such fiscal policies of the company.

That is by the way, it is my opinion that, the unusual financial practice in the company, which I have alluded to earlier, in dealing with consented intrusion and entries of official funds into personal accounts of staff and vice versa, ought to have been defined within narrow confines, and not to be left at the predilection or pleasure of the concerned staff. Testimonies of some of the prosecution's witnesses in the lower court reinforced the assertion of the Appellant's counsel that, the occasion in which the Appellant holds company's official funds in her personal custody was not unusual and that the Appellant often times spends her personal

funds for the purpose of official engagements which include loans to other units in the company. PW3 stated at pages 1126-1127 of the record thus:

> ***"In the course of my job, I have had course to transfer moneys from my own Account to other staff of Dangote Oil and Refinery Company...***
> ***I have had to withdraw cash from my Account on account to Dangote because I handle the day to day imprests. ...***
> ***I am aware that site project borrow (sic) money from the Defendant. There are payment for AGO's there are different vendors to whom payment is made on a daily basis"***

The assertion was corroborated by the PW5, one Hamza Ahmed Tijani, who is said to be the Administrative Manager in charge of the project site activities and in his own account stated that the Appellant had released an aggregate of a sum of N66,078,500.00 *"from her personal account for site expenses. And the money has been returned to her...".* The Appellant counsel had been vehement in his argument on the need for the prosecution to have undertaken accounts reconciliation exercise as it relates to Exhibits 27, 28, 33 and 34 at the trial, which are connected to the count 2 for which the Appellant was convicted. The position maintained

by the Appellant has been resolute on the assertion that the adjudged need for reconciliation of accounts was never carried out before the proceeding was commenced and the subsequent conviction of the Appellant. It was on record also, that the learned trial judge was in agreement with the Appellant in the lower court on the requirement for the ascertainment of the position of the accounts in issue and this was evident when his lordship held that:

> ***I am in agreement that the exact figure outstanding against the Defendant can only be ascertained after a proper accounts reconciliation which the Defence had always harped upon.***

The learned trial judge added thus:

> ***It should be pointed out that the reconciliation of accounts is not the duty of the court, neither is auditing or accounting***

I am unable to see the reason why the prosecution, in the lower court, would ignore the need for a proper and comprehensive auditing of the accounts on record, in order to ascertain, with clinical precision and clarity, the culpability or otherwise of the Appellant in the offences with which she was charged in the lower court. The learned trial judge, having convicted the Appellant on count 2 in the information, found himself *"unable to*

convict her (the Appellant) on any other count". It was the reasoning of the lower court that, apart from the fact that the relevant statement of accounts were adjudged as being inadmissible in law, it was in agreement that the exact figures outstanding against the Appellant can only be ascertained by a proper accounts reconciliation. It then beat this court's imagination, that despite these findings, the lower court nevertheless proceeded to convict the Appellant on the "unascertained" sums she was alleged to have stolen. The query raised by the learned trial judge, as to on whom lies the responsibility of reconciling the accounts involved, since it was stated that it was not the function of the court to do so, was left hanging and largely unresolved. It is clear in my view, as it is well settled in law, that the onus lies and remains un-shifted on the prosecution at the trial, to prove all the ingredients of the offence with which the accused person was being tried, part of which, given the circumstances already mentioned, is the ascertainment of the particulars of what was stolen, by who and when. Failure of the prosecution to discharge this duty will earn the Appellant as the accused person a favourable verdict. See: **IBRAHIM V STATE** (2015) 11 NWLR (Pt 1469) 164 and **ABIODUN V FRN** (2009) 7 NWLR (Pt 1141) 489.

The Appellant's counsel had vehemently contended that the sum of N3Million, upon which the lower court found the Appellant guilty and convicted her, had since been paid alongside other sums, into the coffer of the company by a fund transfer she made through the PW3, who was said to have since remitted same to the company. This was captured in Exhibits 27 to 33, being the Statements of one of the Appellant's Guaranty Trust Bank (GTB) Accounts, however, the lower court chose to discountenance the said evidence, though admitted in evidence, as his lordship opined that the Exhibit 27 was not the one that captures count 2.

My Lords, it is my respectful view that the learned trial judge could not have validly determined, from the records placed before the lower court, which one of the accounts of the Appellant the said refund of the N3Million was made by the Appellant, if it was indeed made. I am also of the view that the ownership of the funds in an account that is being jointly funded and operated by the company and the Appellant could not be determined on the face of it.

My Lords, I hold the view that the failure of the Respondent to ensure a proper auditing of all the accounts concerned, prior to the commencement of the proceedings in the lower court is fatal to its case. It

is clear to me that the ownership of thing said to be stolen is a vital issue as one of the ingredients that must be proved in order to establish an offence of conversion. Can it be safely asserted that the totality of the funds found in the account of the Appellant, being considered in the offence she was charged with, belonged to the company or to the Appellant? Why were all debit and credit entries in the accounts involved in the whole transactions not closely scrutinised and forensically audited prior the arraignment of the Appellant in the lower court? It is my considered view, that the prosecution in the instant case, had placed the cart before horse, as it ought to have done a more detailed investigation into the matter before the commencement of the criminal prosecution in the lower court.

The Appellant's counsel had contended that the lower court erred in law when it failed to review the unchallenged evidence of the Appellant as it relates to the proof of whether or not the refund in contention was ever made, as captured in Exhibit 27. I am in agreement with the Appellant's counsel that the learned trial judge ought to have considered the available defence to the Appellant. My opinion is premised on the settled principle of law that entitles any defence of an accused person, in criminal

adjudication, to be considered by trial courts, it is immaterial whether such defence sounds stupid, puerile or unreasonable. See: **WILLIAMS V STATE** (1992) 8 NWLR (Pt 261) 515.

The trial judge on one hand held that the prosecution failed to reconcile its accounts in order to ascertain the magnitude of the Appellant's "improper dealings" with the complainant-company's funds that were legitimately held in her custody, prior to her arraignment in the lower court, the same court proceeded to convict the Appellant on the unascertained sum as in count 2 of the Information filed. I have serious doubts that the Appellant was validly convicted, as the lower court agreed that "*the exact figure outstanding against the Defendant (Appellant) can only be ascertained after proper accounts reconciliation*". It was also not controverted as being untrue, by the prosecution at the trial, that the assertion of the Appellant that she actually made a fund transfer of a sum of N3,163,000.00, representing the sum in contention together with other sums to one Kazeem Adebayo, on 20/4/2016, and that the said fund had actually been remitted to the company coffers. With all these, the onus had shifted to the Respondent at the trial to show that the said fund that was

transferred was in fact stolen or converted by the Appellant and which it failed to discharge.

There is no evidence on the record that the said account reconciliation was ever carried out. I am of the view that, since it has been established by the evidence of both parties in the lower court that the projects of the complainant-company, were on-going at the material time of arrest and eventual arraignment and trial of the Appellant, it is not unlikely or reasonable to expect the funds of the company to still be in the custody of the Appellant, which was in tandem with the practice of the company that lodged funds in the personal accounts of the staffs as at the time of the appellant's arrest and prosecution. The Appellant had however, testified at the trial that she had returned the balance of funds in her custody to the company through one Mr. K.B Chandra, who by the evidence led, usually approves funds to be released to the Appellant in the company. When I examined Exhibits 41 and 42 in the record, they clearly indicate usual communications between the Appellant and the said Mr K.B Chandra. The evidential lacunae remains the failure to properly audit the various accounts involved by the company. It appears there is a huge gap of doubt which the prosecution failed to fill by the evidence called at the

trial. I am of the considered view, that this has invariably created a reasonable doubt on the case of the Respondent. I have earlier on, in this judgment, emphasised on the fundamental requirement of the age-long rule of proving guilt of an accused person beyond reasonable doubt, and it is my view that the Respondent did not live up to this sacred standard of proving its case against the Appellant beyond reasonable doubt. I am left with the inevitable decision to resolve the first issue in favour of the Appellant, it is hereby so resolved.

Though, the law is undoubtedly settled that, where the prosecution has failed to prove its case against the accused person, as in the instant case, the inevitable path for the court to tow is that of making an order of acquittal in favour of the accused person. See: **SHEHU V STATE** (2010) 8 NWLR (Pt 1195) 112 and **ADESANYA V FRN**, supra.

This court, for obvious reason, would have drawn the curtain on the judgment at this point, having found that the Respondent, as the prosecution in the lower court, failed to prove its case against the Appellant beyond reasonable doubt, but the duty imposed on this court by the extant decisions of the Supreme Court, is the need for the other issues in the appeal to be considered and determined in one way or the other for

completeness in the adjudication. See: **OVUNWO & ANOR V WOKO & ORS** (2011) LPELR-2841 (SC) and **UZUDA V EBIGAH** (2009) 15 NWLR (Pt 1161) 1. For this reason, I will proceed to look into the rest of the issues raised in the appeal by the Appellant.

The Appellant's learned counsel had argued issues 2 and 3 together in the Appellant's brief, and it is to the effect that the lower court had failed to carry out proper and sufficient evaluation of evidence placed before it by the Appellant and whether it is right to have convicted the Appellant on such improperly evaluated evidence. It was argued by the Appellant's counsel that the lower court having rejected the prosecution's Exhibits P1-P5 which it described as being *"worthless documents for establishment of any criminal liability"*, it was argued that the lower court erred when it failed to consider the Appellant's other account, Exhibit 27 but rather relied majorly on only exhibit 3. The learned counsel contended that if the lower court had properly evaluated the evidence placed before it by the Appellant, it would have arrived at a different conclusion. The Appellant's counsel also re-emphasised on the need for proper auditing of the various banks' accounts involved in the transactions, while relying on the provision of Section 167 (d) of the **Evidence Act, 2011** and decisions

in **THE PEOPLE OF LAGOS V MOHAMMED** (2014) 2-3 SC @ pg 64 and **EBOH V PROGRESSIVE INSURANCE CO LTD** (1987) 2 QLRN 167 and **GEORGE V THE STATE** (2009) 1 NWLR (Pt 1122) 325, the learned counsel submitted that the failure of the prosecution to present a Reconciliation Statement or an Audit Report was fatal to its case.

The Appellant's counsel asserted that there lay on trial courts like the lower court to carry out proper evaluation of evidence adduced at the trial by the parties, both documentary and oral assertions. He cited the decisions in **AYUYA V YORIN** (2011) ALL FWLR (Pt 583) 1842 SC; **MATTHEW V STATE** (2019) 22 WRN 84 @ 102 and **CHEDI V AG FEDERATION** (2006) 48 WRN 149 @ 174-175, to submit that failure of the lower court to properly evaluate the evidence adduced by the Appellant at trial entitles the court of appeal to evaluate the said evidence. The decision in **OLAYINKA V STATE** (2007) NWLR (Pt 1040) 561 @ 586, was cited to submit that the failure of the lower court to evaluate the evidence of the Appellant had occasioned a miscarriage of justice against the Appellant.

The Appellant's learned counsel had a scathing remark on the activities of the prosecution, and he invoked the provision of Rule 32 of the

Rules of Professional Conduct, 2007, to submit that the lower court was misled when the said counsel deliberately obscured the defence available to the Appellant, counsel argued that the Appellant has suffered a miscarriage of justice in the instance. The learned counsel reiterated the importance of documents tendered and admitted in evidence, and the decisions in **UNION BANK NIG LTD V OZIGI** (1994) 3 NWLR (Pt 333) 385; **OGUNDELE V AGIRI** (2010) 9 WRN 1 @ 22 were relied on while submitting that the contents of Exhibits 27, 33, and 43 (i) & (ii) are self explanatory in order to exonerate the Appellant of the offence with which she was charged and convicted. The decisions in **AIKI V IDOWU** (2006) 9 NWLR (Pt 984) 50 @ 65; **CDC NIG LTD V SCOA NIG LTD** (2007) 37 WRN 1 and **OGBEIDE V OSIFO** (2007) 37 WRN 61, were also cited in support of the proposition.

It was the contention of the Appellant's counsel that much of the evidence adduced at the trial by the Appellant were largely unchallenged, and submitted that the Appellant reinforced her testimonies with documentary exhibits. This court, on the strength of the decisions in **OLAGUNJU V ADESOYE** (2009) 33 WRN 1 @ 36; **KARIBO & ORS V GREND & ANOR** (1992) 3 NWLR (Pt 230) 426 @ 441; **MORENIKEJI & ORS V**

ADEGBASIN & ORS (2003) 25 WRN 1 and ANYANWU V UZOWUAKA (2009) 49 WRN 1-182 @ 17, was urged to evaluate the said evidence. In all, the court was urged to allow the appeal.

RESOLUTION OF ISSUES 2 & 3

The resolution of the twin issue under review herein, seems to me as quite simple, and same is in tandem with the views of this court earlier expressed. The Respondent, as the prosecution in the lower court, has been found to have failed to prove its case against the Appellant beyond reasonable doubt. This failure, in my opinion.is majorly due to the failure of the lower court to properly evaluate the evidence adduced before it at the trial.

As it had earlier been noted, the lower court chose to rely on particular documentary exhibit, i.e Exhibit 3, which was the Statement of Account of the Appellant which is the same as Exhibit 28, from the Appellant's GTB Current Account, despite the existence of a conflicting evidence which was left unresolved. It can be observed from the record of appeal, that the Appellant was vehement in her testimony that the funds in contention, i.e the N3Million, was paid back into the company's account through PW3, Mr Kazeem Adebayo from the Appellant's GTB savings

Account, which Statement was tendered and admitted as Exhibit 27 in the lower court. This, in my opinion, left much to be desired in the case of the prosecution in the lower court. The testimony of the Appellant before the lower court, which by the Appellant's counsel's submission was not impugned, even under cross examination and remained that she paid back the money sent to her by PW1 when she was on her maternity leave, and it was emphasised that the payment of N3,163,000.00 made on 20/04/2016 vide a cash transfer made to the PW3's account represents the fund being contested in addition to some other funds. But the lower court held on to a unilateral finding from only one of the accounts of the Appellant, both of which were in issue before the lower court.

I am of the view that, this attitude smacks of nothing other than abdication of that sacred duty of proper scrutiny and evaluation of the evidence placed before the trial court, who had the singular and unique opportunity to have seen and heard the witnesses and observed their demeanor during the trial. See: **ADEKUNLE V. AREMU** (1998) 1 NWLR (Pt. 533) 203 @ 229. In deciding a case, a Court is bound to consider all the evidence presented before it, be it oral or documentary. In the instant case, the evaluation, in my opinion, was done rather haphazardly as the

lower court appears to have ignored the evidence that could inure to the benefit of the Appellant and failed to give adequate consideration whatsoever to the vital evidence adduced by the Appellant, but brashly, if it can be so described without being disrespectful to the trial judge, proceeded to convict her on the same evidence which had earlier been discredited by being described as worthless. It's my view that this omission, on the part of the lower court, was a grievous one because, the learned trial judge, no doubt was misled into an error of improper evaluation of the evidence tendered before him, and I am in agreement with the Appellant's counsel that the error had indeed, occasioned miscarriage of justice on the Appellant. This simply connotes that the decision of the lower court was legally flawed and highly prejudicial and not in consonance with the constitutional right of the Appellant to be presumed innocent until the elements of the indictments have been proved beyond reasonable doubt. See: **OKE & ANOR V MIMIKO & ORS.** It is settled law that when there is a reasonable probability of a more favourable outcome of the case of a litigant, then there has been a miscarriage of justice occasioned on the party alleging same. See also: **GBADAMOSI V DAIRO** (2007) 3 NWLR (Pt.1021) 282 @ 306. The

Supreme Court in **ONOBRUCHERE & ANOR V ESEGINE & ANOR** (1986) 1 NWLR (Pt 19) 799, per Oputa, JSC., Rtd (of blessed memory), put it succinctly thus:

> ***"Once it is found that there had been a misapprehension as to the onus of proof and a misdirection casting such onus on the wrong party, I think it will be reasonably fair to assume the likelihood of a miscarriage of justice. To go further would be to speculate".***

A miscarriage of justice, being a departure from the settled rules of judicial process, ought not to be encouraged. It amounts to a failure of justice. See: **IGBOBAHI V AIFUWA** (2006) 6 NWLR (Pt 976) 270 @ 290 – 291. In the instant case, the decision of the lower court, having been found to have occasioned on the Appellant a miscarriage of justice, is liable *ex prio pro motu* to be set aside. I so hold.

The Appellant's counsel had equally raised the issue of whether the lower court rightly convicted the Appellant, in the circumstance of the case of the parties in this appeal. I am of the respectful view that the issue has been fairly dealt with and resolved already. There is no gainsaying that it is a cardinal principle of criminal justice that a conviction could only result where the charge against an accused person has been proved beyond

reasonable doubt, and this is undoubted duty placed squarely on the prosecution because, once a reasonable doubt is created in the case of the prosecution, as in the instant case, the resulting conviction, must as a matter of course, be quashed. See: **ONUCHUKWU & ORS V THE STATE** (1998) 4 NWLR (Pt 547) 576; **AJOSE V FRN** (2011) 6 NWLR (Pt 1244) 465 @ 470. This proposition of the law as it relates to criminal adjudication, is well settled that in order to sustain a conviction on a criminal charge, the prosecution must prove its case beyond reasonable doubt as prescribed in Section 138 of the **Evidence Act, 2011.** See: **CHUKWUMA V FRN** (2011) LPELR-863(SC).

My Lords, from the totality of the foregoing, it is certain that it will not serve the interest of justice if the conviction of the Appellant by the lower court is allowed to stand. I resolve the issues under review herein in favour of the Appellant.

On issue 4 of the appeal, the learned counsel called in aid relevant judicial and statutory authorities, in order to question the exercise of the discretionary powers of the lower court in sentencing the Appellant, as a first offender to a jail term of 7 years. I have carefully perused the submissions of the learned counsel in this regard, I have come to the

conclusion that by virtue of the circumstance of the appeal, the issue being reviewed herein has become academic, sterile and academic and it would no longer deserve the valuable time and scarce resources of this court to be expended on resolving the issue. This is because, having regard to the conclusions I have reached on issues 1, 2 and 3, issue 4 on whether the sentence was high handed against a first offender has become a mere academic issue owing to the fact that the conviction on its own has been held to be legally flawed and it is liable to be set aside. Whichever way my resolution of the said issue goes, it could only earn the victor a hollow or pyrrhic victory with no value at all attached to it. See: **SALIK V IDRIS & ORS** (2014) 15 NWLR (Pt 1429) 36 and **ADELAJA & ORS V ALALADE & ANOR** (1999) 6 NWLR (Pt 608) 544. In the light of this analysis, I am inclined to discountenance the submissions of the Appellant on the said issue 4.

In the conclusion, I am convinced that the instant appeal has merit, not in the least because the Respondent failed to file a Brief of argument, but based on the evidence and facts on the record, the conviction of the Appellant cannot be sustained without doing great violence to certain elementary principles in the administration of criminal justice which I had

applied to review the findings made based on the evidence on the record of appeal and I have no doubt that the appeal deserves to be allowed, and I hereby allow it.

In the circumstance, and for the avoidance of doubts, the judgment of the lower court delivered on 3/5/19 by Dada, J., in Charge No: **ID /5906C/17**, wherein the Appellant was convicted on count 2 out of the 23 counts in the charge preferred against her, is hereby set aside. The Appellant is accordingly discharged and acquitted.

GABRIEL OMONIYI KOLAWOLE
JUSTICE, COURT OF APPEAL

Appearance

T. O. Elusogbon, Esq with O. S. Ogundipe, Esq. for the Appellant.

A. B. C. Ozioko for the Respondent.

APPEAL NO. CA/L/883/2019

MOHAMMED LAWAL GARBA, JCA

After reading a draft of the lead judgement written by my learned brother *Gabriel Omoniyi Kolawole, JCA*, in this appeal, I agree with him that it is meritorious and deserves to be allowed.

The appeal is allowed for reasons set out in the lead judgement and in terms thereof.

MOHAMMED LAWAL GARBA
JUSTICE, COURT OF APPEAL

C[illegible]383/2019

BALKISU BELLO ALIYU, JCA

I have had the privilege of reading in draft the Judgment of my learned brother **GABRIEL OMONIYI KOLAWOLE, JCA** just delivered.

I agree with him that this Appeal should be allowed on the failure of the persecution to prove its case against the Appellant beyond reasonable doubt as borne by the evidence on record.

I too allow the Appeal and set aside the Judgment of the trial court delivered on the 3/5/2019 in respect of charge No: ID/5906C/17.

I order the discharge and acquittal of the Appellant of the count two (2) of the charge. Appeal allowed by me.

BALKISU BELLO ALIYU
JUSTICE, COURT OF APPEAL

CTC of Judgment ₦/100

COURT OF APPEAL
Cashier's Office
Date 6/8/2019
LAGOS NIGERIA

CERTIFIED TRUE COPY