IN THE COURT OF APPEAL
ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

ON FRIDAY THE 24TH DAY OF APRIL, 2020

BEFORE THEIR LORDSHIPS

STEPHEN JONAH ADAH — **JUSTICE, COURT OF APPEAL**
TINUADE AKOMOLAFE-WILSON — **JUSTICE, COURT OF APPEAL**
PETER OLABISI IGE — **JUSTICE, COURT OF APPEAL**

CA/A/533C/2019

BETWEEN:

ENGR. ANDREW YAKUBU === **APPELLANT**

A N D

FEDERAL REPUBLIC OF NIGERIA === **RESPONDENT**

JUDGMENT
[DELIVERED BY: STEPHEN JONAH ADAH, JCA]

This is an Interlocutory Appeal against the decision of the Federal High Court, Abuja delivered on 16th May, 2019 (Coram: A. R. Mohammad J.) in respect of a No-case Submission made on behalf of the Appellant after the close of the Prosecution's case.

The Appellant was arraigned before the said Court on 16th March, 2017 on six (6) Count Charge as follows:

> *"1. That you Andrew Yakubu (former Group Managing Director of Nigerian National Petroleum Corporation - NNPC) on or before the 18th day of August, 2015 at the Economic and Financial Crimes Commission (EFCC) office at No. 5 Fomella Street, Wuse 11, Abuja within the jurisdiction of*

this Honourable Court knowingly failed to make full disclosure of your Assets, to wit: the sum of $9,772,800 (Nine Million, Seven Hundred and Seventy Two Thousand, Eight Hundred United State Dollars) only in the Declaration of Assets Form -you filled' at the Economic and Financial Crimes Commission (EFCC) dated 16th August, 2015 and you thereby committed an offence contrary to Section 27(3)(a) of the Economic and Financial Crimes Commission (Establishment) Act, 2004 and punishable under Section 27(3)(c) of the same Act.

2. That you Andrew Yakubu (former Group Managing Director of Nigerian National Petroleum Corporation - NNPC) on or before the 18th day of August, 2015 at the Economic and Financial Crimes Commission (EFCC) office at No. 5 Fomella Street, Wuse 11, Abuja, within the jurisdiction of this Honourable Court knowingly failed to make full disclosure of your Assets, to wit: the sum of £74;000 (Seventy Four Thousand Pound Sterling) only in the Declaration of Assets you filled at the Economic and Financial Crimes Commission (EFCC) dated 18th August, 2015 and you thereby committed an offence contrary to Section 27(3)(a) of the Economic and Financial Crimes Commission

Establishment Act, 2004 and punishable under Section 27(3)(c) of the same Act.

3. That you Andrew Yakubu sometime between 2012 and 2014 in Abuja within the jurisdiction of this Honourable Court without going through a financial institution received cash payment of the sum of $9,722,800 (Nine Million Seven Hundred and Seventy Two Thousand Eight Hundred United State Dollars) only and thereby committed an offence contrary to Section 1 of the Money Laundering (Prohibition) Act, 2011 as amended in 2012 and punishable under Section 16(2) (b) of the same Act.

4. That you Andrew Yakubu sometime between 012 and 2014 in Abuja within the jurisdiction of this Honourable Court without going through a financial institution received cash payment of the sum of £74,000 (Seventy Four Thousand Pound Sterling) only and thereby committed an offence contrary to Section 1 of the Money Laundering (Prohibition) Act, 2011 as amended in 2012 and punishable under Section 16(2) (b) of the same Act.

5. That you Andrew Yakubu (while being the Group Managing Director of Nigerian National Petroleum Corporation' - NNPC) the Advance Fee Fraud & Other Related Offences Act, 2006 and punishable

under Section 7(5) of the same sometime between 2012 and 2014 in Abuja within the jurisdiction of this Honourable Court with intent to avoid a lawful transaction under law transported at various times to Kaduna the aggregate sum of $9,722,800 (Nine Million Seven Hundred and Seventy Two Thousand, Eight Hundred United State Dollars) only /when you knew or reasonably ought to have known that the said funds formed part of the proceed of some form of unlawful activity and thereby committed an offence contrary to Section 7(4)(b)(ii) of the Advance Fee Fraud & Other Related Offences Act, 2006 and punishable under Section 7(5) of the same Act.

6. That you Andrew Yakubu (while being the Group Managing Director of Nigerian National Petroleum Corporation - NNPC) sometimes between 2012 and 2014· in Abuja within. the jurisdiction of this Honourable Court with intent to avoid a lawful transaction under law transported at various times to Kaduna the aggregate sum of £74,000 (Seventy Four Thousand Pound Sterling} only when you knew or reasonably ought to have known that the said funds formed part of the proceed of some form of unlawful activity and thereby committed an offence contrary to Section 7(4)(b)(ii) of the

Advance Fee Fraud & Other Related Offences Act, 2006 and punishable under Section 7(5) of the same Act."

The Appellant pleaded NOT GUILTY to all the Counts and the matter proceeded to trial and Prosecution called six witnesses. The Appellant made a no case submission through his learned Senior Counsel contending that the prosecution did not make out any prima facie case against him to warrant his being called upon to enter upon his defence. The Prosecution insisted that prima facie case was made against the Appellant requiring his explanation or defence to the six Count Charge against him.

In a considered Ruling the learned trial Judge ruled on the no case submission and found as follows:

> **"I have gone through the testimonies of all the 6 prosecution witnesses in this case and the exhibits tendered. I have equally perused the charges against the Defendant and also taken note of the Defendant's plea of not guilty. I have similarly considered the no case submission made on behalf of the Defendant at the close of the prosecution's case, the reply to the no-case submission and the reply on points of law of learned senior counsel to the Defendant agree with the submission of learned senior counsel to the Defendant that the complainant has failed to prove the essential element of transportation in respect of counts 5 and 6. I accordingly discharge Defendant on counts 5 and 6,**

Even though I am tempted to also discharge the Defendant on counts 1-4.

I am however constrained to ask the Defendant to explain how he came about the monies recovered from his house.

I am fortified in my position relying on the case of DAUDU VS. FRN, supra cited by the learned counsel for the prosecution.

The Defendant is hereby ordered to enter his defence in respect of counts 1 – 4 of the charge." (Underlining mine for emphasis)

The Appellant was dissatisfied with that part of the decision of lower Court asking him to enter upon his defence in respect of Counts 1 – 4 of the Charge and has vide his Notice of Appeal dated and filed on 14th June 2019 appealed to this Court on seven (7) grounds which without their particulars are as follows:

"2. DECISION COMPLAINED OF

The Ruling, in part.

3. GROUNDS OF APPEAL

GROUND ONE

The learned trial Judge erred in law and thereby acted in excess of his jurisdiction, when in refusing the No Case Submission on Count 1 - 4 for which the Appellant stands trial, he created a new Charge which the Respondent (prosecution) did not initiate, and thereby denied him of a fair hearing, which has now occasioned a miscarriage of justice.

GROUND TWO

The learned trial Judge erred in law, when he failed to apply the Judgment delivered at the Lagos Judicial Division of the Court of Appeal, in Appeal No. *CA/L/1298/2017]* cited to him by the Appellant, on the fact that no law prohibits a private storage,

accumulation or possession of funds in Nigeria, he thereby occasioned a miscarriage of justice, when he ordered the Appellant to enter defence in Count 1 to 4, and explain how he got the monies found in his Kaduna house.

GROUND THREE

The learned trial Judge erred in law, when having reviewed the Appellant's No Case Submission and consequently expressed doubts over evidence led by the Respondent in Count 1 to 4 of the Charge for which the Appellant stands trial, he failed to resolve the doubts in favour of the Appellant.

GROUND FOUR

The learned trial Judge erred in law, acted without jurisdiction and thus denied the Appellant of a right to fair hearing *cum* trial, when he placed an evidential burden on the Appellant in Count 1 to 4 of the Charge *[for which he stands trial].* by directing that he should enter defence on them, contrary to the doubts he expressed on the evidence led by the Respondent in the said Counts and his hesitation to discharge the Appellant on them; he thereby occasioned a miscarriage of justice.

GROUND FIVE

The learned trial Judge erred in law, denied the Appellant a right to fair hearing *cum* trial, and consequently acted without jurisdiction, Then having clinically reviewed the evidence led by the Respondent and expressed very serious doubts on the success of Count 1 to 4 of the Charge: his lordship however ordered the Appellant to explain how he got the money in his house and enter defence in respect of Count 1 to 4; he thereby occasioned a miscarriage of justice.

GROUND SIX

The learned trial judge erred in law, when in consequence of his failure to resolve ,specific issues presented for determination under Counts 1 and 2 of

the Charge *for which the Appellant stands trial],* he called on the Appellant to enter a defence thereto and thereby occasioned a miscarriage of justice.

GROUND SEVEN

The learned trial judge erred in law, when in consequence of his failure to resolve specific issues presented for determination under Counts 3 and 4 of the Charge *for which the Appellant stands trial},* he called on the Appellant to enter a defence thereto and thereby occasioned a miscarriage of justice."

The Defendant/Appellant sought the following reliefs:

4. **RELIEFS SOUGHT FROM THE COURT OF APPEAL**

a. **An Order allowing the Appeal, set aside in part, the trial Federal High Court's Ruling [on Appellants No Case Submission] of 16th May 2019, by discharging the Appellant on Counts 1, 2, 3 & 4 of the Charge for which he currently stands trial.**

b. **And for such Orders or other Orders this Honourable Court may deem fit to make in the circumstance."**

The Appellant's Brief of Argument dated 17th September 2019 was filed on the same date and deemed filed on 29th January 2020 while the Respondent's Brief of Argument dated 28th day of October, 2019 was filed on 28th day of 2019 and also deemed filed on 29th January 2020. The appeal was heard on 29th January, 2020 when the learned Counsel to the parties adopted their respective Briefs of Argument in the appeal.

The learned Senior Counsel to the Appellant AHMED RAJI, SAN, nominated four issues for determination as follows:

"a. Whether the learned trial Judge did not act in

excess of his jurisdiction and [thereby] breached the Appellant's right to a fair hearing in the circumstance, when he ordered the Appellant to explain the source of the monies referenced in the charge; the source of the said monies, having NOT been made an issue before the Court by the Respondent; [Ground 1].

b. Whether the lower court's refusal to follow and be bound by the decision of this noble court in Appeal No: *CA/L/1298/2017* between EFCC v. MARTINS did not render its order to the Appellant to explain the source of the monies found in his account in respect of counts 1 - 4 of the charge, liable to be set aside? [Ground 2].

c. In the face of the expressed doubts over the evidence led by the Respondents regards to Counts 1- 4 of the charge, whether the lower court ought NOT to have discharged the Appellant, but instead, ordered the Appellant to enter a defence thereto; [Grounds 3, 4 & 5].

d. Whether the lower court's order directing the Appellant to enter a defence to counts 1 - 4 of the charge is not a nullity; having been made in consequence of its failure to resolve specific issues presented to it for determination [in

respect of the said counts of offences] and in breach of the Appellant's right to fair hearing [Grounds 6 & 7]."

The learned Counsel to the Respondent formulated three issues as follows:

"1. Whether the decision of the trial court ordering the Appellant to enter his defence in respect of counts 1, 2, 3 & 4 of the charge upon which he was arraigned amounts to framing a new charge? [Ground] of the Notice of Appeal].

2. Whether ordering the Appellant to enter his defence in respect of counts 1, 2, 3 (me 4 of the charge preferred against him amounts to denying him a fair hearing by the trial court? [Grounds 3, 4 & 5 of the Notice of Appeal].

3. Whether the trial court's decision overruling the Appellant's no-case submission in respect of counts 1, 2, 3 & 4 of the charge preferred against him was wrong? [Grounds 2, 6 & 7 of the Notice of Appeal]."

The appeal will be resolved on the issues formulated by the Appellant.

I will however take the issues together.

On issue one as to whether the lower Court exceeded its jurisdiction or breached Appellant's right to fair hearing when it ordered that the Appellant ought to offer explanation as to how he came about the monies contained in Counts 1 – 4 of the Charge; the learned Senior Counsel to the Appellant submitted that none of the six Count Charge questioned the source of the monies stated in the claims against the Appellant.

That what the Appellant was charged is that he failed to make full disclosure of his assets; receipt of cash payments without going through financial institutions and transportation of monies with interest to avoid lawful transaction under the law. That since there is no Charge against the Appellant warranting explanation of the source of the money and as such the order asking the Appellant to tender upon his defence on Counts 1 – 4 was made without jurisdiction and in breach of Appellant's right to fair hearing. That jurisdiction of the lower Court was hinted to the offences contained in the Charge. That what the lower Court did amounted to acting without jurisdiction, against the Defendant. He relied on the cases of: **FRN V. NWOSU (2016) 17 NWLR (PT. 1541) 226 AT 290;** and **ONWUDIWE V FRN (2006) 1 NWLR (PT. 988) 382.**

That a Court can only adjudicate on offences contained in the Charge and is not empowered to frame a new Charge or create a new offence against a defendant.

That the lower Court suo motu in breach of the law and the Constitution made findings against offences for which he was not charged. The learned Senior Counsel to the Appellant also contended

that the learned trial Judge also breached the provisions of Section 217 of Administration of Criminal Justice Act 2017. That the only remedy is for this Appellate Court to set aside the decision reached outside the purview of the Charges against the Appellant by the trial Court. He relied on the cases of: **FAGBENRO V. AROBABI (2006) 7 NWLR (PT. 978) 172; FRN V BULAMA (2005) LPELR – 7493 CA and UDENGWU V UZUEGBU (2003) 13 NWLR (PT. 386) 136 AT 151 – 152.**

The learned Senior Counsel also submitted that the learned trial Judge also relied erroneously on the case of **DAUDA V. FRN (2018) 10 NWLR (PART 1626) 169** to wrongly support himself to the effect that the Appellant should enter upon his defence to explain the source of the monies referred to in Counts 1 – 4 of the Charge against the Appellant. The learned Silk submitted most vehemently that the facts and circumstances of the case of **DAUDA V. FRN** supra are not relevant and are not on all fours with the charges or Counts against the Appellant in this case. He contended that evidential burden was shifted in DAUDA's case because the Charge was based on Section 19(3) of MONEY LAUNDERING (PROHIBITION) ACT. But there is no such provisions in the EFCC ACT allowing such burden to be shifted on the Defendant. That the Appellant was Charged under Section 27(a)(a) of the EFCC Act for offences in Counts 1 and 2 against the Appellant while he was charged in Counts 3 and 4 for offences contrary to Section 1 and punishable under Section 16(3) thereof. He urged the Court to resolve issue one against the Respondent in favour of the Appellant.

Under issue 2, the learned Senior Counsel to the Appellant argued that the lower Court's Order asking the Appellant to explain how he came about the monies referred to in Counts 1 – 4 of the Charge against him was made in clear breach of established precedent set by this Court in the case **of EFCC VS DR. MARTINS OLUWAFEMI THOMAS Appeal No. CA/L/1298/2017** delivered on 13th April, 2018 PER NIMPAR, JCA where according to the learned Silk this Court held:

> ***"That there is no law prohibiting the keeping of monies whether local or foreign currency at one's home. In this regard his Lordship stated thus: "is there any legal provision against the keeping of money be it local or foreign currency in the house, on your person and outside the bank? None was cited and I also found none in my research. That was the finding of the trial Judge too that none was established before him."***

The learned Senior Counsel believed the Order was influenced by the testimonies of PW1, PW2 who claimed that the monies found in Appellant's house were proceeds of crime. That for the Respondent to succeed on Counts 1 – 4 of the Charge, the particulars of the Counts ought to name the illegal source or illegal acts done by the Appellant. That Respondent failed to do so. He relied on the cases of: **MUSA V. THE STATE (2019) LPELER 46350; BELLO V. STATE (2007) 10 NWLR (PT. 1043) 364** and **IGABELE V. STATE (2006) 6 NWLR (PT. 975) 1005.**

That the said Counts 1 – 4 of the Charge did not require the Appellant to explain the source of the monies found in the safe. That the allegations against the Appellant in Counts 1 and 2 of the Charge was that he failed to disclose his ownership of the said monies when he filed Exhibit 1 – An Asset Declaration FORM sometime in 2015. According to the learned Silk the allegation(s) in Counts 3 and 4 was the alleged receipt of cash payments in excess of the threshold set out in Section 1 of the money Laundering (Prohibition) Act. He relied on pages 3 – 5 of the record.

He urged the Court to resolve the issue in Appellant's favour.

Under issue 3 is whether the learned trial Judge did not err in law when he failed to uphold the no case submission having express doubts as to whether he should discharge the Appellant.

The learned Senior Counsel quoted the finding of the learned trial Judge on page 309 of the record of appeal whereat he found as follows:

> ***"I agree with the submission of learned Counsel to the Defendant that the complainant has failed to prove the essential element of transportation in respect of Counts 5 and 6. I accordingly discharge the Defendant on Counts 5 and 6. Even though I am tempted to also discharge the Defendant on Counts 1 – 4, I am however contained to ask the Defendant to explain how he came about the monies discovered from his house."***

The learned Silk to the Appellant believes that since the lower Court did not say it accepted the evidence of the Respondent his finding is clearly an indication that the Respondent failed to discharge the burden placed on it in respect of Counts 1 – 4. He relied on the cases of **UDOSEN VS THE STATE (2007) LPELR 3311 SC** and **NAMSOH V STATE (1993) 5 NWLR (PT. 292) 129** among legion of cases cited to submit that the doubt expressed by the learned trial Judge ought to have been resolved in Appellant's favour on the no case submission relying on the cases of **NWEZE V. STATE (2017) LPELR – 42344 and UGBOJI V STATE (2017) LPELR 43427 SC.**

That it is not the duty of the Defendant to prove his innocence. The onus is always on the Prosecution and that where as in this case the essential ingredients of the offences charged were not established the Appellant ought to have been discharged. He relied on numerous cases including **FAGORIOTA V. FRN (2013) 17 NWLR (PT. 1353) 322 and (PT. 1353) 322** and **IKUFORIJI V. FRN (2018) LPELR – 43884 SC.**

That the position taken by lower Court infringes of Appellant's right to fair hearing and a breach of the Constitutional provision of presumption of innocence and that it goes to the jurisdiction of the Court. That no prima facie case was made out against the Appellant since essential ingredients of alleged offences were not proved. He relied on **ONAGORUWA V. STATE (1993) 7 NWLR (PT. 303) 19 AT 82 – 83.**

The learned Senior Counsel submitted there could be no appeal to sentiments as the trial Judge had done in that as per Exhibit "C" and

prosecution evidence it was not disputed by Respondent that the Appellant saved the money found in his house over time. He relied on pages 17 – 18 of the record of appeal. He urged the Court to hold that the no case submission ought to have been upheld. He urged the Court to resolve issue three in favour of the Appellant.

On issue 4 as to whether the lower Court resolved specific issues raised by the Appellant concerning Counts 1 – 4 of the Charge aforesaid.

It is the submission of learned Senior Counsel that the lower Court was bound to resolve all issues submitted to it for adjudication especially where such issues are central to resolution of the dispute between the parties. Reference was made to pages 70 – 79 pertaining to Counts 1 and 2 and the implication of Section 27 of EFCC Act 2004 and 27(2)(a), (b) and (c) of EFCC Act concerning the hurdles the prosecution must scale through. The learned Silk is of the view that two things must co-exist, and they are:

1. ***There must be an arrest of the Appellant for commission of an offence under the Act before he could be called upon to make a declaration of his assets and properties.***
2. ***The learned Silk to the Appellant submitted that in addition that a person must have been arrested in connection with offence charged, the Respondent must show that it conclusively investigated the Asset Declaration Form before it can level***

allegation as contained in Counts against a person and by extension the Appellant in this case.

That it was submitted at the lower Court that where arrest of a person does not take place for an alleged offence under EFCC Act and called upon to make declaration or full disclosure of his assets in accordance with alleged breach of section 27(3)(a) of EFCC ACT, the person cannot be charged for failing to make a full disclosure of his assets let alone substantiating the offence.

That from a literal interpretation of Section 27 of EFCC Act 2004 as submitted to the lower Court, the Respondent failed to show or prove that the Appellant was arrested for commission of an offence cognizable under the EFCC Act and as such the conditions stipulated in Section 27(3)(b) and (c) are not present in this case to warrant the charge against the Appellant in Counts 1 and 2 of the Charge.

That PW4 whose evidence the Respondent relied upon to prove Counts 1 and 2 did not establish any of the ingredients of the offence against the Appellant.

He contended that elements of offences contained in Counts 1 and 2 were not established. That in any event Appellant was entitled to remain silent and asking him to make Exhibit 1 breached his right to fair hearing relying on many cases including **GIRA V. THE STATE (1996) 4 NWLR (PART 443) 375** and Section 35(2) of the Constitution of the Federal Republic of Nigeria 1999 as amended.

In respect of Counts 3 and 4 of the Charge, the Appellant stated he submitted on pages 79 – 94 of the record that Section 1 of the Money Laundering (Prohibition) Act 2011 only criminalizes ***"receipt***

of cash in excess of the set threshold therein as payments made in a transaction."

The learned Silk then laid out what he considered to be the ingredients of the offences contained in Counts 3 and 4 as argued at lower Court that the following ingredients must co-exist: ***that there was a transaction; the Defendant received cash payment above N5,000,000.00 in respect of the said transaction; the Defendant did not receive the said cash from a financial institution; and the Defendant is a natural person."***

The case of **OYEBODE ALADE ATOYEBI V. FRN (2017) LPELR – 43831 SC at pages 20 – 21**. That the ingredients must be cumulatively proved beyond reasonable doubt. That the prosecution failed in this case to prove the ingredients of the offence hence the Appellant was entitled to be discharged and acquitted. He relied on the case of **FRN V. MOHAMMED ABUBAKAR (2019) LPELR – 46533 SC.**

Learned Silk defines what "transaction" means and again further relied on the case of **EFCC V. MARTINS** supra where transaction was defined. He urged this Court to be guided by the authorities and hold that for the prosecution to establish the elements of offences in Counts 3 and 4, Respondent must show that the Appellant did a transaction wherein he was paid the stated sums of money in cash and not through a financial institution.

That all the prosecution's witnesses did not allude to any such transactions. That Exhibits A – N1 tendered by the prosecution turned out to be unhelpful to prosecution's case. That the Court cannot

speculate for the prosecution. He relied on the cases of **ADIGBITE VS THE STATE (2017) LPELR – 42585 and ISAH V THE STATE (2007) NWLR (PT. 9049) 582 AT 614**. He urged the Court to resolve issue 4 in Appellant's favour. Allow the appeal and grant the reliefs sought in the appeal by the Appellant.

In response to the Appellant's contention that the learned trial Court acted on Charge put before the Court to overrule the no case submission of the Appellant, the learned Counsel to the Respondent referred to pages 271 and 309 to contend that the leaned trial Judge acted on the six Count Charge before it and not in any view charge allegedly framed by the learned trial Judge. That the learned trial Judge specifically made mentioned that "the Defendant is hereby ordered to enter his defence in respect of Counts 1 – 4 of the charge. He submitted that the learned trial Judge did not frame a new charge against Appellant other than the charge referred against the Appellant by the Respondent as reproduced in the Ruling of the learned trial Judge. He argued that the Appellant's arguments border on obiter dictum which the learned trial Judge expressed before the ratio of the Ruling asking the Appellant to enter upon his defence. That obiter dictum does not constitute the Court's decision. He relied on the case of **NWAWOLO V. FRN (2015) LPELR – 24423 CA**. That in a no case a single sentence by a Court as in this case is permissible to overrule a submission of no case to answer relying on the case of **UZOAGBA V. COP (2012) LPELR – 15525 SC.** That obiter dictum is not capable of being appealed against. That issue 1 relates to obiter dictum. He urged the Court to strike out Ground of the grounds of appeal to which

issue one relates. He relied on the case of **OROK V. STATE (2009) LPELR 8271 CA** per OWOADE, JCA.

Nonetheless the Respondent learned Counsel argued on the merit of issue 1 and submitted that the decision of the lower Court to the effect that the Appellant should enter his defence in respect of Counts 1 - 4 in order "to explain how he came about the monies recovered from his house" amounts to a ratio that can be appealed against. That the Respondent filed a Respondent's Notice on pages 7 – 9 of the Supplementary/Additional Record.

He contended that the decision of the trial Court overruling the no case submission in respect of Counts 1 – 4 of the Charge is very sound because according to him the evidence adduced at the end of his case like the Appellant with the offences charged and if not rebutted is capable of proving the essential elements of this Counts of the Charge.

The learned Counsel to the Respondent urged this Court to uphold the decision of lower Court overruling the no case submission on the ground that available prima facie evidence was made out "not necessarily on the grounds supposedly relied upon by the trial Court."

He urged to thus discard all authorities cited by the Appellant as according to Respondent's learned Counsel they are inapplicable. He urged the Court to resolve issue 1 in Respondent's favour.

On whether ordering the Appellant to enter his defence in respect of Counts 1, 2, 3 and 4 of the Charge amounts to breach of Appellant's right to fair hearing by the trial Court, the Respondent's learned Counsel submitted that the trial Court did not deny Appellant fair

hearing or fair trial in that the Ruling did not decide whether the Appellant is guilty or not of the offences in the four Counts. That the Ruling of the trial Court is a manifestation of fair trial. That the complaint is mistaken. He relied on the case of **NWOKOCHA V. A.G. IMO STATE (2016) LPELR – 40077 (SC).** He reiterated and adopted his arguments contained in paragraphs 4.1.4 to 4.17 of the Respondent's Brief of Argument under issue 1 and urged the Court to discountenance Appellant's arguments under issue No (C) and to strike out grounds 3, 4 and 5 of the Notice of Appeal. He again asked the Court to give effect to Respondent's Notice in resolving the issue.

On whether **DAUDA V. FRN** (Supra) is applicable to the facts in this case, learned Counsel to the Respondent preferred the following reasons to argue that **DAUDA V. FRN** (supra) is applicable viz:

"i. ***Section 19 of the Money Laundering (Prohibition) Act, 2011 [as amended in 2012] has no subsection (3); thus, Daudu could not have been convicted under what is non-existent.***

ii. ***Daudu, the appellant in that case, was convicted under the provisions of the Money Laundering (Prohibition) Act, 2004.***

iii. ***The Money Laundering (Prohibition) Act, 2004 actually has section 19(2) inadvertently typed as 19(3) by the court but that section did not create any offence; as such, Daudu could not have been convicted under it.***

iv. ***Section 19(2) inadvertently typed as 19(3) by the court of the Money Laundering (Prohibition) Act, 2004 is a***

procedural provision that applies to all offences created and tried under that Act.

v. *Section 19(2) [inadvertently typed as 19(3) by the court] of the Money Laundering (Prohibition) Act, 2004 is in pari materia with section 19(5) of the Economic and Financial Crimes Commission (EFCC) Act, 2004. Much of this was stated by the Supreme Court at pp. 9-10 paras. F-C of the Law Pavilion Electronic Law Report (LPELR).*

vi. *While section 19(2) of the Money Laundering (Prohibition) Act, 2004 has been repealed, section 19(5) of the EFCC Act ~ 2004 remains extant.*

vii. *Section 19(5) of the EFCC Act, 2004 which remains valid till today is a procedural provision that applies to all trials of offences created by the Act.*

viii. *Section 19(5) of the EFCC Act, 2004 equally applies to trial of all offences under the said Act, including the AFF Act, 2006 other legislations mentioned in sections 7(2) and 42 of the EFCC Act, 2004."*

He urged the Court to resolve issue 2 in Respondent's favour.

On whether the Respondent was wrong in preferring Counts 1, 2, 3 and 4 of the Charge against the Appellant, the learned Counsel to the Respondent first adopted his submissions under paragraph 4.1.4 & 4.1.7, 4.1.2 and 4.2.3.

The learned Counsel to the Respondent stated with respect to case of **EFCC V. MARTINS** (supra) cited by the learned Silk to the Appellant as follows:

> ***"Appellant's Brief. At paragraphs 2.2.2, 2.2.4 & 2.2.5 of the Appellant's Brief references were made to a purported decision of this Court referred to as ECONOMIC AND FINANCIAL CRIMES COMMISSION v. DR. MARTINS OLUWAFEMI MARTINS allegedly delivered in Appeal No. CA/L/1298/2017 on 13th April, 2018. We categorically state that the decision of this Court in Appeal No. CA/L/1298/2017 delivered on 13th April, 2018 was between the Economic and Financial Crimes Commission v. Dr. Martins Oluwajemi THOMAS. It has since been reported as EFCC v. Thomas (2018) LPELR-45547 (CA).***
>
> ***4.3.4 We had drawn the attention of the learned silk to the above correct position. See paragraphs 5.30, 5.31 & 5.33 of our Written Address before the trial court contained at pages 136-137 of the record. We do not understand why the Appellant's senior counsel repeatedly misstates the case (even after drawing his attention) to the point of citing it wrongly in his Issue for Determination (No.***

b). In any event, even if the judicial authority is real (and not a hoax and it is cited correctly, it could ony bind the trial court if it was relevant to the issue at hand. It is humbly submitted that a case is only an authority or what it decides. In this regard, it is further humbly submitted that EFCC v. Thomas (supra) is not an authority for the present case. This is principally because the facts and circumstances of Thomas case are different from those of the instant case. Indeed, Thomas is not even a criminal case and therefore cannot determine criminal liability. See Nwaoboshi v. FRN (2018) LPELR-45107 (CA). We further submit that even if it were, it cannot override the Supreme Court's decision in Atoyebi v. FRN (2017) LPELR - 43831 (SC) which was decided on the basis of the same offences as those in counts 3 and 4 of the instant case. We urge your lordships to so hold."

On the complaints of the Appellant that specific issues were not addressed or resolved by trial Court, the learned Counsel to the Respondent contended that the Appellant cannot make those submissions in this Court because he had at the lower Court stated that the basis of his no case submission was:

"the Complainant/Respondent's failure at the close of its evidence in respect of all six (6) counts of the

said Charge, to prove essential ingredients of each of the offences alleged against the Defendant, thereby obviating the need for the Defendant to put up a defence in the first place. See page 60 of the record."

On the Appellant's position that the Respondent did not prove the essential elements of the offences in Counts 2, 3 and 4 of the Charge, learned Counsel to the Respondent submitted that the evidence of PW4 both in-chief and under cross examination and Exhibit "J' tendered by the Defendant through PW4 strengthened the case of Prosecution/Respondent against the Appellant as far as Counts 1 and 2 of the charge are concerned.

He accused the Appellant of misrepresenting the evidence of PW4. Respondent's learned Counsel drew attention of the Court to pages 202 – 204 of the PW4's evidence.

On whether arrest of a suspect for an offence under EFCC ACT is an ingredient of offence under Section 27(3)(a) of EFCC Act, the learned Counsel to the Respondent submitted that neither the particulars of the offence stated in respective Counts nor the relevant law creating the offence i.e. Section 27(3)(a) of EFCC Act made mention of ***"arrest for an offence under the EFCC Act.'***

That it is certain that the Prosecution is not expected to prove what it did not state in the particulars of offence and it is not required by the provision of the law creating the offence. That the offences in Counts one stated they are contrary to Section 27(3)(9) of EFCC Act

2004 and as such the Appellant cannot go outside it to fish for ingredients.

That in any event since the Appellant has filed the Asset Declaration FORM at EFCC which according to Respondent is required to be filled only by persons arrested by EFCC for offence under EFCC Act, there is a legal presumption that he was arrested for an offence under EFCC Act, He relied on Section 168(10 of Evidence Act 2011 and **AMAKA V. STATE (1995) 6 NWLR (PT. 399) 1533.**

That Appellant admitted in Exhibit 1 (EFCC ASSET DECLARATION FORM) that he was accused of offences under EFCC Act. He also urged the Court to discountenance Appellant's argument that his Declaration of Asset was not investigated in that if EFCC had not investigated they would not be able to ascertain the amount contained in Courts 1 and 2. That he could not impugn Exh. 1 at this stage relying on the case of **GWADABE V. FRN (2016) LPELR – 41267 CA AT 8B – F.**

That the trial Court was right in asking him to defend himself on Counts 1 and 2 because Prosecution's evidence disclosed prima facie case.

On the Appellant's contention regarding issues 3 and 4, the learned Respondent recalled that the Appellant's main complaint here, according to Respondent's learned Counsel is that:

> ***"the law only criminalizes receipt of cash if it is a "payment made in a transaction" in order words, "payment made in a transaction is an ingredient of the offence according to the Appellant."***

He then drew attention to the response he made to the submission at the lower Court on pages 133 – 135 of the record and the case of **ATOYEBI V. FRN (2017) LPELR – 43831** which he said does not support Appellant's position. He urged the Court to rely on **ATOYEBI V. FRN** supra and **IKUFORIJI V. FRN** supra on the ingredients of offences contained in Counts 3 and 4 and hold that prima facie case has been established against the Appellant in Counts 3 and 4. He finally urged the Court to dismiss the Appellant's appeal and order the Appellant to enter upon his defence in the case without further delay.

In his Reply Brief, the learned Senior Counsel to the Appellant with respect to allegation of Respondent that Grounds 1, 3 4 and 5 of Appellant's appeal are incompetent, no formal application was filed in form of Preliminary Objection or Motion on Notice to challenge the competence of the said grounds of appeal. He relied on Order c21 Rule 5 of the Court of Appeal Rules 2016.

On the submission of Respondent on presumption of regularity the Appellant stated the Respondent cannot formulate issue outside the grounds of appeal and there was no such argument by Respondent at the lower Court.

On whether the decision appealed was obiter with regard to issue 1, the learned Counsel to the Appellant contended that what the lower Court said while ordering Appellant to explain how he came about the money in the Counts constitutes ration decidendi and not obiter.

On whether the case of **DAUDA V. FRN** is apposite learned Silk said the Respondent in his Notice to contend admitted the Appellant's submission. That Respondent's submissions should be

discountenanced, relying on Section 139 of Evidence Act 2011 and **ARUWA V. STATE (1990) LPELR – 568 SC.**

On issue 2 Appellant insists on his submissions that DAUDA's case is inapplicable. On the case of **EFCC V. THOMAS** (supra), the Appellant insisted the lower Court was bound by the decision in it not withstanding that it is a civil case.

That the order of lower Court against the Appellant to explain himself amounts to suspicion which has no support in law relying on the case of **ZUBAIRU VS STATE (2015) 16 NWLR (PT. 1486) 504, 529 – 530.** He urged the Court to set aside the order.

Now the learned Counsel to the Respondent has argued or contended that this Court ought to strike out grounds 1, 3, 4 and 5 of the Appellant Notice of Appeal and corresponding issues 1 and 3 emanated from them on the ground that the grounds did not challenge the decision of lower Court but obiter dictum that does not form part of the judgment or decision of the lower Court.

Though the Appellant in his Reply Brief contends the contrary, he also made the point that the Respondent failed to formally file Motion on Notice in that behalf nor did it file any form of objection against the impugned grounds of appeal.

I have gone through the processes and I found as a fact that the Respondent did not formally challenge any of the grounds of appeal referred to by her as bordering on obiter dictum and not against the ratio *decidendi* of the lower Court's judgment. It behoves a Respondent who wishes to challenge the incompetence of ground or grounds contained in a Notice of Appeal to file a formal application in

form of Motion on Notice asking the Appellate Court to strike out the offending grounds of appeal. Without a formal Motion on Notice or application in that respect a Respondent is disentitled from raising any issue relating to competence or otherwise of a ground or grounds of appeal. No party is allowed to overreach his opponent or to spring surprises in the presentation of his own case.

Whereas in this case the challenge to grounds 1, 3, 4 and 5 of the grounds of appeal is not capable of bringing the appeal to an abrupt end, filing a Motion complaining against the incompetent grounds would have sufficed. See - **MADAM ADUNOLA ADEJUMO *VS* MR. OLUDAYO OLAWAIYE (2014) 12 NWLR (PART 1421) 252.**

I have read the Grounds contained in the Notice of Appeal filed by the Appellant and a close perusal of the said Notice of Appeal and the Ruling of the lower Court shows clearly that the grounds of appeal complained of in the Respondent's Brief of Argument are valid and competent including grounds 1, 3, 4 and 5 of the said Notice of Appeal.

Now it is not in doubt that this Country operates accusatorial system or procedure in Administration of Criminal Justice. Thus an accused or Defendant in a criminal matter is presumed innocent until he is proved guilty by the prosecution. See **DAVID USO V. COP (1972) 11 SC 37 AT 46 – 47** where ELIAS, CJN, of blessed memory said:-

> ***"In our system of criminal trial, the Judge as umpire is not expected to descend into the arena. This illustrates the difference between the inquisitorial***

method of trying an accused person the difference between the Anglo-Saxon and the Civil Law systems. Our procedure is accusational in the sense that the innocence of the accused is presumed until he is proved guilty by the prosecution. Under the inquisitional system of trial which obtains in most continental legal systems, the Judge plays a dynamic role in cross-examining litigants and witnesses and the accused's guilt is presumed until he proved his innocence."

Thus pursuant to Section 36 of the Constitution of the Federal Republic of Nigeria 1999 as amended every person who is charged with a criminal offence shall be innocent until he is proved guilty. It is also relevant to refer to Section 135 of the Evidence Act 2011 which provides for standard and burden of proof where commission of crime is in issue.

In **DR. OLUBUKOLA ABUBAKAR SARAKI V. FRN (2018) 16 NWLR (PART 1696) 405 AT 452 D** – H, NWEZE, JSC, held as follows:

"Unlike mathematics where proof is attained through inflexible formulae an answers are arrived at with inviolable certitude, proof in criminal trials is attained against the background of the burden codified in section 135(1) of the Evidence Act. This section does not impose a duty on the accused person to purge himself of guilt. Rather, it imposes

an obligation on the prosecution to prove the guilt of the accused person beyond reasonable doubt, Esangbedo v. State (supra); State v. Azeez and Ors. (supra); Ozaki and Ors. v. State (supra); Alabi v. The State (supra), Solola v. The State (supra).

This is an offshoot of the impregnable canon ordained in section 36 (5) of the Constitution of the Federal Republic of Nigeria, 1999. This section guarantees the right to the presumption of innocence, a fundamental principle of most just penal laws, often couched in the ancient maxim in dubio pro reo. This maxim dictated the constitutional principle in the said section 36(5) of the 1999 Constitution. It provides that:

Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty; provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts.

The courts have interpreted the section as imposing the burden of proving the guilt of an accused person on the prosecution, Obiakor v. State (2002) 10 NWLR (Pt. 776) 612. The duty thus imposed on the prosecution is to prove, the case beyond reasonable doubt. This is axiomatic. It is indeed, well-settled

under Nigerian criminal Jurisprudence, Bello v. State (2007) 10 NWLR (Pt. 1043) 564, 585 Oladele v. Nigerian Army (2004) 6 NWLR (Pt. 868) 166. This is so because our criminal justice is accusatorial in nature. In our system, trials are, initiated and sustained by accusation rather than by inquisition, Uso v. C.O.P. (1972) ANLR 825, (1972) 11 SC 37, Elias CJN".

Essentially, the burden of proof beyond reasonable doubt is on the prosecution. The Appellant in this case had after the prosecution's case conceived that the prosecution has not made out any prima facie case against him to warrant a defence from him or being called upon by the learned trial Judge to enter upon his defence. He therefore made a no case submission as he is entitled under the law.

The import and connotation of a no case has been enunciated in numerous cases suffice to refer to some of them.

See - **GODWIN DABOH & ANOR V. THE STATE (1977) 5 SC 187 AT 209 – 211.** See also - **COP VS. MR. EMMANUEL AMUTA (2017) 4 NWLR (PART 1556) 379 AT 391 C - H** and **FRN VS. THOMAS ISEGHOHI (2019) 12 NWLR (PART 1685) 154 AT 179 G - H** per KEKERE – EKUN, JSC.

The principles guiding a no case submission have now been explicably enacted in sections 302 and 303 of the Administration of Criminal Justice Act 2015, which all provides:

"302.The court may on its own motion or on application by the defendant, after hearing the evidence for the prosecution, where it considers that the

evidence against the: defendant or any of several defendants is not sufficient to justify the continuation of the trial, record a finding not guilty, in respect. of the defendant without calling on-him or them to enter his or their defence and the defendant; shall accordingly be discharged and the court shall then call on the remaining defendant, if any, to enter his defence.

"303.(1).Where the defendant or his legal practitioner makes a no case submission in accordance with the provisions of this Act, the court shall call on the prosecutor to reply.

(2) The defendant or his legal practitioner has the right to reply to any new point of law raised by the prosecutor, after which, the court shall give its ruling

(3) In considering the application of the defendant under section 303, the court shall, in the exercise of its discretion, have regard to whether:

(a) an essential element of the offence has been proved;

(b) there is evidence linking the defendant with the commission of the offence with which he is charged;

(c) the evidence so far led is such that no reasonable court or tribunal would convict on it; and

(d) any other ground and which the court may find that a prima facie case has not been made out against the defendant for him to be called upon to answer."

The germane question in this case is, whether from the totality of the evidence led by the prosecution established the crucial and essential elements or ingredients of the offence alleged against the Defendant now Appellant as contained in counts 1, 2 3 and 4 of the charge over which the lower Court ordered the Appellant to enter upon his defence to explain how he came about the various sums of money contained in the said charge.

In order to establish the elements or ingredients of counts 1 and 2, the Respondent relied principally on the evidence of PW4 and Exhibits "J" and "I" respectively. The Learned Counsel to the Respondent in response to the submissions of the Appellant's Counsel that evidence of PW4 and exhibits tendered did not establish the elements of offences charged in counts 1 and 2 having regard to section 27(3) of the EFCC Act, 2004, he argued inter alia as follows:

> ***"It was further argued for the Appellant that the evidence of PW4 which was intended to prove counts 1 and 2 did not help matters. Similarly, it was the Appellant's argument that none of the exhibits tendered at trial helped the case of the prosecution specifically in respect of counts 3 and 4. Nothing can be further from the truth, in our humble view. We humbly submit that the evidence of PW4 (in-chief and under cross-examination) as well as Exhibit J tendered by the Defendant/ Appellant through PW4 have strengthened the case of the***

prosecution/Respondent against the Appellant as far as counts 1 and 2 of the charge are concerned. The attempt by the Appellant to misrepresent the testimony of PW4 as rephrased in the Appellant's Brief (page 11, paragraph 2.4.4) cannot succeed since the Record of appeal (page 202-204) contains the verbatim evidence of PW4."

The Learned Counsel to the Respondent further argued in paragraph 4.3.9 of his Respondent's Brief of Argument as follows:

"4.3.9 My lords, notwithstanding the foregoing arguments on both sides of the divide, it is our humble submission that in view of the fact that the Appellant had filled (and he is not denying that fact) the Asset Declaration Form at the EFCC which Form is required [by S. 27(1) of the Act] to be filled only by persons arrested for an offence under the EFCC Act, there is a legal presumption that he was arrested for an offence under the EFCC Act. This is what is called presumption of regularity. Section 168(1) of the Evidence Act, 2011 and Amaka v State (1995) 6 NWLR (Pt 399) 533 are relevant. We therefore urge this Court to invoke the presumption since it has not been rebutted. If the Appellant wishes to rebut the presumption, he could enter his

defence and do just that. Meanwhile, was the arrest and investigation of the Appellant by the EFCC made pursuant to an offence under the EFCC Act? The Appellant has provided the answer in Exhibit 1 (the EFCC Asset Declaration Form) tendered during trial. He wrote and signed in the document thus: "I Andrew Laah Yakubu being accused of an offence conspiracy and diversion of public funds under the Economic and Financial Crimes (Establishment) Act 2004 declare my assets and liabilities as follows ... " In spite of this, the Appellant still wants your lordships to believe him that the trial court was wrong in ordering him to enter his defence on counts 1 & 2 of the charge."

The learned trial judge set out profusely the evidence in his judgment on pages 283 - 286 of full evidence as given by PW4 which can be found on pages 201 - 204 of the record as follows:

"PW 4, male, adult, Muslim affirms and states as follows:-

My name is Sambo Mu'azu Mayana, a senior Detective Superintendent attached to the Operations Department of the EFCC. My duties are mainly investigations and other related assignments. I live in Gwarinpa 2nd Avenue, Abuja. Presently, I am attached to the Economic

Governance Section of the Operations Department. I have been in the job of investigation of the EFCC for 12 years (Economic and Financial Crimes Commission. I know the Defendant standing trial. Back in 2015, we commenced investigation into two category of contracts awarded by NNPC and it's subsidiary. The first category of the contract relates to Strategic Alliance Agreement between NNPC and it's subsidiary NPDC and Atlantic Energy Drilling Concept Ltd. The contract was signed between NPDC and the Atlantic Energy Drilling Concept Ltd. The first Strategic Alliance Agreement was on oil mining, lease OML 26, OML, 30, OML 34, OML 40 and OML 42.The second contract also called the second Strategic Alliance Agreement was on OML. 60; OML 61, OML 62 and OML 63: The investigation was sequel to intelligence Report received by the EFCC relating to suspicious Funds transfers from Atlantic Energy Drilling Concept Account in Nigeria to a sister company called Atlantic Energy Holding. Also, additional transfers from Atlantic Energy Brass Dev. Ltd to the said Atlantic Energy Holding Account based in Switzerland. There was also fund transfer from Atlantic Energy Holding in Switzerland to Nigerian Account to the two sister companies Atlantic Energy Drilling Concept Ltd and Atlantic

Energy Brass Dev. Ltd. It was on the basis of these suspicious transactions that investigations commenced. During the course of investigation, it became necessary to seek clarifications from Engr. Andrew Yakubu. Engr. Andrew Yakubu was invited accordingly and we interacted with him and thereafter, we reduced the interaction into writing. The two Strategic Alliance Agreements were executive between end of 2011 till April, 2014 during which Engr. Andrew Yakubu was the General Managing Director of the NNPC from June, 2012 to mid-August, 2014. After the interaction and after recording the statement, Engr. Andrew Yakubu declared his Assets sometimes between July and August, 2015. The EFCC have a standard Asset Declaration Form and a copy of that Asset Declaration Form was given to Engr. Andrew Yakubu, wherein, he filled the Form by declaring his Assets. Engr. Andrew Yakubu was made to declare his Assets based on the allegations that the Company Atlantic Energy Drilling Concept Ltd was allowed to lift crude oil worth over a Billion Dollars without carrying out the necessary obligations on their part; it is on this basis that investigations carried out that led to the charging some NNPC officials before the Federal High Court. The Assets

Declaration Form was filled by the Defendant himself and I was present and I witnessed the filling of the Asset Declaration Form. If I see the said Asset Declaration Form, I will recognise it by my signature and thumbprint. Witness shown a C.T.C. of the Asset Declaration Form and he said it is the one he referred to in his evidence- in-chief.

Prince Ikani:- *We seek to tender a C.T.C. of the Asset Declaration Form in evidence.*

Raji SAN:- *We have no objection to the tendering of the C.T.C. of the Asset Declaration Form in evidence.*

Court:- *A C.T:C. of Asset Declaration Form bearing the name of the Defendant Engr. Andrew Yakubu is admitted in evidence as exhibit I.*

Signed:-
Justice A. R. Mohammed
Judge
10/5/18.

PW4 continued:-Witness shown exhibit I and asked to state whether there is any column where the sum of US $9,772,800,000 was declared there, PW 4 said there was no such money stated. PW 4 also said there was no sum of £74t900.00 Pound sterling.

Prince Ikani:-That is all for the witness..

XX PW4 BY SENIOR COUNSEL FOR THE DEFENDANT.

We have been following the trial in which I said some NNPC staff were charged to Federal High Court on the allegation that Atlantic Energy Drilling Concept was allowed to lift crude oil worth over 1 Billion Dollars without carrying out the necessary obligations.

It is correct that in the case before the Federal High Court against some staff of the NNPC before Justice Dimgba, the Defendant in this case testified for the prosecution.

Witness shown the record of proceedings in Justice Dimgba's Court of the Federal High Court and asked whether it included the evidence of the Defendant Eng.

Andrew Yakubu, PW4 said it is the record of proceedings of Justice Dimgba's Court where the Defendant herein Andrew Yakubu testified as a prosecution witness.

Raji SAN:- We seek to tender the record of proceedings in evidence.

Prince Ikani:- We have no objection to the tendering of the record of proceedings from Justice Dimgba's court.

Court:- C.T.C. of the record of proceedings of Justice Dimgba's Court in Suit No: FHC/ ABJ/CS/121/2016 is admitted in

evidence as exhibit J.

Raji:- *That is all for the witness.*

Re-examination PW 4 b the Prosecution Counsel:-

Prince Ikani:- We have no re-examination for PW 4.

Court:- PW4 is hereby discharged, This case as agreed by the learned counsel, is adjourned to 3/7/18 for continuation of trial.

Sgd.
Justice A. R. Mohammed
Judge
10/5/18"

From Exhibit D, which the prosecution relied upon, the Appellant was accused of offences of conspiracy and diversion of public funds under the EFCC Act 2004. The Appellant was made to declare his assets according to PW4

"...based on the allegations that the company Atlantic Energy Drilling Concept Limited was allowed to lift crude oil worth over a billion dollars without carrying out the necessary obligations on their part; it is on this basis that investigations carried out that led to the charging of some NNPC Officials before the Federal High Court."

As could be seen under cross examination the Appellant gave evidence on behalf of the complainant now Respondent in the case against some Staff of NNPC.

In effect Exhibit "I" was made in connection with a case in which the Appellant was not charged or accused. The investigation carried

out by PW4 was not in respect of Counts 1 and 2 of the charge against the Appellant in his case on appeal. It means the Appellant was not arrested and investigated for offences in Counts 1 and 2 as at the time he made Exhibit "I". The offences contained in counts 1 and 2 have no bearing with allegations of Conspiracy and diversion of public funds investigated in 2015 when he signed Exhibit "I" on 18/7/2015. According to PW 3 the offences for which the Appellant was arraigned came to light on or about 3rd February, 2017. He was arrested in 2017 for the offences contained in the charge now against him (Appellant).

In this case there is no charge relating to diversion of public funds and conspiracy and there is no evidence of asset investigation carried out by the PW4 of any of the witnesses for the prosecution under and by virtue of section 27(3) of the EFCC Act, 2004.

The offence for which the appellant was charged is under Section 27 of the EFCC Act 2004. Section 27(1), (2) and (3) is very plain and clear. The law provides:

> **27. (1) Where a person is arrested for committing an offence under this Act, such person shall make a full disclosure of all his assets and properties by completing the Declaration of Assets Form as specified in Form A of the Schedule to this Act.**
>
> **(2) The completed Declaration of Assets Form shall be investigated by the Commission.**
>
> **(3) Any person who –**
>
> **(a) knowingly fails to make full disclosure of his**

assets and liabilities; or

(b) knowingly makes a declaration that is false; or

(c) fails, neglects or refuses to make a declaration or furnishes any information required, in the Declaration of Assets Form, commits an offence under this Act and is liable on conviction to imprisonment for a term not exceeding five years.

The law is trite that statues are to be interpreted liberally with words given their ordinary meaning. However, where words used are clear, unambiguous and directly to the point, any addition or subtraction will be sequel to introducing an illegal back door amendment. See **SKYE BANK PLC V. IWU (2107) 16 NWLR (PT. 1590) 24.** It is patently the requirement of this law that a person to make a full disclosure of all his assets and property by completing the Declaration of Assets Form A of the Schedule to the Act, is a person arrested for committing an offence under the Act. A person invited by the EFCC as a witness to the crime committed by other persons cannot be subjected to filing Asset Disclosure Form under that law. It must be born in mind that under our Constitution by Section 36 (5) thereof, there is a guaranteed right of everyone to be presumed innocent until proved guilty. No citizen therefore should undergo any harassment when he is invited to testify as a witness in any trial other than his own trial. The appellant from the evidence before us was not arrested for any offence allegedly committed by him in 2015 to warrant being subjected to making full declaration of Assets. Furthermore, the

offence for which the appellant was invited as a witness was the offence relating to a charge of diversion of public funds and conspiracy. It is not for the offence for which the appellant was charge in this case. It is certain that until the appellant was arrested for commission of any offence he cannot be forced to made declaration of asset to enable the respondent mine out the offences for which he would later be accused of as it is in the instant case. I am therefore in agreement with the learned senior counsel for the appellant that the Appellant must be shown to have been arrested for committing a crime under EFCC Act and upon such arrest, that he made a declaration of his asset and liabilities and there must be investigation which led to discovery of assets different from what he filled in the Asset Declaration Form. That no such thing happened in this case and thus Appellant could not have been charged as in Counts 1 and 2 to the effect that the Appellant knowingly failed to make full disclosure of the funds. That failure to investigate Exh. 1 militates against the Respondent in that Appellant was not shown or proved to have been arrested in connection with a crime under EFCC Act.

It is the law that where a statute provides for particular method of carrying out a duty it must be performed strictly in the manner prescribed by the statute. See on the case of **FBN V. UDOMA EDDA (2006) ALL FWLR (PT. 307) 1012 AT 1028**.

A Defendant or an Accused in a Criminal Case cannot be convicted for an offence he was not charged with. See: - **FRN V. THOMAS ISEGHOHI (2019) 12 NWLR (PART 1685) 154 at 178 H TO 179 A - D** where ODILI, JSC, held:

"Indeed, from the findings of the Court of Appeal and the ensuring conclusion what comes to light is that an accused person cannot be convicted on what he was not charged with and no evidence in support such as the case in hand where there was no count in the charge on misappropriation of funds or financial recklessness or mismanagement ineptitude. Rather the charge on Money Laundering and Advance Fee Fraud and while the elements of financial recklessness or misappropriation or management ineptitude were the evidence led by the prosecution and so it cannot be said the offences charged were made out for which a conviction can be secured, as the appellant's counsel urges the court to do. This goes against the grain of what this court had stated in Abidoye v. FRN. (2014) 5 NWLR (Pt. 1399) 30 at 55-56 thus:-

"Once a charge is laid, it is deemed that all the ingredients included in the particulars are needed to prove the charge and any ingredient omitted is not necessary. The prosecution cannot default in proving any ingredient included in the particulars of the offence charged, nor can he offer proof of an ingredient omitted in the particulars of the offences. Having considered what the court below did in its findings and the conclusion and decision reached,

there is no gainsaying that none of the ingredients of money laundering or advance fee fraud was proved by the prosecution and I acknowledge that the court below was right in setting aside the decision of the trial court and on its part upholding the no-case submission."

See also **PROF. BUAKAR BARABE V. FRN (2019) 1 (1652) 100 At 125 C – E.**

I am of the firm view that the ingredients or elements of the offences contained in Counts 1 and 2 of the charge were not established by the pieces of evidence given by the witness for the Prosecution. I therefore hold that there is no prima facie case made out in counts 1 and 2 of the charge.

In respect of counts 3 and 4 relating to receiving cash payment in foreign currencies between 2012 and 2014 without going through a financial institution in alleged breach of Section 1 of the Money Laundering Prohibition Act, 2011 as amended in 2012 and punishable under section 16 (2) (b) of the same Act.

With regard to counts 3 and 4 the Learned Counsel to the Respondent relied heavily on the cases of **ATOYEBI V. FRN** (supra) and **IKUFORIJI V. FRN** (supra).

The position of the Appellant's counsel is that it is pivotal for the prosecution to prove that the monies in question were cash payments made in a transaction. That this is a vital ingredient Respondent sees it as a strict liability offence. That the ingredients of the offence are that:

1. **That the Defendant accepted cash payment above the applicable threshold.**
2. **That he did not receive the cash payment from a financial institution and**
3. **That he is a natural person.**

The Learned Senior Counsel to the Appellant relied also on the case of **EFCC v. THOMAS (2018) LPELR 45547 (CA)** wherein he said this Court held that that there is no law prohibiting how much a person can have in his possession.

The lower Court did not discuss any ingredients pertaining to any of counts 1, 2 3 and 4. What the lower court said is that he was tempted to discharge the Appellant on counts 1 - 4 but was constrained to call upon the Appellant to explain how he came about the monies recovered in his house. He relied on the case of **DAUDA v. FRN** (supra) relied upon by the prosecution. The Respondent also relied heavily on the case of **DAUDA V. FRN** and submitted it was rightly cited and relied upon by the trial judge.

I agree with the Learned Senior Counsel to the Appellant that the Counts in the charge particularly counts 3 and 4 did not charge or indict the Appellant to account for the source of the monies. The charge is that he received the monies without passing through financial institution.

The learned trial judge had held that he was tempted to discharge the appellant on counts 1 – 4 and that he was constrained to ask the Defendant now Appellant to explain how he came about the monies recovered from his house. I must say here that this is not just a

breach of the appellant's right to fair hearing, it is with due respect a perverse finding of the trial court. The learned trial judge did not attempt to give any reason for that finding. No evidence was relied upon. Perverse findings of the court go to no issue and cannot be sustained. This court has a bona fide duty to set such a perverse finding aside. See **ADEBAYO V. IGHODALO (1996) 5 NWLR (PT. 450) 507; OLABODE V. ANIBI (1998) 9 NWLR (PT. 567) 559**. This is apt because a perverse finding is a finding of facts which is merely speculative and not based on any evidence before the court. A perverse finding is an unreasonable and unacceptable finding because it is wrong and completely outside the evidence before the trial judge. See the case of **OVERSEAS CONSTRUCTION COMPANY NIG. LTS V. CREEK ENTERPRISES (NIG.) LTD (1985) 3 NWLR (PT. 13) 407**.

I am not unmindful of the Respondent's Notice to contend contained on pages 7 - 9 of the supplementary/Additional Record of Appeal.

I want to make it very clear that in our procedure, a respondent can either cross-appeal or file a notice of intention to contend. There is no rule that allows a respondent to file both a cross-appeal and a respondent notice to contend as the respondent did at pages 1 to 9 in the Supplementary/Additional Record of Appeal. It is excellent though, that the respondent had abandoned the cross-appeal and argued the respondent's notice of intention to contend.

The notice of intention reads as follows:

"NOTICE OF INTENTION TO CONTEND THAT

JUDGMENT SHOULD BE AFFIRMED ON GROUNDS OTHER THAN THOSE RELIED ON BY THE COURT BELOW

ENGINEER ANDREW YAKUBU.....APPELLANT

Vs.

FEDERAL REPUBLIC OF NIGERIA.....RESPONDENT

TAKE NOTICE that upon the hearing of the above appeal the Respondent intends to contend that the decision of the court below delivered on the 16th day of May, 2019 overruling the appellant's no-case submission in respect of counts 1 - 4 shall be affirmed on grounds other than those relied on by the court below.

AND TAKE NOTICE that the grounds on which the Respondent intends to rely are as follows:-

GROUNDS

1. In overruling the Appellant's no-case submission in respect of counts 1 - 4 of the charge, the court below relied on the case of Daudu v. FRN (2018) 10 NWLR (Pt. 1626) 169 cited in the Respondent's Written Address dated 26th November, 2018 and filed on 28th November, 2018.

2. The Respondent's Address dated 26th November, 2018 and filed on 28th November, 2018 had been withdrawn by Respondent's counsel during the court proceedings of 17th January, 2019 and the same was struck out by the court on that date.,

3. Respondent's Written Address in response to the Appellant's no-case submission which was adopted by the Respondent's counsel at the hearing of no-case submission is dated 15th January, 2019 and was filed on 16th January, 2019.

4. *The case of Daudu v. FRN (2018) 10 NWLR (Pt. 1626) 169 at 183 (supra) cited by the Respondent's counsel in its Written Address dated 15th January, 2019 was not in respect of counts 1-4 of the charge. Rather, it was in respect of counts 5 and 6 which the trial court however discharged the appellant.*

5. *The case of Daudu v. FRN (supra) cited by the Respondent is not very relevant in determining counts 1 - 4 of the charge for which the trial court ordered the Appellant to enter his defence.*

6. *How the Appellant came about the monies which formed the subject of counts 1 - 4 is not an essential element of the offences in counts 1 - 4 and therefore irrelevant in the circumstance.*

Dated this 30th day of May, 2019"

As can be seen from the above notice, the learned counsel to the Respondent while asking this Court to affirm the Ruling of lower Court of 16 -5-2019, ordering the Appellant to enter upon his defence to explain how he came about the monies in counts 1 - 4, he conceded that the case of **DAUDA V. FRN (2018) 10 NWLR (1626) 169 at 183**:

> *"...was not in respect of counts 1 - 4 of the charge. Rather, it was in respect of counts 5 and 6 which the trial Court however discharged the appellant."*

As a matter of fact, he considered the case **DAUDA V. FRN** (supra), is irrelevant to Counts 1 - 4 and further stated that how the Appellant come about the monies which formed the subject of counts 1 - 4 is not an essential element of the offence in counts 1 - 4.

Therefore, he agreed that the premises upon which the no case submission was refused in respect of counts 1 - 4, aided by the

reliance placed on **DAUDA v. FRN** is faulty.

A respondent's Notice is normally filed when a Respondent to an appeal does not wish to appeal or file cross appeal against the Ruling or judgment appealed against by his opponent. The Respondent can contend or admonish the Appellate Court to vary the lower Court's decision or to affirm it on grounds other than those relied upon by the trial Court based on the evidence or facts contained in the printed record of the trial court.

In the case of **NABISCO INC. v. ALLIED BISCUITS COMPANY LIMITED (1998) LEPLR 1932 (SC)** 1 BELGORE, JSC, later CJN, had this to say at page 14 B - C viz:

> ***"Respondent's notice under order 3 Rule 14 of the Court of Appeal Rules is a means for fine-turning a victory not to destroy it. It is absolute in many common law jurisdiction and has in fact been abolished in the Supreme Court Rules 1985. The Respondent's Notice is open to Respondent who having had victory in the Court below but dissatisfied with certain aspects of the reasons for the reasons for that victory now asks that the reasons be varied in whole or part."***

The Respondent having admitted the position of the Appellant that Dauda's Case is not applicable and that "coming to explain how a Defendant came about monies is not an element or ingredients of the offence charged, argued in her Brief of Argument the contrary.

The prosecution cannot be allowed to approbate and reprobate

at the same time. That is not the purpose of a Respondent's Notice. See: - **OZURUMBA NSIRIM V. DR. SAMUEL W. AMADI (2016) 5 NWLR (PART 1504) 42 AT 58H TO 59 A - G** per ONNOGHEN, JSC (later CJN), who said:

> *"Order 3 rule 14(1), (2) & (3) of the Court of Appeal Rules 2002 (being the applicable Rules) provide as follows:-*
>
> *"(1) A respondent who not having appealed from the decision of the court below, desires to contend on the appeal that the decision of that court should be varied, either in any event or in the event of the appeal being allowed in whole or in part, must give notice to that effect, specifying the grounds of that contention and the precise form of the order which he proposes to ask the court to make, or to make in that event, as the case may be.*
>
> *(2) A respondent who desires to contend on the appeal that the decision of the court below should be affirmed on grounds other than those relied upon by that court must give notice to that effect specifying the grounds of that contention.*
>
> *(3) Except with the leave of the court, a respondent shall not be entitled on the hearing of the appeal to contend that the decision of the court below should be varied upon grounds not specified in a notice given under this rule, to apply for any relief not so*

specified or to support the decision of the court below upon any grounds not relied upon by that court or specified in such a notice." It is settled law and practice that the duty of a respondent to an appeal is to defend the judgment of the court below which is usually in his favour. His duty is not to attack the judgment already given in his favour except where he disagrees with some aspects of the judgment in which case he is required to file a cross appeal in which he prays the appellate court to set aside the aspect of the judgment he considers against his interest or for the court to consider an aspect of the case he put forward at the lower court which the lower court failed and/or neglected to consider and determine in its judgment.

Where, however, the respondent is of the view that there is the need for the appellate court to vary the decision of the lower court or affirm that decision on other grounds, he has to file a respondent's notice to that effect as provided for in Order 3 rule 14 supra."

See also - **J. G. D. GWEDE VS. INEC & ORS (2014) 18 NWLR (PART 1438) 56 AT 88 A – B.**

For counts 3 and 4, the burden on the respondent at this stage of the trial is to lay evidence to show that the accused or the Defendant before the lower court made or accepted cash payment above the regulated sum and that the cash payment did not pass through a

financial institution. That the accused/defendant is an individual and not a body corporate. See the case of **ATOYEBI V. FRN (2017) LPELR 43831-CA**. The prosecution witness testified that the investigator recovered cash from the appellant. The prosecution's allegation as in counts 3 and 4 is that the recovered cash was cash payment without going through a financial institution. The cash from the evidence was recovered by the prosecution from the appellant. The money recovered is in excess of N500,000=. In **KUFORJI V. FRN** (supra), the Supreme Court per Eko, JSC, held that:

> **"The elements the prosecution must prove for the offences under Section 1 of either the MLPA, 2004 or MLPA, 2011 are: i. The defendant is a natural person, not a corporation. Ii. The defendant, an individual, made or accepted cash payment in excess of N500,000.00 – in the charge under Section 1 MLPA, 2004, Or, in respect of the charge under Section 1 MLPA, 2011 the amount is N5,000,000.00. That is, if the defendant, an individual, made or accepted cash payment in excess of N5,000,000.00**
>
> .....
>
> **It appears that the purpose the cash received or accepted in excess of the prescribed threshold statutorily fixed by Section 1 MLPA 2004, or Section 1 MLPA, 2011 is immaterial. Let it not be forgotten that an agreement to do a lawful act unlawfully is also criminal offence. This point caught the attention of**

the lower court and at page 2410 of the record it stated the law thus: (It) does appear to me that the court below missed the finer point that, the purpose of Section 1 of MLPA, 2004, before its repeal, and Section 1 of MPLA 2011 respectively is in my view and I so hold, to clearly and strictly bar the payments and or acceptance of cash payments above the set threshold irrespective of the purpose and authorization for the payments. Every payment above the threshold amount stated in Section 1, with the coming into effect of MPLA 2004, before its repeal, and MPLA, 2011 must be made through a financial institution to be excluded from the operation of the MLPA. See Nyame v. FRN (2010) 7 NWLR (Pt. 1193) 344 at p. 399. The purpose of paying the money and accepting the money/cash in excess of the prescribed threshold may be lawful in the defendant's wishful thinking. However, in the Penal Statute; the payment and or acceptance of cash in excess of the prescribed threshold is illegal or unlawful, if not done through a financial institution. The purpose for either the payment or receipt of cash of the prescribed threshold is not a *mens rea* defence under the MLPA, 2004 or MLPA, 2001, pp. 16 – 24 paras. E-E"

In the instant case, the appellant who was the defendant at the

trial court is a natural person; he is accused of accepting cash payment in excess of the regulated sum of ₦500,000=. Since the appellant has been sufficiently linked to the recovered money which was alleged to be payment accepted outside a financial institution, there is a prima facie case made out for the appellant to explain his own side of the story by entering into his defence in respect of the said counts 3 and 4.

From the foregoing therefore, it is only in respect of counts 3 and 4 that there is prima facie case disclosed against the appellant. The appeal therefore succeeds in part. Since I have found that there is prima facie case in respect of counts 3 and 4 of the charge, the case is remitted back to the trial court for the appellant to enter his defence in respect of the said counts 3 and 4.

STEPHEN JONAH ADAH
JUSTICE, COURT OF APPEAL

APPEARANCES:

Ahmed Raji, SAN, with: Saidu Mohammed, Esq., Adeola Adedipe, Esq., E.I. Umunnakwe, Esq., W.A. Adenira, Esq., and Adejumoke Ademola, Esq., for the Appellant.

M.S. Abubakar, Esq., with: H.A. Shehu (Miss), for the Respondent.

APPEAL NO: CA/A/533C/2019
TINUADE AKOMOLAFE-WILSON, JCA.

I read the draft copy of the judgment just delivered by my learned brother, **Stephen Jonah Adah, JCA**.

I am in agreement with the reasoning and conclusion as contained in the lead Judgment.

TINUADE AKOMOLAFE-WILSON
JUSTICE, COURT OF APPEAL

CA/A/533C/2019

PETER OLABISI IGE, JCA

I agree.

PETER OLABISI IGE
JUSTICE, COURT OF APPEAL