

THE HIGH COURT OF JUSTICE: DELTA STATE OF NIGERIA
IN THE EFFURUN JUDICIAL DIVISION
HOLDEN AT EFFURUN
BEFORE HIS LORDSHIP HON. JUSTICE MICHAEL NDUKA OBI, (JUDGE)
ON MONDAY, THE 20TH DAY OF MARCH, 2023

SUIT NO. EHC/13^{CA}/2021

BETWEEN:

ABDULL MOHAMMED

COMPLAINANT

VS.

COMMISSIONER OF POLICE

DEFENDANT

JUDGMENT

Abdull Mohammed the Appellant was charged along with one John Wilberforce and one Ahmed Mamodu. They were first charged with Conspiracy to commit a felony to wit stealing as well as the offence of stealing. On the 22nd of March 2021 the Appellant and his co-defendants pleaded guilty to the two counts. The Court found that from the facts presented by the Police Prosecutor, the offence of stealing has not been proved against the Appellant and Ahmed Mamodu rather the facts showed that they committed the offence of receiving stolen property pursuant to **section 427 of the Criminal Code, Delta State**. The Prosecutor applied and amended the charge to read four counts. Counts 1 and 3 relates to the Appellant. The charges were read to him, and he pleaded guilty once again to the offence of Conspiracy to commit felony to wit; stealing as well as guilty to the offence of receiving stolen goods. The Prosecutor stated the facts, and the Trial Magistrate pronounced the guilty verdict. The court then sentenced the Appellant to three years imprisonment on each of the count to run concurrently. The Appellant was directed to return the stolen goods to the Complainant.

On the 5th of November 2021, the Appellant through his counsel filed a Motion on Notice at the trial court for extension of time to file a Notice of Appeal on the ground that the time allowed by the Administration of Criminal Justice Law of Delta State (ACJL) had lapsed. The Motion on Notice also had a prayer to deem the Notice of Appeal dated and filed on the 15th of October 2021 as properly filed and served. The Motion was moved on the 22nd of November 2021 and the Trial Magistrate declined jurisdiction to hear the application and directed Counsel for the Appellant to go to the appropriate court. Learned Counsel for the Appellant took no further step in regularizing the Notice of Appeal which he had held to have been filed out of time as stipulated in the ACJL.

On the strength of Notice of Appeal dated 15th October 2021, Counsel to the Appellant filed his Appellant's brief on the 10th of March 2022. The said brief was served on the Respondent. In response, the Respondent's brief was filed on the 6th of April 2022. The Appellant filed a Reply on Points of Law on the 5th of May 2022. Counsel adopted their respective briefs on the 9th of May 2022. The Appeal was adjourned for Judgment. The Respondent filed a Motion on Notice on the 29th of June 2022, a day before Judgment was to be delivered, praying this Court to dismiss the Appeal on the ground that the Appeal was heard with an incomplete Records of Appeal. The said Motion on Notice was struck out and this Court ordered that the complete Records of Appeal be transmitted, and Judgment was put on hold. Order of this Court was complied with, and the complete Records were transmitted to this court. Parties were asked if they intend to file additional briefs in the circumstances of the complete Records of Appeal. The Respondent indicated that they intend to file additional brief. It turned out that the Respondent rather than file a further brief, ended up filing a Preliminary

Objection on the 20th of January, 2023 on ground that this appeal is incompetent. The contention of the Respondent in the above referenced Preliminary Objection is that the Notice of Appeal in this suit was filed out of time without the leave of Court.

A perusal of the Respondents brief showed that the same issue had been raised by way of Preliminary Objection. The brief having been adopted where the issue of filing Notice of Appeal out of time without leave of Court is vigorously argued, the Preliminary Objection of the Respondent filed on the 20th of January 2023 is therefore of no moment. Moreover, leave was only given to parties to file further brief only as it relates to the complete Records of Proceedings, which was transmitted to this court after briefs were adopted. The Preliminary Objection of 20th of January, 2023, has no bearing with the complete Records of Appeal, which was transmitted after briefs were adopted.

This Court shall now proceed to resolve the preliminary objection as contained in the Respondent's brief.

It is the submission of the Respondent that by the provisions of **Section 477(4) of the Administration of Criminal Justice Law (ACJL) of Delta State**, the Appellant has 30 days within which to file his Notice of Appeal against the decision of the Trial Magistrate. It is the further submission of the Respondent that the Notice of Appeal in this case was filed on 15th of October 2021, challenging a Judgment delivered on the 22nd of March 2021. It is Counsel's contention that the Appellant having not sought leave of court to file out time, makes the said Notice of Appeal incompetent as well make the present appeal liable to be struck out for lack of Jurisdiction. It is the submission of the Respondent that the Appellant cannot go out of the purview of the ACJL to find succor.

Respondent prayed the Court to strike out the Appeal as the Notice of Appeal which is the originating process in this Appeal is incurably defective.

On his part, Counsel to the Appellant argued that the Respondent ought to have come by way of Motion on Notice praying for leave of Court to argue its Preliminary Objection raised in its brief. Counsel referred this Court to the case of **Okafor Vs Inspector General of Police Force Headquarters Abuja (2021) ALL FWLR PART 1102 PAGE 103 @ 106** and **NDP Vs INEC (2012) 12 SC Part 4** as well **Onochie Vs. Odogwu (2006) All FWLR (Part 317) 544**.

Counsel submitted that the Respondent in this Appeal failed to seek leave of this Court to argue its Preliminary Objection and as such, the Preliminary Objection is deemed abandoned. He argued further that assuming without conceding that the Respondent's brief of argument (I suspect counsel means Preliminary Objection) is not deemed abandoned, the **Magistrate's Court Law of Delta State, 2008** does not provide for any time limit within which the Appellant is to file his Notice of Appeal. Appellant's Counsel referred to **Section 67** of the said **Magistrate Court Law** and submits that the Appellant has a right of appeal without limitation of time. Counsel submitted that the ACJL is a procedural rule which is subordinate to the Magistrate's Court Law of Delta State, which is the substantive law governing causes and matters in the Magistrate Court. Counsel referred to **Section 101 of the Magistrate's Court Law of Delta State** and submitted that the Respondent do not have the standing to challenge any defect in the Notice of Appeal. He concluded his argument on this point by submitting that this Appeal raises issue of Jurisdiction and thus it can be raised at any time.

I have given submission of both counsel due consideration. I shall first deal with the issue on whether the Respondent need to seek leave before raising a Preliminary Objection in the brief of argument. The law guiding Criminal Procedure in this Court and at the Magistrate Court, is the Administration of Criminal Justice Law (ACJL) of Delta State. There is nowhere in the said ACJL where it provides that leave of Court would be required before a Respondent can raise and argue a Preliminary Objection. There is nothing in the ACJL that forbids a party from raising and arguing a Preliminary Object in his brief. The authorities of **OKAFOR VS INSPECTOR GENERAL OF POLICE FORCE HEADQUARTERS ABUJA (2021) ALL FWLR PART 1102 PAGE 103 @ 106 AND NDP VS INEC (2012) 12 SC PART 4 AS WELL ONOCHIE VS. ODOGWU (2006) ALL FWLR (PART 317) 544** relied on by the Appellant in challenging the Respondent's Preliminary Objection do not state a substantive law that prevents this court in exercise of his appellate jurisdiction to hear a Preliminary Objection contained in a brief. Whether it is acceptable procedure for a respondent to argue Preliminary Objection in his brief of argument, **RHODES-VIVOUR, J.S.C. in LAWAN ABDULLAHI BUBA WASSAH v. TUKSHAHE KARA (2014) LPELR - 24212.SC(2014) 12 SCM [pt. 1112] 250** held thus "It is also accepted practice for the respondent to argue his Preliminary Objection in his brief in which case the appellant would have to respond in a reply brief. In this appeal the Respondents argued their Preliminary Objection in their brief. The procedure adopted by the respondents obviates the need to file a separate notice of preliminary objection."

I am of the candid view that the Respondent is not restricted by any law from arguing the Preliminary Objection in his brief. The Respondent had argued that the Appellant was out of time in filing the Notice of Appeal. The Appellant argued in response that the ACJL of Delta State which provides for a time frame to file Notice of Appeal is a Procedural Rule and therefore subsidiary to the Magistrate Court Law. It is his contention that the Magistrate Court Law of Delta State is silent on when an Appeal can be filed. It is rather ironic that the Appellant who sought leave pursuant to the ACJL of Delta State for extension of time to file Notice of Appeal at the Trial Court, would turn around to argue that the operative legislation that guides filing of appeals even in criminal matters, is the Magistrate Court law of Delta State and not the ACJL of Delta State. With due respect to counsel for the appellant, the ACJL of Delta State is a law and not a Rule of Court as Appellant's Counsel would want to suggest. The ACJL of Delta State is the procedural law that governs the criminal procedure in Delta State. **Section 477(4) of the ACJL of Delta State** provides thus:

Limitation of Time- The notice of appeal shall be given in every case before the expiration of the thirtieth day after the day on which the court has made the decision appealed against.

The notice of appeal filed in this Appeal did not meet this criteria. The said notice was filed over six months after the decision complained about. The Supreme Court in **OKWUOSA V. GOMWALK & ORS (2017) LPELR-41736(SC)** held that "A notice of appeal has been described as the "spinal cord" of an appeal. It is the originating process, which sets the ball rolling for the proper, valid and lawful commencement of an

appeal. Where the notice of appeal is defective, no appeal can stand. See: *Aderibigbe & Anor. v. Tiamiyu* (2009) 10 NWLR (Pt. 1150) 592 @ 614 E-G; *In re: Otuedon* (1995) 4 NWLR (Pt. 392) 655; *Eboka v. Ekwenibe & Sons Trading Co. Ltd.* (1990) 10 NWLR (Pt. 622) 242".

In *OLOWOKERE V AFRICAN NEWSPAPERS LTD* (1993) 5 NWLR (PT.295) 583 at 599 Nsofor JCA captures what a fundamental defect does to a Notice of Appeal. He stated as follows: - "there is no doubt that a notice of appeal is a very important document. It is the very foundation of an appeal against any appealable decision. If therefore a notice of appeal is defective then the court of appeal shall lack legal competence to entertain the appeal. It will strike out the appeal....."

The facts before me and as rightly argued by the Respondent, the Notice of Appeal filed, was filed out of time provided for in the ACJL of Delta State without the leave of court. In my considered view, the said notice of appeal is fundamentally defective, and the appeal is bound to fail. This appeal therefore being incompetent is liable to be struck out.

However, The Supreme Court in *ORO VS FALADE* (1995) 5 NWLR (PT 396) 385 HELD at page 402 F-G thus:

"It is incumbent on all courts to pronounce on all issues raised by the parties and not restrict themselves to one or more of the issues which in their opinion dispose of the case. This is only reasonable because of the obvious danger of a higher court disagreeing with the view held by the court below on the point ..."

This court shall now consider the issues raised in the substantive appeal. The issues canvassed by the Appellant in his brief can be compartmentalized to two core issues. The first being failure to comply with **Section 374 (4) of the ACJL of Delta State**, which states what should accompany a charge filed at a Magistrate Court. The said provision states thus:

4) Where the offence is one for which a Magistrate Court has jurisdiction to try, the prosecutor shall file the charge at the Magistrate Court, accompanied with:

- 1. the list of witnesses;**
- 2. the list of exhibits and documents the prosecution intends to rely on at the trial of the defendant;**
- 3. the copies of the documents the prosecution intends to rely on at the trial of the defendant; and**
- 4. the statements of the witness and defendant but the prosecution and the defendant may, with leave of the Court file and serve an additional document.**

When the Records of Appeal were initially transmitted to this Court, the records contained only the charge sheets on pages 1-3 and no accompanying documents. This Court order that the parties further settle Records of Appeal. As stated earlier in this Judgment, the Order of this Court of 27th of September 2022 was complied with and a complete record was transmitted to this Court. Pages 4-29 of the subsequent records contains proof of evidence. It became apparent that it was not a bare charge sheet that was filed at the trial Court as argued by the Appellant. I am of the firm view that **Section 374 (4) of the ACJL of Delta State** was adhered to by the Prosecutor at the trial Court. This issue is thus resolved in favour of the Respondent.

The second core issue has to do with the procedure adopted by the trial Court leading to the conviction and sentencing of the Appellant. The alleged procedural infractions are captured in issues 2 & 3 formulated by the Appellant. The first infraction is that the Learned Magistrate had no jurisdiction to sit on appeal over its Judgment when it delivered judgment by finding the Appellant guilty, amended the charge to reflect the findings of the Trial Magistrate that the Appellant committed the offence of receiving stolen goods and called on the Prosecution to present further summary of facts. Appellant contention is that at the time the trial Magistrate made the following pronouncement—

“From the summary of the facts of the case, in respect of count I of the charge, the three defendants are found GUILTY since they actually conspired to commit the said offence of stealing. However, in respect of count II of the charge the court finds that the 1st Defendant alone is guilty of that charge, but the 2nd and 3rd defendants committed the offence of receiving stolen property pursuant to Section 427 of the Criminal Code, Delta State 2006”.

The trial Court became functus officio and should not have permitted the amendment of the charges and the subsequent presentation of the facts by the Prosecutor.

The second alleged procedural infraction is that the Appellant was not properly arraigned, especially where the lower court failed to record a plea of not guilty in his favour and defaulted to comply with **Sections 271(2)(a)(b), (3), 274(1)(c), 347(1)(a)(b) and 347(6)(a)(b) of the**

Administration of Criminal Justice Law of Delta State, 2016, and as such, the trial Court lacks the jurisdiction to sentence and convict the Appellant.

In dealing with these issues raised by the Appellant, this court has to take cognizance of **section 481 of the ACJL of Delta State** which provides thus:

“A High Court exercising appellate jurisdiction shall not, in the exercise of such jurisdiction, interfere in the finding or sentence or other order of the lower Court on the ground only that evidence has been wrongly admitted or that there has been a technical irregularity in procedure, unless it is satisfied that a failure of justice has been occasioned by such admission or irregularity”.

The clear implication of the above provision is that failure to adhere to the procedural provision of the law per se, would not be a ground to set aside an order or decision of the Trial Magistrate except the Court is satisfied that a failure of justice has been occasioned by such admission or irregularity. The duty of the Appellant is therefore to state the irregularity in the procedure and show to the satisfaction of the Court on how the said irregularity has occasioned miscarriage of justice. The Appellant pleaded guilty to the two counts on the original charge sheet and the amended charge sheet. The Charges were read to him in Hausa language, and he understood what he was pleading guilty to. I do not see how any procedural infraction could have occasioned any miscarriage of justice. I resolve issues 3 and 4 in favour of the Respondent.

I have earlier on found that this Appeal is incompetent as the Notice of Appeal was filed out of time and without leave of Court to file out of time. The Appeal is accordingly struck out.



HON. JUSTICE MICHAEL NDUKA OBI

JUDGE

20th March, 2023

REPRESENTATION:

O. L. Ojevwe Esq., for the Respondent.
No counsel for the Appellant.