

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE APPEAL DIVISION

HOLDEN AT COURT 6, MAITAMA, F.C.T., ABUJA.

BEFORE THEIR LORDSHIPS:

HON. JUSTICE O. O. GOODLUCK (PRESIDING JUDGE)

HON. JUSTICE Y. HALILU (HON. JUDGE)

APPEAL NO.: CRA/463/2009

SUIT NO. CR/14/2013

B E T W E E N:

RUTH OGBUNUJU } **APPELLANT**

AND

1. COMMISSIONER OF POLICE } **COMPLAINANT/RESPONDENT**
2. MR. VINCENT EFFIONG }

R U L I N G

The Appellants are by the Notice of Appeal challenging the Ruling of the Upper Area Court delivered by Honourable Adamu Wakili on the 1st November, 2013.

The Appeal is predicated on 5 grounds namely;

1. The Honourable Upper Area Court Judge erred in law when he ruled that the prosecution had established a prima facie case of Adultery against the Appellant.

2. The Honourable Upper Area Court Judge erred when he overruled the no case submission and held that there is ground to call upon the Appellant for explanation.
3. The Honourable Area Court Judge erred in law when he held that the exhibits tendered by the prosecution particularly the 46 copies of photographs shows the circumstances and intimacy between the Appellant and the 2nd Respondent.
4. The Honourable Upper Area Court Judge erred in law when he framed a charge that the complainant caught the Appellant with the 2nd Respondent in his bedroom having sexual intercourse with each other.

Uwalaka Ihuoma K, Learned Counsel for the Appellant in the Appellant brief dated 20th March, 2014 raised three issues for determination as follows;

1. Whether the Learned trial Judge was correct when he held that a prima facie case was established against the Appellant and over ruled the no case submission made by the Appellant (Grounds 1 and 2.

2. Whether at the no case submission stage the trial Court is expected to make findings on the evidence led by the prosecution. (Ground 3)
3. Whether there was any evidence before the trial Court to support the charge framed by the Court. (Ground 4)

Learned Counsel for the Respondent has submitted that in order to make a prima facie case for the offence of adultery the prosecution must prove that;

- (a) That the Accused had sexual intercourse with a man
- (b) That she knew or had reason to know that the man was not her husband
- (c) That she is subject to a native law and custom in which extra marital sexual intercourse is regarded as a criminal offence.

He contends that there is no evidence from any of the witnesses that there was any sexual intercourse between the Appellant and the man whom Appellant is alleged to have had sexual intercourse with.

Appellant's Counsel then went on to posit that the elements of the offence of Adultery is lacking in prosecution's evidence. This Court is however unable to allude to the submission of Learned

Counsel for the Appellant that the prosecution is to establish all the ingredients for the offence of adultery.

*In the case of **AGBO & ORS. v. THE STATE (2013) L.P.E.L.R. 20388 SC** the Supreme Court held that: “The purport of a no case submission is that the Court is not called upon at that stage to express any opinion on the evidence before it. The Court is only called upon to take note and rule accordingly that there is before the Court no legally admissible evidence linking the accused person with the commission of the offence charged but if there is legally admissible evidence, however slight, the matter should proceed as there is something to look at. See **IGBABELE v. THE STATE supra AITUMA v. THE STATE (2007) 5 N.W.L.R. (PART 1028) page 466.***

Similarly, the Apex Court had cause to shed more light on the implications of a “no case submission” in the case of **TONGO v. COMMISSIONER OF POLICE (2007) N.W.L.R. (PART 1049) 525 at 544 – 545 paras. E – F SC**, it was held that:

“The essence of a submission of a no case submission lies in the contention that the evidence of the prosecution called in the discharge of the burden of proof placed on them by law has failed to establish a prima facie case or establish the ingredients of the offence against the accused, to make it imperative for the Court to call upon

*the accused to defend himself or answer to the charge or upon his defence or enter his defence. Where no case submission is made particularly where Learned Counsel indicates intention to rely on the same what is to be considered by the Court is not whether the evidence produced by the prosecution against the accused is sufficient to justify conviction but whether the prosecution has made a prima facie case requiring at least, some explanation from the accused person as regards his conduct or otherwise. See **QUEEN v. OGUCHA (1959) S.C.N.L.R. 154, DURU v. NWOSU (1989) 4 N.W.L.R. (PART 113) 24; IKOMI v. STATE (1986) 3 N.W.L.R. (PART 28) 340, ONAGORUWA v. STATE (1993) 7 N.W.L.R. (PART 303) 49 see page 544 paras. E – H.***

Flowing from these considerations, the pertinent poser is to determine whether a prima facie case has been made out as held by the trial Court. It is thus needful to look at the evidence elicited by the prosecutors witness in proof of the charge.

P.W.1 had this much to say.

“...I met the 1st and 2nd Accused Person in their house that is, the husband’s house. I called the husband and he came with a policeman and he found his wife, 2nd Accused with the 1st Accused in his room.

He knocked and knocked on the door but they refused to open the door. When they finally opened the door, we saw the 1st Accused trying to escape through the toilet and was caught wearing short knickers” The two Accused Persons were playing love in the room...”

Under cross examination P.W.1 said “yes, I trailed the accused at night club in Wuse II and there I caught her I got entry into the club by paying for the gate fee and entered”

When the 2nd Accused was in the club I called the husband (nominal complainant) and ...he said I should follow her and see if she can take the boyfriend to the house... They were there knocking the door for about 30 minutes before they finally opened the door...when we got in the Accused was holding wrapper on her chest”

P.W.2, the nominal complainant said inter alia in his evidence in chief thus;

I received a report that after outing with the particular man, they both retired to our matrimonial home to spend the night. I tried to call her on her three lines but they were all switched off.

During this time I could hear voices inside the room but in a very low tone. Luckily I was able to gain entry from the back of the house. As soon as I entered, the 1st Accused ran out of the master

matrimonial bedroom wearing boxer short and ran into the guest toilet and locked himself up there.

"I then asked my wife who is that who just ran out? She said there was no one in the house. She quickly dressed up. I now got the police to come and break the guest toilet door that was when the 1st Accused was pulled out of the toilet.

In the room, I noticed alcoholic breath and they were drunk. Empty bottles of alcohol in the living room with littered garments in the room. The bedroom was roughened and stained indicating sexual intercourse has taken place. I also found condom inside but was torn, the packet showing some had been used"

In answer to a question, under cross examination, P.W.2 said *"yes, when I entered the house, the 1st and 2nd Accused came out of the bedroom I told the Court that I saw used condoms in the bedroom"*

P.W.4, SGT Ator Ochijunu, the IPO said that the complainant made a report on the 9th November, 2008 against the 1st and 2nd Accused. He said he went to the scene of the incident where he recovered some exhibits such as

- (a) *One HP Laptop with some pictures*
- (b) *Some pieces of condom*
- (c) *One packet of Rothman's cigarette*

(d) *Half bottle of wine*

(e) *A pair of boxers belonging to the 1st Accused Person.*

Under cross examination P.W.4 said. Yes, the 2nd Accused was brought around 1.20 a.m. and I visited the scene around 4 a.m. I visited the scene around 4.a.m. Yes, we went to the scene with all the two Accused Persons.

All the foregoing evidence was not impugned under cross examination. They are pieces of evidence legally admissible more importantly they were not discredited evidence under cross examination neither was it demonstrated to be manifestly unreliable that no reasonable persons can safely convict on it. See the decision of Per Onnoghen JSC in the case of **TONGO v. COMMISSIONER OF POLICE supra**. The evidence presented by the prosecution as this Court sees it and this Court will therefore hold are weighty requiring the defence to at least render some explanation from the accused. I am of the view that the foregoing evidence is not one which should be brushed beneath the carpet, it portends of a prima facie case calling for the defence to react by way of explanation.

This Court will draw strength from the decision in **OLAWALE AJIBOYE & ANOR. v. THE STATE (1995) 8 N.W.L.R. (PART 414) page 408**, Iguh JSC held thus: "What has to be considered in a no

case submission is not whether the evidence against the accused is sufficient to justify conviction but whether the prosecution has made a prima facie case requiring at least some explanation from the accused.

In the light of the foregoing considerations, this Court's answer to the Appellant's Counsel's issue two is in the affirmative. As already noted the objective of the no case submission is not to convict the Appellant but to determine whether a reasonable case has been put up by the prosecution calling for an explanation by the accused.

The Ruling of Her Worship, Adamu Mohammed Wakili on the 9th November, 2008 on the no case submission is hereby upheld by this Panel. This Appeal fails and is accordingly dismissed.

**Justice O.O. Goodluck,
(Presiding Judge)
28th November, 2014**

**Justice Y. Halilu
(Hon. Judge)
28th November, 2014**

Appearance

S. O. Ojo Esq.: For the Accused/Appellant.

Respondent's Counsel unrepresented.