IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY, IN THE ABUJA JUDICIAL DIVISION (APPELLATE DIVISION), HOLDEN AT COURT NO. 12 MAITAMA, ABUJA.

BEFORE THEIR LORDSHIPS: HON. JUSTICE M.E ANENIH (PRESIDING JUDGE)

HON. JUSTICE O .A. MUSA

APPEAL No. CRA/22/2015

BETWEEN:

1. *ABAK NDIFREKE*
2. *EVELYN NWANZE*
3. *AWALA VANESSA*

…… APPELLANTS

AND

COMMISSIONER OF POLICE …… RESPONDENT

JUDGMENT

This is an Appeal against part of the ruling on no case submission by Chief Magistrate Court of the Federal Capital Territory sitting at Karu Abuja; Presided over by His Worship Bashir A. Alkali, the ruling which overruled part of the no case submission made to the Court by the Appellants was delivered on the 14th April, 2015.

The Appellant has Appealed to this Honourable Court on three grounds as contained on the notice of Appeal and seek for the following reliefs:-

(1) An order setting aside the part of the ruling where the trial Magistrate held that a prima facie case of criminal conspiracy and theft by servant has been established against the Appellants.

(2) An order striking out the two count charges of criminal conspiracy and stealing by servant contrary to section 97 and 289 of the penal code laws drafted against the Appellants.

(3) An order discharging the Appellants on the two (2) counts charges of criminal conspiracy and stealing by servant, contrary to sections 97 and 289 of the penal code laws.

(4) Such further order or others as this Honourable Court may deem fit to make in the circumstances of this case.

The Appellants (as accused persons) were arraigned before His worship, Bashir A. Alkali of the Chief Magistrate Court of The Federal Capital Territory , sitting at Karu Abuja on 2nd September , 2013 on 3 count charges of :-

(1) Criminal conspiracy, contrary to section 97 of the penal code.
(2) House breaking, contrary to section 346 of the panel code.
(3) Theft by servant, contrary to section 289 of the penal code.

The above charges are contained in the first information report, file dated 02/09/2013 and signed by SGT. Egoh Oghenekaro.

To established the above allegation against the Appellants, the prosecution called 4 (Four) witnesses and tendered Exhibits and closed his case.

At the close of the prosecution case on 28/10/2014, the Appellants through their counsel filed a no – case submission on the ground that the totality of the evidence of PW1, PW2, PW3 and PW4 have not established the essential elements of the offences charged and thus no prime facie case has been disclosed against the 3 accused persons with regard to the FIR before the Court dated 02/09/2013.

The respondent (prosecution) filed its response to the no case submission and the Trial Magistrate in its ruling upheld part of the argument of the Appellants and discharged the Appellants of the charge of house breaking, but proceeded to draft a charge of criminal conspiracy and theft by servant against the Appellants.

Dissatisfied with the part of the ruling wherein the above mentioned charges were drafted, the Appellant has now appealed to this Honourable Court.

The appellants filed their brief of argument dated 27th of July, 2015 and filed same day.

The Appellants in their brief of agreement dated 27th of July, 2015 formulated three issue of determination which was distilled from the ground in the Appellant notice of Appeal. The following are the issues:

(1) Whether a prima facie case of theft, and by extension, theft by servant, has been established against the Appellants?
(2) Whether a prima facie case of criminal conspiracy has been established against the Appellants?

(3) Whether the part of the ruling where charges were drafted against the Appellants was not a miscarriage of justice with regards to the entire facts and circumstances of this case?

Issue 1: Whether a Prima Facie Case of Theft, And by Extension, Theft by Servant, has been established Against the Appellants?

Counsel submitted that the answer to the above issue is in the negative, with regards to the evidence before the Court.

He urges the court to be guided by:

1. The documented report contained at page 8 of the supplementary records of Appeal, particularly paragraphs vi, vii, and viii and therein.
2. The essential elements of the offence of theft, and by extension, theft by servant. Vis-à-vis he charge drafted by the trial Court at pages 89 – 90 of the records of Appeal , and the oral evidence led in this case at the trial Court.

counsel submitted that the contents of the supplementary records, being the CTC of the interim police investigation report, supersedes the oral testimonies of PW1, PW2 and PW3 , which testimonies were given upon an afterthought during trial , and which contradicts the contents of the said police investigation report. It is trite law that under section 128 (1) of the evidence act, 2011 documentary evidence, which includes official reports or proceedings (such as that contained at page 3 – 8 of the supplementary records of Appeal), supersedes and excludes oral evidence. No oral evidence can be relied upon to contradict, vary or alter documentary evidence.

Counsel cited the cases of Owoeye vs Oyinlola (2012) 15 NWLR (part 1322) 84 at 122, paragraph C. also, Ezemba vs Ibeneme (2004) 14 NWLR (part 894) 617

C.D.C. vs SCOA (Nig) Ltd (20070 6 NWLR (part 1030) 300 at 366, paragraph g – h,

He contended that the said interim police investigation report was in the file of the prosecution, who deliberately refused to tender same before the Trial Court. He specifically refer the court to page 73 of the records of Appeal.

From the above, the PW3 who was also the investigating police officer (IPO) confirmed that the said police investigation report was inside the case file, but proceeded to lead oral evidence contrary to the contents of the said documented police investigation report wherein the accused persons (Appellants herein) had been

unambiguously exonerated of the offence of "theft", and by extension, "theft servant" during investigation.

It was only on 19th may, 2015 that the Appellants herein were able to obtain a certified true copy, (CTC) of the interim police investigation report, as can be seen on the foot of the document. The Appellants consequently obtained the leave of this Court on 22/06/2015 to rely on same in this argument, and same was compiled as supplementary records of Appeal before this Court.

Consequently, counsel submitted that the said interim police investigation report, being a document made by the prosecution team, must be strictly construed against the prosecution. The prosecution ought not to be allowed to continue the prosecution of the Appellants on the criminal charge of "theft", and by extension, "theft by servant" when they have by their own hand and documented investigation reported that "there was no evidence of "theft" against the Appellants". The continuation of the trial of the Appellants (as accused persons) on the allegation of "theft", and by extension, "theft by servant", on the oral evidence of the prosecution witnesses led at trial, and contrary to the documented evidence in the investigation report, would amount to calling on the Appellants (as accused persons) to prove their innocence against the trite tenets of the criminal justice system in Nigeria.

He therefore urge the court to rely on the said CTC of the interim police investigation report contained at pages 3 – 8 of the supplementary records of Appeal to hold that no prima facie case of "theft", and by extension, "theft by servant", have been established against the Appellants, as to warrant the chargers at page 1 and 89 – 90 of the records of Appeal.

Furthermore, on the essential elements of the offence of theft, and by extension, theft by servant, he refers the court to section 289 of the penal code and submitted that it is settled that the offence of "theft" must be established, in order to be able to establish the offence of "theft by servant" only crystallizes when such theft was committed in respect of any property.

From the above provisions of sections 289(1) and 289 of the penal code, counsel stated this Honourable Court would therefore first enquire whether a prima facie case of theft has been established against the 3 accused persons. For the offence of theft to be established, the following essential elements must be established:

(a) That an item capable of being stolen exists.

(b) That the items were in the possession or custody of a specific person before the alleged theft.

(c) That the allegedly stolen item was trace or found or recovered from a particular person, as evidence that such a person stole same.

He submitted that the oral evidence of PW1, PW2 and PW3 did not in any way established that the 4 items allegedly stolen were in existence in the first place , let alone being in the possession of any specific person, nor were they traced to or recovered from any of the 3 accused persons, (Appellants herein).

He submitted further that the evidence of PW1 is founded on hearsay. (See pages 48 – 50, and 52 – 54 of the records of Appeal). PW1 informed the trial Court that Dr. Imoh Enang informed her in Akure that he bought certain items for her, specifically an Ipad, 2 Mini Ipad, and cash of N800, 000.00. There was no person called as a witness to corroborate that the said late Dr. Imoh Enang actually told PW1 anything in Akure. This foundation of hearsay is faulty from the outset.

He also refer the court to the following portions of the evidence – in – Chief of PW1 at the 2nd paragraph at page 49 of the records of Appeal.

The above testimony of the PW1 (the nominal complainant) is based on hearsay, as the PW1 testified that she was "told" by one Mrs. Easther Ajusi, the accountant. The said Mrs. Easther Ajusi was never called to testify as to whether she actually said or witnessed what PW1 has alleged. He submitted that the evidence of PW 1 is not admissible under sections 37 and 38 of the evidence act, 2011.

Consequently, counsel submitted that it is trite law that you cannot build something on nothing and expect it to stand, for it will certainly fall. The basis of the complaint of the nominal complainant, PW1, which led to this case, is built on hearsay, which is not admissible evidence in law. He submitted that the evidence and testimony of PW1 is not admissible in law, and urge the court to so hold.

In another submission, counsel stated that the evidence of PW1 did not disclose any prima facie case of "theft" against the 3 accused persons, (Appellants herein). By extension, the case of "theft by servant" cannot be said to have been established by the testimony of PW1, the nominal complainant.

The learned Appellants counsel refer the court to the evidence – in – Chief and cross – examination answers of PW2 at pages 57 – 60 and 63 – 65 of the records of Appeal

and submitted that the evidence of PW2 did not disclose a prima facie case of stealing (theft) against the 3 accused persons, and he urged the court to so hold.

Furthermore, counsel referred the court to the evidence of PW3, who also is the investigating police officer (IPO) that signed the first information report, (FIR). (See pages 67 – 70, and 73 – 74 of the records of Appeal). He stated that the evidence of PW3 is a repetition of the evidence of PW1 who petitioned the accused persons (Appellants) to the police.

Counsel further stated that none of PW1, PW2 and PW3 tendered in evidence any document in proof of the existence of the said one Ipad, two mini Ipads, the sum of N800, 000.00 or the 4 units of Halography medical equipment allegedly stolen, as contained in the FIR and the charge drafted by the trial Court.

He submitted that there is no substance in the evidence of PW3 (the IPO) in respect of the alleged offence of "theft", and by implication, "theft by servant".

Furthermore, he contended that the evidence of PW1, PW2 and PW3 also did not establish in whose possession or custody the items were, if at all they existed. The allegedly stolen items were not found in the private possession or custody of any of the accused persons (Appellants herein).

To that extend, he submitted that the essential elements of the offence of "theft", and by extension, "theft by servant", have not been established against the 3 accused persons (Appellants herein) as charge by the trial Court at pages 88 – 90 of the records of Appeal. Thus, no prima facie case of "theft", and by extension, "theft by servant" has been disclosed against the Appellants as to necessitate their defence. He urged the court to so hold and discharge and acquit the Appellants on the said allegations of "theft by servant" as contained in the charge at pages 89 – 90 of the records of Appeal.

Issue 2: whether a prima facie case of criminal conspiracy was established against the Appellants?

Counsel submitted that the answer to this issue is in the negative.

He referred the court to the argument under issue 1 above, and the analysis of the evidence in this case, and stated that it is obvious that the offence of theft by servant has not been established against the Appellants, who have been discharge of the

allegation of house breaking at page 88 of the records of Appeal. Thus, the Appellants cannot be said to have been involved in criminal conspiracy.

He referred that court to section 96(1) of the penal code and the cases of:

Garba vs COP (2007) 16 NWLR (pt. 1060) 378 at 403 – 404.

Oduneye vs State (2001) FWLR (pt. 38) 1203 at 1213.

Aituma vs state (2006) 10 NWLR (pt. 989) page 452, at page 468 paragraph c – d, page 473 – 474, paragraph h – a.

Section 96 of the penal code presupposes an agreement between two or more persons to do or cause an illegal act to be done. (Such act is "theft" in the instant case.)

Counsel submitted that the evidence of the prosecution witnesses in this case is largely founded on hearsay and assumption, which must not be allowed in law. He cited the case of Suleiman vs State (2009) 15 NWLR (pt. 1164) 258 at 280.

Balogun vs A.G Ogun State (2002) 6 NWLR (pt. 763) SC 512 at 540

Counsel referred the court to evidence of PW2 at paragraph 1 of page 58 of the records of Appeal.

He also referred the court to the testimony of PW2 at paragraph 2 of page 57 of the records of Appeal and Exhibit D1 at pages 10 – 12 of the records of Appeal.

He submitted that the offence of "conspiracy" is hinged on the establishment of the offences of "theft by servant" in the circumstances of this case. That is to say that in the instant case, the charge of "conspiracy" cannot stand where it is not established that the offence of "theft by servant" was committed.

He cited the case of Aituma vs State (2006) 10 NWLR (pt. 989) page 452, at pages 471 – 472, paragraph H – A.

Appellants' counsel stated that it is obvious that the offence of "theft by servant" was not established against the Appellants, and therefore, the Appellants cannot be said to have conspired criminally, where indeed no substantive offence was committed.

In the circumstance, he urge the court to discharge and acquit the Appellants on the charge of "criminal conspiracy" as contained at pages 89 – 90 of the records of Appeal.

Issue 3: whether the part of the ruling where charges were drafted against the Appellants was not a miscarriage of justice with regards to the entire facts and circumstances of this case?

In arguing the issue, counsel submitted that the part of the ruling of the trial Court herein appealed against, wherein charges were drafted against the Appellants was indeed a miscarriage of justice, with regards to the entire facts and circumstances of this case.

In his submission, he referred the court to the charges before the trial Court, the peculiar facts of this case, the legal argument upon which the Appellants were discharged of the offence of house breaking in a part of the ruling, while the charges of theft by servant and criminal conspiracy were drafted against the Appellants in a part of the ruling.

He stated that the charges in the first information report, (FIR) before the trial Court were criminal conspiracy, house breaking and theft by servant. He referred the court to first information report, FIR at page 1 of the record of Appeal.

The evidence of PW1 , PW2, and PW3 and the documentary report contained at page 7 of the supplementary records of Appeal, particularly at paragraph 4 ii therein abundantly revealed that the accused persons (Appellants) were all bonafide staff of Biolaz Premark Limited (the specific office relevant to this case). See also exhibit D1, the document at page 10 – 12 of the records of Appeal.

He contended that the Appellants could not be said to have broken into their own office, of which they had a bonafide right of entrance. Section 346 of the penal code upon which the charge of house breaking was based required "trespass" as an essential element of the said offence. Moreover, the nominal complainant, PW1 who had been in Ghana at all material time relevant to the events in the case did not know how things were being done in the said office. He referred the court to the entire page 53 of the records of Appeal.

He submitted that the Trial Court rightly discharged the Appellants of the charge of house breaking in a part of the ruling at page 88 of the records of Appeal.

However, it was the learned counsel contention that the trial Court miscarried justice in drafting a charge of conspiracy and theft by servant against the Appellants in not having regards to the peculiar facts and circumstance that related to the said charges.

He added that due to the length of time between the adoption of addresses on the no case submission, and the date of the ruling, being a period of 133 days (one hundred and thirty three days) the trial Court lost grasp of the essential facts and testimony upon which he should have also discharged the Appellants of the said allegations of theft by servant and criminal conspiracy.

As such, he submitted that the trial Court violated the provisions of section 294 (1) and (5) of the 1999 constitution of the federal republic of Nigeria (as amended).

He stated that the Appellants indeed suffered a miscarriage of justice in the part of the ruling where the trial Court drafted a charge of criminal conspiracy and theft by servant against the Appellants.

He refers the court to the cases of Onagoruwa vs State (1993) 7 NWLR (pt. 303) 49 at 82, Shatta vs FRN (2009) 10 NWLR (pt. 1149) 403 at 413,

Consequently, counsel submitted that In the circumstance of this case, the respondent's evidence (prosecution's evidence) on the allegation of theft by servant and criminal conspiracy is so manifestly unreliable that no reasonable tribunal could safely proceed to call on the Appellants to defend same, let alone convict on same. He relied on the case of Suberu vs State (2010) 8 NWLR (pt. 1197) 586.

He therefore submitted that the part of the ruling where the trial Court drafted the charges of theft by servant and criminal conspiracy against the Appellants, contained at pages 89 – 90 of the records Appeal, was a miscarriage of justice. He Urged the court to so hold and set aside the said part of the ruling of the trial Court.

In conclusion, counsel submitted that no prima facie case of the offence of theft, and by extension, theft by servant, and the offence of criminal conspiracy were established against the Appellants that warranted the charges drafted at page 89 – 90 of the records of appeal, for which the Appellants should be called upon to defend.

In the end, counsel urged the court in the interest of justice to allow this appeal and grand the following relief in favour of the appellants:

1. An order setting aside the part of the ruling where the trial magistrate held that a prima facie case of criminal conspiracy and theft by servant has been established against the Appellants.

2. An order striking out the two (2) count charges of criminal conspiracy and theft by servant, contrary to sections 97 and 289 of the penal code laws, drafted against the Appellants.
3. An order discharging and acquitting the Appellants on the two (2) count charges of criminal conspiracy and theft by servant, contrary to sections 97 and 289 of the penal code laws.
4. Such further order or other orders as this Honourable court may deem fit to make in the circumstances of this case.

It should be stated here that the respondent (prosecution) did not file its brief of argument.

We have carefully gone through the Appellants' brief of argument, the three issues formulated and the submission therein, and in our humble opinion, the crucial issue raised by this appeal is whether from the evidences before the trial court the prosecution was able to make out a prime facie case of criminal conspiracy and theft by servants against the Appellants requiring them to be called upon to enter their defence.

It is on the basis of this issue that we would resolve this appeal

Let us begin by the decision of the apex court of our land i.e. supreme court in the case of suleimen vs state (2011) 6 NCC pages 220 at 222 Ratio 1 & 2 where it was held thus:-

> "At the close of the case for the prosecution, an accused persons may make a no case submission which in effect is telling the court one or two things or both; (a) That there has been throughout the trial no legally admissible evidence linking the accused with the commission of the offence. (b) That the evidence as adduced by the prosecution has been so discredited under cross examination that no reasonable tribunal can safely convict on it."

The court went further to hold that:-

> "Where a no case submission is made on behalf of an accused person, the trial court at that stage is not expected to express an opinion on the evidence adduced , it is only called upon to prime facie find whether on the evidence

adduced there is admissible evidence linking the accused person with the offence with which he is charge."

At this juncture, the question that agitate itself is, from the totality of the evidence before the trial court, was there no legally admissible evidence linking the accused persons with the offence of criminal conspiracy and theft by servant to warrant them being called upon to enter defence or at least explain?

We must say before we proceed that learned counsel to the Appellants made detailed submissions to show that the case of the prosecution was rendered manifestly unreliable under cross examination and same was initiated by hearsay evidence. The submissions were, no doubt, quite powerful.

Nevertheless, it is trite law that at the stage of no case submission, the prosecution is only expected to make out a prima facie case against the accused and not prove beyond reasonable doubt. In support of this we call in aid another supreme court decision In Ekwunugo vs F.R.N (2008) 15 NWLR (pt. 1111) 630 at 641 – 642 paragraph g – b where it was held thus:-

"It has to be noted that at the stage of where a no – case submission is made by learned counsel for the Appellant, the issue is not whether the prosecution has / had proved the charge against the Appellant beyond reasonable doubt but whether a prima facie case has been made out by the prosecution against the Appellant so as to make it necessary for the court to call on the Appellant to open his defence to the charge. It is settled law that a prima facie case is made out where the evidence adduced by the prosecution is such that if uncontradicted would be sufficient to prove the case against the accused person. At the no case submission stage, it is not for the trial court to go into a consideration of the issue of credibility of the witnesses."

In the instant appeal, we have observed having analyzed the record of appeal that there is sufficient evidence to justify a finding of there being a prime facie case of criminal conspiracy and theft by servant against the appellant. The totality of the evidence adduced by the prosecution through PW1, PW2, PW3 and PW4 and the exhibits tendered shows that the Appellants were staff of Biolaz Premark Ltd which the late husband of PW1 was the C.E.O and that the missing items were in the personal office of the C.E.O late husband to PW1 and that the said personal office of the C.E.O was entered. Off course, there was no doubt some discrepancies as to the

items alleged to have been stolen from the office of the C.E.O and those recovered, which detailed, we shall not highlight now.

It should be noted that trial in this case has not concluded and a detailed discussion on the evidence and all the issue raised by learned counsel to the Appellant might be prejudicial to the fair trial of the Appellants at the trial court and we shall, therefore, refrain from doing so. Suffice it to hold, in the circumstances, that there was prima facie case of criminal conspiracy and theft by servant against the appellants.

In that regard, and without much ado, we resolve the issue for determination against the appellants in favour of the respondent. The result is that this appeal lacks merit and is accordingly dismissed in its entirety. Consequently, we therefore uphold part of the ruling of magistrate appeal against.