IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GUDU - ABUJA
DELIVERED ON THURSDAY THE 24TH DAYOF JUNE, 2021.
BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE R. OSHO-ADEBIYI

SUIT NO. CR/25/2018

BETWEEN

INSPECTOR GENERAL OF POLICE ---------------- COMPLAINANT

AND

SULEIMAN SIKIRI BABATUNDE----------------------DEFENDANT

RULING

Defendant was charged before this count on a 2count charge of armed robbery to wit: -

"Count One:

> That you SULEIMAN SIKIRU BABATUNDE 'm', EZE 'm' now at large, and LUCKY 'm' now at large, on or about 2nd January and 25th May, 2018 at Plot 31 Extension 26B, CBN Estate Quarters, APO, Abuja within the jurisdiction of this Honourable Court did criminally Conspire among yourselves to commit an offence to wit: armed robbery with the use of dangerous arms, wherein you robbed Hajiya Salamatu Mamman Yusuf 'f aged of her valuable property

and thereby committed an offence contrary to Section 97 of the Penal Code Act."

"Count Two:

That you SULEIMAN SIKIRU BABATUNDE ‘m’, EZE 'm' now at large, and LUCKY 'm' now at large, on or about 2nd January and 25th May, 2018 at Plot 31 Extension 26B, CBN Estate Quarters, APO, Abuja within the jurisdiction of this Honourable Court, armed with two Pump action rifle invaded the aforementioned house occupied by Hajiya Salamatu Mamman Yusuf 'f aged and put her in complete state of fear of imminent danger with the aim of causing her death or grievous bodily harm, wherein you stole one Infinix Handset, one medium Sized Samsung plasma television, gold jewelleries about one hundred and fifty thousand naira (N150,000.00) a sum of five hundred thousand naira (500,000.00), Four Thousand US Dollars without her consent during which you fired shots with the two pump action guns (cartridges recovered) and thereby committed an offence contrary to Section 298 (c) of the Penal Code Act."

Defendant pleaded not guilty to the charge on the 15/01/2019. Trial commenced on the 20th of May, 2019 with prosecutor calling 2 witnesses – PW1 and PW2. At the close of prosecution’s case, Defendantfiled a no case submission on the premise that prosecution has not been able to establish a prima facie case against the defendant.

The facts of the prosecution's case are as follows:

PW 1 testified that his name is Abdulrahman Suraji, a printer by profession. That defendant was his customer and PW 1 Used to do some printing work for defendant. That one morning defendant came to him and complained of being sick, that defendant had with him a phone with brand name "infinix Hotnote 2" for sale in order to use the proceeds from the sale of the phone to take care of his health.

That defendant wanted a sum of N15,000 (fifteen thousand naira only) for the phone but PW 1 had declined the offer and told defendant that one Ayo Richard who was also a customer of PW 1 would likely buy the phone.That Ayo Richard had bought the phone from PW 1 for a sum of N12,000 (Twelve Thousand Naira only) and PW 1 had in turn given defendant N10,000 (Ten thousand naira only) while PW1 kept N2,000 (two Thousand Naira only) for himself (with consent of defendant).That shortly after, PW 1 was arrested for selling a stolen phone to Ayo Richard andPW 1 had in turn informed the police that defendant sold the phone to him.That during investigation he got to know that the phone was stolen during a robbery incident.Under cross-examination PW 1 admitted that he had never known defendant to be an armed robber. There was no re-examination. PW 2 who is the investigating police officer attached to Federal Special Anti-Robbery Squad thereafter gave evidence in court that one Hajiya Salamat Mamman-Yusuf (female) of CBN Estate Apo Abuja was attacked by some armed robbers in her home between 1am – 2:30am and in the process the following items were stolen from her: gold jewelleries, laptops, Samsung plasma television.

That on the 2nd of January, 2018 the police investigating team commenced investigation activities into the said robbery. That while investigation was still ongoing the same Hajiya made a 2nd report that on 25th May, 2018 she was robbed a second time by the same robbers heavily armed between the hours of 1am – 3am and the following items were carted away: gold jewelleries, N500,000 (Five Hundred Thousand Naira only), $4,000 (Four Thousand Dollars only), one gold and white coloured infinix hot note gsm handset, laptops amongst other valuables. That the armed robbers during the attack had fired shots indiscriminately inside her compound. That PW 2 and his team had visited the scene of the crime and recovered a black torchlight and 4 (four) extended cartridges all admitted as exhibits. That the gold and white infinix hot note gsm handset was tracked and recovered from PW 1 who confessed that defendant gave him the phone for sale. That he had sold it to one Richard Ayo who in turn fingered PW 1 to the police. That defendant was arrested, cautionedand volunteered his statement in his own handwriting and signed same and appended the date of writing and signed his confessional statement on 22/07/2018.That defendant later wrote an additional statement on 23/7/2018 which PW 2 countersigned both statements.That all efforts made to apprehend the other members of the armed robbery team proved abortive. Both the torchlight and spent cartridges were admitted as exhibits while the phone was marked rejected in a well-considered ruling by this court. Both confessional statements allegedly made by the defendant and tendered by the prosecution was also marked "rejected" at the conclusion of a trial within trial to test the

voluntariness of the confessional statement made by the defendant.PW 2 concluded his examination in chief with the following statement "at the end of our investigation we discovered there is a prima facie case established against the defendant as a result we sent the case file to legal office for prosecution".

Under cross-examination when asked if there was apolice report to support the assertion that defendant had a prime facie case against him, PW 2 replied that his assertion was based on the investigation he conducted.When further asked if PW 2 in his investigation had interviewed the neighbours of the victim of the crime and if they had offered their statement to the police, PW 2 replied that he had indeed interviewed the neighbours but they only offered oral statements.

Prosecutor thereafter closed its case and Defence counselfiled a no-case submission.

The Defence Counsel in his written address raised two issues for determination to wit;

1. Whetherthe Prosecution has established a prima-facie case against the Defendant.
2. Whether there is defect in the charge sheet that affects fair trial and could lead to miscarriage ofjustice.

On the first issue, learned counsel submitted that for a No CasetoAnswer to be successfully relied on by the Defence, the provisions of Section 303 of the Administration of Criminal Justice Act, 2015 (ACJA) has to be relied on by the Court in coming to a decision. Counsel submitted that the logic behind this principle is the Constitutional provision for presumption of

innocence, by virtue of Section 36 (5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). Counsel submitted that the Court of Appeal in the recent case of **Agaba v FRN (2018) LPELR-44575(CA),** succinctly explained instances where a No Case Submission should be upheld to wit; "It must be made clear that a no case submission should succeed where there is no evidence in support of one ingredient or element of the offence to be proved and not necessarily when all the ingredients are not made out." Learned counsel further submitted that the Defendant on the first count was accused of conspiracy. However, there was no co-defendant arraigned before Your Lordship toprove the offence of conspiracy, there was no witness to establish the offence of conspiracy, and there was no evidence tendered by the prosecution to ground the offence of conspiracy. Counsel submitted that the Prosecution has failed to prove the essential ingredients of the offence of Conspiracy to wit: (a) an agreement between two or more persons to do an illegal act or an act which is not illegal by illegal means; (b) that the illegal act was done in furtherance of the agreement; and (c) that each of the accused persons participated in the illegality or the conspiracy. Counsel also submitted that it is the law that he who alleges ownership must prove, unfortunately, the Prosecution did not invite the nominal complainant to prove her ownership of the said phone, but he instead relied on hearsay of PW I and PW2. Defence counsel submitted that there is not enough evidence to prove and secure conviction for Armed Robbery, moreso, the said phone was tendered and rejected by this Honourable Court. Counsel urge this Honourable Court to hold that the

Prosecutionhas not been able to establish a prima facie case against the Defendant, and that issue one be resolved in favour of the Defendant to discharge and acquit him of the two offences he is charged with. On the second issue raised, learned counsel submitted that the two counts are defective, Count one does not state an existing law where the Defendant is charged with. Section 97 of the Penal Code Act has upto four subheads, which are Section 97 (l), 97 (2), 97 (A), and 97 (B) and that the Prosecution has not identified the specific law the Defendant is guilty of. The count head is ambiguous with no law being stated by the Prosecution.Counsel therefore urged this Honourable Court to resolve this ambiguity in favour of the Defendant by discharging and acquitting the defendant of count one for being an ambiguous charge. Learned counsel further submitted that Count two has offended the Rule against Duplicity. The rule states that no single count shall contain more than one offence, but up to five (5) offences are juxtaposed into one count in the same charge sheet. Counsel urged the court to use it;s favourable discretion to award substantial cost against the Complainant as that will go along way in ameliorating the loses of the defendant due to the long-time of unjust incarceration. Learned counsel relied in the following authorities amongst other;

1. AJULUCHUKWU VS. THE STATE (2014) 13 N WLR (Pt.1425) 641 at 651
2. OGUNBODEDE V, FRN (2018) LPELR-44883(CA)
3. ORISA V STATE (2018) LPEI„R43896(SC)
4. SIMEON V STATE (2018) LPELR-44388(SC)
5. MOHAMMED V STATE (2013) LPELR-20178(SC)
6. SHAIBU V STATE (2014) LPELR24465(CA)

7. MUSTAPHA V FRN (2017) LPELR-43131(CA)
8. SECTION 323 (1) OF THE ADMINISTRATION OF CRIMINAL JUSTICE ACT, 2015.

The issue for determination is:

> "Whether prosecution has established a prime facie case againstthe defendant"

S.303(3) of Administration of Criminal Justice Act, 2015 provides:

"in considering the application of the defendant under S.303, the court shall in exercise of its discretion, have regard to whether: -

a) Whether an essential element of the offence has been proved.

b) Whether there is evidence linkingdefendant with the commission of the offence with which he is charged.

c) Whether, on the face of the record, the evidence of the prosecution has been so discredited and rendered unreliable by cross-examination that it would be unsafe to convict on such evidence.

d) Whether the evidence so far led is such that no reasonable court or tribunal would convict on it, and

e) Any other ground on 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.

It is however worthy to note that at this stage the test is not whether evidence led so far is sufficient to convict or acquit the

defendant but on whether evidence led so far is such that a reasonable tribunal might convict the defendant.

In EDAKARABOR VS C.O.P (2008) All FWLR (Pt.428)333 the court held that:

> *"The test for determining whether a prima facie case has been established is whether at the end of the prosecution's case and after the prosecution's witnesses have been cross-examined by the accused, the accused person is seen to be blameless of the charge he is confronted with. The entirety of the evidence adduced by the prosecution is not necessary to establish a prima facie case against the accused person sufficient for him to be called upon to defend himself".*

Hence it is correct to state that at this point the court is to ascertain if from the totality of evidence adduced by the prosecution, the defendant has in any way, no matter how slight been linked to the offence.Defendant in the charge before me is being charged for criminal conspiracy to commit an offence punishable with death contrary to S.97 of the penal code.First and foremost it is worthy to note that learnedcounselto the defendant in his written address on no case submission relied heavily on the testimony of the defendant in the trial within trial and in fact reproduced defendants testimony word for word in proof of his no-case submission. This is a wrong approach by learned counsel because the defendant's confessional statement having been rejected as evidence, it is the duty of the court to

expunge any part of the proceedings in relation to the said statement.

It is not the duty of the court at this stage to evaluate the evidence of the defendant as reproduced by the learned defence counsel rather what the court is called upon to do at this stage is to ascertain if from the totality of prosecution's evidence, defendant has been linked to the offence, hence this court will discountenance all the testimony which Defendant stated in the trial within trial but which defence counsel relied upon in support of no-case submission.Also lead counsel to the defendantwent ahead in his written address to bring out contradictions between prosecution's evidence in the substantive trial and defendants' evidence in the trial within trial.This of course is a far cry from the doctrine of no-case submission.Defendant in the first count is being charged for conspiracy to commit armed robbery. The word conspiracy has been defined as an agreement of two or more persons to do an unlawful act by unlawful means.In **SALAWU VS STATE (2011) All FWLR (pt.594) pg.35 @ 56-57** it was held that *"a conspiracy consists not merely in intention of two or more but is the agreement of two or more to do an unlawful act, or to do an unlawful act by an unlawful means."*

In essence, the prosecution must proof that there were two or more people who agreed to carry out the unlawful act. The offence of conspiracy can rarely be proved by direct evidence, rather it can be deduced from the circumstances of the case.In **KAYODE BABARINSA & ORS VS THE STATE (2014) 3NWLR**

(pt.1395) 568 @ 594 perKekereEkon JSC held that because of the nature of the offence of conspiracy, it is rarely or seldom proved by direct evidence but by circumstantial evidence and inference from certain acts.

Prosecution in proof of the first count charge of conspiracy fielded two witnesses PW1 & PW2. PW1 gave evidence that defendant had simply given him a phone to sell which he had in turn sold to a certain Ayo Richard. That when the police traced the phone to him, he had in turn taken them to defendant as the person who gave him the phone for sale.Clearly, from the evidence of Pw1, there is no iota or link of defendant with the offence of conspiracy to commit any crime.PW2 on his part being the IPO gave evidence that the phone that was traced to defendant was the same phone stolen from the house of the victim of the armed robbery, a certain Hajiya Salamatu Mamman-Yusuf (female) who was robbed on two consecutive occasions by a gang of armed robbers.That in the process, her gold infinix hot note gsm phone amongst other valuables was stolen and same was traced to the defendant through the Pw1.That when Pw2 and his team visited the scene of the crime, one black torchlight and 4 (four) expended cartridges were recovered from the scene of the crime. Only the cartridges, the black torchlight were admitted in evidence while the gold phone was marked rejected in a detailed ruling by this court.Having rejected the gold hot note gsm phone handset in evidence, this court does not have the powers to rely on it again in the course of this trial or ruling/judgment and same principle applies to the confessional statement of the defendant which was

marked rejected in another detailed and well considered ruling climaxing the trial within trial.

Hence, this court is only left with 2 (two) exhibits from the prosecution, i.e. the black torchlight and the spent cartridges admitted through PW2.

In **AGBAJE VS ADISGUN & ORS (1993) INWLR pt. 269 p.271** it was held that a document tendered and marked rejected stays rejected for the purpose of the trial in which it was marked rejected and the defect cannot be cured during the said trial, consequently such a document is not one upon which the court can rely in its judgment.PW2 in his evidence simply testified that he recovered the black torchlight and the spent cartridges at the scene of the crime without as much as even attempting to link the defendant to the exhibit. It is trite that exhibits tendered without tying it to the evidence of a witness amounts to dumping same on the court.

Although prosecution has been able to prove through PW2 that the recovered spent cartridges and torchlight were used by the gang of armed robbers in committing the crime, prosecution has failed to link the defendant to the gang who used the torchlight and cartridges to commit the offence.

The mere fact that the said exhibits were recovered at the scene of crime does not link the defendant to the charge of conspiracy as it is the burden of the prosecution to prove that the defendant indeed conspired with the other gang members to perpetrate the act of conspiracy to commit the crime and prosecution has not been able to establish this just by tendering a torchlight and spent cartridges without cogent evidence linking defendant to the

gang. Consequently, I humbly hold that defendant has no case to answer in respect of the 1st count charge.

The second count charge is armed robbery contrary to S.298 (4) of the Penal Code Act. In the case of **KAREEM LATINWO VS STATE (2013) LPELR – 19979 (SC)** the supreme court listed the ingredients needed to prove the offence of armed robbery as:

1. That there was a robbery
2. That the robbery was armed robbery (that is fire arms and weapons were used)
3. That the accused was the robber or one of the robbers.

Pw1 in his evidence was strictly to the effect that he sold a gold handset (phone) on behalfof defendant which the police linked to him and PW1 in turn linked police to defendant. The said phone was rejected in evidence. Nowhere in the evidence of PW1 did he say he was aware that a robbery incident took place involving the defendant save for the information Police gave him.PW2 on the other hand gave evidence that from his investigation the defendant was part of the gang that invaded and robbed the residence of a certain Hajiya Salamatu Mamman-Yusuf.It is worthy to note that this court at this stage is not called upon to prove whether evidence produced by the prosecutor is enough and sufficient to justify a conviction, but whether evidence has linked the defendant to committing of the offence of armed robbery no matter however slight or remote.

As earlier stated, PW2 who is the IPO gave evidence that defendant was part of the armed robbery gang that robbed Hajiya

Yusuf.PW2 failed to give evidence that Hajiya Yusuf who was the victim was able to identify defendant as part of the robbery gang nor was Defendant paraded before Hajiya Yusuf in order for Hajiyato identify him nor did Hajiya give a description of the defendant no matter how remote as being part of the robbery gang. In fact, the said Hajiya was never called as a prosecution witness nor was her statement tendered in evidence.

Also there was no evidence of eye witness account linking defendant to the incident. When asked if Pw2 interviewed the neighbours at the scene of the crime, PW2 replied in the affirmative but did not state whether any of the neighbours were able to identify any member of the gang nor if the neighbours or other eye witness were able to link the defendant to the robbery gang.In fact, prosecution did not field any eye witness nor any of the neighbours as a witness and Pw2 stated that the police did not obtain the statement of any of the neighbours not minding the fact that they were interviewed and were allegedly eye witness to the robbery attack.Evidence before me is that the defendant was not arrested at the scene of the crime hence burden of proof is on the prosecution to either link him to the offence or at least link the defendant to the scene of the crime as at the time the crime was being perpetrated, but prosecution failed to do so.PW2 also failed to link the defendant with the torchlight and expended cartridges as nowhere in evidence of PW2 was a search warrant executed on the premises of defendant neither was defendant found to be in possession of a gun nor torchlight. In fact, PW2 failed to give evidence of the probable type of gun which would have discharged the expended bullets

tendered neither was there any such brand or type of gun or any gun at all linked to the defendant.PW2 also failed to link defendant to the torchlight. In all, Prosecution failed to link Defendant to the offence either by direct or circumstantial evidence.

It has been held that a submission of no case to answer postulates one or two or both of the following:

It postulate that throughout the trial, no legally admissible evidence at all was laid against the accused person linking him in any way with the committing of the offence with which he is being charged, necessitating his being called upon to answer and that whatever evidence there was which could have linked the accused with the commission of the offence has been discredited by cross-examination, that no reasonable tribunal or court can act on it in convicting the accused person. **See ISRAEL VS STATE (2019) LPELR 46884 (CA), TONGO VS C.O.P. (2007) LPELR – 3257 (SC) PerOguntade JSC.**

From all I have stated above, the question that comes to the fore is whether from the totality of evidence before this court a prima facie case has been made out against the defendant? Establishing a prima facie case by the prosecution is a far cry from proof of the offence. It is when a prima facie case has been established by the prosecution that proof will subsequently follow in order to determine the guilt or otherwise of the defendant.A prima facie case simply means that “there is grounds for proceeding in other words it means that the evidence so far deduced by the prosecution if uncontradicted is enough to ground a plea of guilty

on the defendant.See **IBEZIAKO VS C.O.P. (1963) 1 ALLNLR 61 @ 67-68 P. Adetokunbo Ademola (JSC)**.

In all, prosecution has not been able to establish a prima facie case against the defendant no matter how remote to warrant the defendant to be called upon to put in his defence. Evidence of the prosecution is so manifestly unreliable that no reasonable tribunal or court can convict the defendant on such evidence.In the light of the above, I humbly HOLD that the defendant has no case to answer in respect of the two-count charge proffered against him.

In **OWONIKOKO VS STATE (1989) LPELR – 1996 (CA) p.10, para C-FAkanbi JCA** stated

> *"clearly if on the evidence on record, it is apparent that through effective cross-examination the case of the prosecution has been manifestly discredited or shattered as to make it unreasonable for the adjudicating tribunal to call on the accused to enter his defence, a no-case submission will be upheld; and equally so, if on the totality of the evidence so far led, it is apparent that an essential ingredient of the offence charged has not been proved.In this circumstance, the accused would be entitled to an order of acquittal and discharge."*

Consequently, defendant in this case is hereby discharged and acquitted.

Parties: Defendant present. Prosecution absent.

Appearances: Jude Mmuoka appearing with A. P. Bello for the Defendant.

HON. JUSTICE M. R. OSHO-ADEBIYI

JUDGE

24TH JUNE, 2021