IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA

THIS TUESDAY, THE 14TH DAY OF JULY, 2020.

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

CHARGE NO: FCT/HC/CR/189/18

BETWEEN

COMMISSIONER OF POLICE ....COMPLAINANT

AND

1. **EMANI KURE**
2. **ASABE KURE**

} **...DEFENDANTS**

JUDGMENT

The Defendants were arraigned on a two (2) Counts Charge of Conspiracy and Culpable Homicide contrary to the provisions of **Sections 97** and **221 of the Penal Code.**

The Defendants pleaded not guilty to the charge on 27th June, 2018 and the matter was then adjourned for hearing. For inexplicable reasons, the prosecuting counsel then stopped coming to court and the matter suffered several avoidable adjournments largely at his instance.

Hearing however finally commenced on 20th November, 2019 when the prosecution called its first witness, ASP Alexander Aiyemela attached to the State C.I.D FCT Police Command Abuja who testified as PW1. In the course of his evidence, the statement of 1st defendant dated 21st March, 2018 said to have been

voluntarily obtained was tendered in evidence. The admissibility of the statement was challenged on grounds that it was not voluntarily obtained.

A trial within trial was then conducted and the parties addressed court on 19th November, 2019 and the matter was adjourned to 12th December, 2019 for Ruling and continuation of hearing.

On 12th December, 2019, when the court gave a **considered Ruling** rejecting the said confessional statement as inadmissible having not been obtained voluntarily, the learned prosecuting counsel was not in court despite being aware of the date and his witness PW1 was equally not in court. There was no correspondence as to why they were not in court. It must be noted that **PW1** was still giving evidence in chief at the time trial within a trial was conducted. Indeed, in addition to this document held by court to be inadmissible, he had tendered already in evidence Exhibit P1 (Another statement of 1st defendant); P2 (Statement of 2nd defendant) and P3(Handwritten letter of Gabic Divine Clinic and Maternity Ltd). It was thus expected that the prosecution would produce this witness to conclude his examination in chief and to allow the defendants cross-examine him.

In the circumstances, learned counsel for the defendants moved the court to close the case of the prosecution because of the antecedents of prosecuting counsel, but the court refused the application and in the interest of justice bent over backwards and adjourned the matter at the instance of the prosecution to 22nd January, 2020 for continuation of hearing.

On 22nd January, 2020, counsel for the prosecution was again not in court and his witness (PW1) was equally not in court to conclude his evidence. There was equally no explanation for their absence. The court was again moved by defendants to close the case of the prosecution and allow them to file a no case to answer address and in a considered Ruling, same date, the court granted the application of the defence counsel, closed the case of the prosecution and ordered for the filing of the address on no case to answer and adjourned the matter to 2nd March, 2020 for adoption.

The address was served on the prosecution as far back as **29th January, 2020** when they acknowledge Receipt but the prosecution did not respond or take any steps knowing fully well that their case was foreclosed. Rather on 2nd March, 2020,

learned counsel for the prosecution now appeared and informed court that they intend to bring an application to re-open the case of the prosecution and was therefore seeking for an adjournment. The defence counsel opposed the application for adjournment and prayed that the court continue with the business of the day which is for hearing and adoption of the address on the no case to answer submission. The court gave a considered Ruling refusing the application for adjournment and ordered that hearing will continue with liberty granted to the prosecuting counsel to respond orally if he had anything to urge with respect to the no case to answer submission.

As already stated, the address of defendants dated 28th January, 2020 was duly served on the prosecution on 29th January, 2020 but they chose not to respond.

I have above and at length deliberately given a trajectory of the facts of this case as it provides a clear basis to situate the facts in resolving the issues raised by the no case to answer submission.

Now in the address of defendants dated 28th January, 2020 and filed on 29th January, 2020 in the court's Registry, one issue was raised as arising for determination, to wit:

Whether at the close of the prosecution's case, a prima facie case has been established against the Defendant to warrant them to enter their defence.

The address of defendants dealt at length with the settled principles that guides the making of a no case to answer submission and it was submitted that the evidence led by the prosecution do not disclose any iota of prima facie case against the defendants to justify the continuation of this trial.

The oral submissions of counsel to the prosecution in reply is equally to the effect that on the principles governing the making of a no case to answer submission, they have on the evidence disclosed a prima facie case against the defendants requiring that they put in their defence.

I have carefully considered the evidence of the **sole prosecution witness** who testified on record, the two counts charge and Exhibits together with the submissions of learned counsel to the parties herein to which I may refer to in the course of this Judgment where necessary.

It appears to me that the sole issue to be resolved is **whether the prosecution has made out a prima facie case against the defendants sufficient for t he court to call on them to enter their defence.**

As rightly submitted, it is trite principle in criminal jurisprudence that the court is empowered after hearing the evidence for the prosecution and where it considers that such evidence is not sufficient to justify the continuation of trial, record a finding of **"Not Guilty"** in respect of the accused person(s) without calling on them to enter their defence and such accused person(s) shall there upon be discharged.

In other words, the court is under a duty to discharge an accused person if it finds that no prima facie case has been established or made out against him at the close of the prosecution's case. See **Ajidagba V. I.G.P (1958) 3 FSC 5 at 6.**

The intendment of the law maker, in enacting these statutory provisions, in my view, is so as to prevent protracted and futile trial of frivolous charges brought by complainants against accused persons and to further safeguard the accused person's fundamental right to personal liberty and the presumption of his innocence guaranteed by **Section 36 (5) of the Constitution**. As such, the court is so empowered, nay mandated, after taking a proper look at the evidence led by the prosecution witnesses, to determine whether such evidence is cogent enough to cast some reasonable doubts on the innocence of the accused person and thus to necessitate him to enter into his defence to disprove the reasonable doubts. See **Section 135 (3) of the Evidence Act (as amended).**

The age long general principles that guide the court in determining whether or not an accused person should be discharged and a verdict of "not guilty" be entered in his favour at the close of the prosecution's case, have been properly set out in the written address of learned counsel to the defendants. These parameters were also properly captured by the Supreme Court in **Daboh & Anor V State (1977) 5 SC. 197 at 209**, where it was held, per Udo Odoma, JSC (of blessed memory), as follows:

"Before, however, embarking upon such an exercise, it is perhaps expedient here to observe that it is a well known rule of criminal practice, that in a criminal trial at the close of the case for the prosecution, a submission of no

prima facie case to answer made on behalf of an accused person postulates one of two things or both of them at once. Firstly, such a submission postulates that there has been throughout the trial no legally admissible evidence at all against the accused person on behalf of whom the submission has been made linking him in any way with the commission of the offence with which he has been charged, which would necessitate his being called upon for his defence. Secondly, as has been so eloquently submitted by Chief Awolowo, that whatever evidence there was which might have linked the accused person with the offence has been so discredited that no reasonable court can be called upon to act on it as establishing criminal guilt in the accused person concerned…"

In **Tongo V C.O.P (2007) 12 NWLR (pt.1049) 525 (also reported in (2007) All FWLR (pt. 376) 636; and (2007) 4 S.C (pt.111) 1),** Oguntade, JSC (now retired), also cautioned the court before which a no case submission has been made, on the approach it should adopt in the determination thereof, when he held the position as follows:

"Therefore, when a submission of no prima facie case is made on behalf of an accused person, the trial court is not thereby called upon at that stage to express any opinion on the evidence before it. The court is only called upon to take note and to rule accordingly that there is before the court no legally admissible evidence linking the accused person with the commission of the offence with which he is charge. If the submission is based on discredited evidence, such discredit must be apparent on the face of the record. If such is not the case, then the submission is bound to fail." (At page 15).

Therefore, the duty of the court at this stage is not to evaluate and weigh the evidence adduced by the prosecution in order to determine the cogency thereof or the credibility of the witnesses; but to take a panoramic overview of the entirety of the evidence on record to see whether indeed the prosecution has made out a prima facie case against the accused persons. See also **Bello V. State (1967) NMLR 1; R V Baker (1977) 65 CAR (Criminal Appeal Report) 287; Onagoruwa V State (1993) 7 NWLR (pt.303) 49 at 82-83.**

It would thus seem to me that the essence of a submission of a no case to answer 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 the essential ingredients of the stated offence to make it imperative for the court to call upon the accused person to defend himself or answer to the charge or open his defence or enter his defence.

In the case of **Queen V Oguche (1959) 4 FSC 64 (also reported in (1959) SCNLR 154),** the Supreme Court again postulated that at the stage where a no case submission is made, particularly where learned counsel indicates intention to rely on 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 out a prima facie case requiring, at least, some explanation from the accused person as regards his conduct or otherwise. See also **Duru V. Nwosu (1989) 4 NWLR (pt.113) 24 at 31; Ikomi V. State (1986) 3 NWLR (pt.28) 340 at 366; Onagoruwa V. State (supra) at 80.**

In other words, at this stage of the proceedings, the court is not to seek out whether the prosecution has proved the guilt of the accused person beyond reasonable doubt as required by the provision of **Section 135(1) of the Evidence Act**, but merely, as the meaning of prima facie postulates, to see whether there is a ground for proceeding further with the case.

Thus, the focus of the court at this stage should be on the quality of evidence tendered by the prosecution witnesses relating to the elements of the offences and not necessarily whether or not the court believed such evidence.

Having therefore properly set out at length the guiding principles in the determination of the issue at hand, the simple albeit, delicate task the court is to undertake now, is to examine the evidence led by the prosecution, if any, in the light of the legal ingredients required to establish the offences for which the accused persons were charged and to determine whether such evidence has failed to link the accused persons with the commission of the offences so as not to require them to enter into their defence.

In doing this, the bounden duty of court is to examine the evidence provided by the prosecution to support or establish each of the counts of the charge as it affects or

relates to each of the Defendants. The emphasis is on **“examination of the evidence”** proffered by the prosecution.

As stated earlier, the defendants are facing a two (2) counts charge of conspiracy and culpable homicide punishable with death. Learned counsel to the defendants has elaborately and sufficiently set out, with aid of case law, the salient ingredients or elements constituting both offences.

In the trajectory of the narrative of the case earlier recounted, it is clear that the prosecution called only one witness **ASP Alexander Aiyemela as PW1**. On the records, he is yet to conclude his examination in chief and most importantly he has also not been cross-examined by the Defendants. The Prosecution has refused to produce PW1 despite the ample time given to them thus denying the Defendants the right to cross-examine which they have sought to exercise in this case. The prosecution has also not called any other witness in the case.

The failure or refusal to produce **PW1 for purposes of cross-examination** has fatal legal consequence for (1) the evidence given by him and (2) the entire case presented by the Prosecution especially in the context of the extant charge.

The principle is now settled and also of general application that a court or tribunal should never act on the evidence of a witness whom the other party wants to cross-examine, but who cannot be reproduced or located for cross-examination. The implication of such a witness not making himself available for cross-examination is that all his evidence goes to naught. In **Isiaka V. the State (2011)ALL FWLR (pt.583)1966,** the Court of Appeal stated as follows:

“The platform on which the lower court placed his reasoning for the conviction is weak and unjustifiable. A court or tribunal should never act on the evidence of a witness whom the other party wants to cross-examine, but cannot be reproduced or located for cross-examination after he must have been examined in chief. The most honourable thing for the lower court would been that the evidence of PW3 who tendered Exhibit 5 should have been expunged from the record of the lower court or the lower court should not have attached any weight to it because the essence of cross-examination is to test the veracity and accuracy of the witness and not just a jamboree or merry

making. A witness who fails to make himself available for cross-examination should know that his evidence goes to naught."

In **Major Hamza Al-Mustapha V. the State (2013) LPELR-20995(CA),** the Court of Appeal adopted the reasoning in **Isiaka V. State (supra)** and further added as follows:

"…See also the unreported judgment of this court delivered on 10th December, 2012 in Appeal No:CA/J/71C/2009- Shehu Shegun V. The State wherein it was held:

"The aim of cross-examination is to enable the cross-examining party to demolish or weaken the case of the party being cross-examined and to also allow the cross-examining party the opportunity of stating or representing its case through the witness or its opponents. In ensuring that an accused persons right to fair hearing is manifestly protected, such an accused person must be given the opportunity to examine either in person or by his legal practitioner the witnesses called by the prosecution. The entire trial process revolves around the art of cross-examination. The evidence Act actually underscores the purpose of cross-examination is Section 200 which provides *interalia* **"when a witness is cross-examined, he may in addition to the questions referred to be asked questions which tend: (a) To test his accuracy, veracity or credibility, or (b) to discover who he is and what is his position in life or (c) to shake his credit by injuring his character.**

To deprive an accused person of this opportunity amounts to gross violation of his constitutional right to fair hearing. (per Mshelia JCA)."

I need not say more. With the above illuminating pronouncements, it follows that the entire evidence of PW1 **"goes to naught"** and must be discountenanced. The implication as it relates to the entirety of the case is simply that the prosecution has not led or produced any scintilla of evidence to support or sustain the extant charge against the Defendants. The case of Prosecution is thereby fatally compromised. The result is that the Prosecution has not made out a case against the Defendants by any means in respect of the two counts charge requiring that they put in a defence.

Before I finally conclude, it appears to me imperative to call on learned prosecuting counsel to show more circumspection in filing charges of this nature, if the evidence on record is all they have. Filing of criminal charges in court which involves the liberty of individual(s) is a delicate exercise that must be carried out with a huge sence of responsibility dictated solely by the facts and the ultimate cause of truth and justice. **A person is said to have lost his life in this case, but the cavalier manner in the way this case was conducted unequivocally show that justice was not done to this person. Indeed can justice be said to have been served in this case?** I say no more.

A charge must therefore not be filed for the simple sake of doing so. Justice it has been said is a three way traffic. Justice to the deceased, the accused and the society at large. A prosecuting counsel must in the exercise of his duties bear this principle in mind. He must be firm and courageous and not allow or give room for unhealthy influences that betrays the course of justice. A futile trial predicated on frivolous charges or perfunctory or half hearted prosecution does a lot of incalculable damage to the criminal justice system in terms of time and resources spent which could have been better utilised in more productive courses.

The case presented here by the prosecution appears to seek to turn upside down the cherished constitutional presumption of innocence in favour of the defendants by tending to suppose that it is for the defendants to prove their innocence rather than for the prosecution to present at this stage a prima facie case requiring the defendants to put up a response. The totality of the case put up by the prosecution unfortunately is not worth the time and resources wasted in going through these proceedings for nearly two (2) years.

On the whole, as stated earlier, the prosecution has failed to prove the essential elements of the offences for which the defendants were charged and accordingly the no case submission has considerable merit and must be sustained.

To allow these proceedings to continue, having regard to the totality of the evidence laid bare on the record by the prosecution, is to inflict undue hardship and injustice on the accused persons. They ought not have stood this trial in the first place, if the evidence on record was all the prosecution had to offer. I am minded to further say that if the circumstances have been appropriate, considering the

shoddy prosecution undertaken by the complainant, this court would not have hesitated in awarding heavy costs and damages in their favour. Nevertheless, I believe that they will be assuaged by a discharge which amounts to an acquittal.

The legal consequence of a successful submission of no case to answer is that such a discharge is equivalent to an acquittal and a dismissal of the charge on the merits. See **Ibeziako V. State (1989) 1 CLRN 123; Nwali V. IGP (1956) 1 ERMLR; Mohammed V. The State 29 NSCQR 634 at 640.**

One more point. The defendants are going to be set free today largely because of what I prefer to term or call failure of the prosecution to properly do the needful. The **important question of who killed the deceased** has unfortunately not been answered. The defendants say they do not have any hand in his death. That may will be so, but they must be aware that **God Almighty** who has full knowledge and complete control over all affairs know those Responsible. Their freedom now gives them an invaluable opportunity, if at all they have a hand in his death, to seek the face of the almighty, repent and beg fervently for his forgiveness for all will ultimately be held accountable at the appropriate time for their actions; if not now, as in this case but certainly later and most importantly before the almighty God himself. I say no more.

In the final analysis, and for the avoidance of doubt, my firm decision, on the basis of the provision of **Section 302 of ACJA 2015** is that the evidence adduced by the prosecution on record is not sufficient to justify the continuation of this trial. In other words, the prosecution has failed to make out a prima facie case against the accused persons, in that they have failed to tender required minimum evidence to establish the essential elements of all the counts of the offence that the defendants have been charged with respectively. For this reason I hereby preclude them from entering upon their defence and accordingly, I hereby discharge the defendants of the entirety of the charge preferred against them.

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Hon. Justice A.I Kutigi

Appearances:

1. **F.C. Ogbobe, Esq., for the Complaint.**

2. **B.Y. Yarima, Esq., with F.E. John, Esq., for the Defendants.**