IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT MAITAMA ABUJA
ON THE 7TH DAY OF DECEMBER, 2020.
BEFORE HIS LORDSHIP; HON JUSTICE MARYANN E. ANENIH
(PRESIDING JUDGE)

CASE NO: FCT/HC/CR/58/2012.

BETWEEN

FEDERAL REPUBLIC OF NIGERIA……………………………….COMPLAINANT

AND

MOHAMMED NDAKUPE…………………………….…………..DEFENDANTS.

JUDGEMENT.

The defendant Mohammed Ndakupe was initially arraigned before this Court together with Mohammed Tukur (now deceased) and Babatunde Abisuga on a 12 count charge. An amended charge was subsequently filed on the 9th May, 2016 to which the defendant pleaded not guilty to all the 12 counts of the charge. At the time plea was taken on the said amended charge Mohammed Tukur was deceased and Babatunde Abisuga pleaded guilty, was convicted and accordingly sentenced on 12th May, 2016. The offences with which the defendant is charged are recounted hereunder: as per the amended charge.

Count One

That you Babatunde Abisuga, Mohammed Ndakupe and Hassan Mohammed Tukur (now deceased) being officials of the accounts Department of the Federal Civil Service Commission sometimes between October and November, 2010 at Abuja in the Abuja Judicial Division of the High Court of the Federal Capital Territory Abuja Division did conspire amongst yourselves to do an illegal Act, to wit: conspired to take dishonestly the sum of N109,952,171.61 (One Hundred and Nine Million, Nine hundred and Fifty Two Thousand, One Hundred and Seventy One

Naira and Sixty One Naira and Sixty One Kobo) only from First Bank of Nigeria Plc Account No. 4062040010584, property of the Federal Civil Service Commission without its consent and thereby committed an offence punishable under section 97 of the Penal Code Cap 532 Laws of the Federation of Nigeria (Abuja) 1990.

Count two

That you, Babatunde Abisuga, Mohammed Ndakupe and Hassan Mohammed Tukur (now deceased) being officials of the accounts Department of the Federal Civil Service Commission on or about 12th October, 2010 at Abuja in the Abuja Judicial Division of the High Court of the Federal Capital Territory Abuja did take dishonestly the sum of N26,680,716.53 (Twenty Six Million, Six Hundred and Eighty Thousand, Seven Hundred and Sixteen One Naira (sic) and Fifty Three Kobo) only property of the Federal Civil Service Commission without its consent from the Commission's current Account No. 4062040010584 maintained with First Bank of Nigeria Plc Abuja Main Branch vide a Debit Mandate dated 12th October, 2010 and thereby committed an offence punishable under Section 287 of the Penal Code Cap 532 Laws of the Federation of Nigeria (Abuja) 1990.

Count three

That you, Mohammed Ndakupe and Hassan Mohammed Tukur (now deceased) being officials of the accounts Department of the Federal Civil Service Commission on or about 25th October, 2010 at Abuja in the Abuja Judicial Division of the High Court of the Federal Capital Territory Abuja did take dishonestly the sum of N42,876,054.58 (Forty Million, Eight Hundred and Seventy six thousand, Fifty Four Naira, Fifty Eight Kobo) only property of the Federal Civil Service Commission without its consent from the Commission's current Account No. 4062040010584 maintained with First Bank of Nigeria Plc Abuja Main Branch vide a Debit Mandate dated 25th October, 2010 and thereby committed an offence punishable under Section 287 of the Penal Code Cap 532 Laws of the Federation of Nigeria (Abuja) 1990.

Count Four

That you, Mohammed Ndakupe and Hassan Mohammed Tukur (now deceased) being officials of the accounts Department of the Federal Civil Service Commission on or about 1st November, 2010 at Abuja in the Abuja Judicial Division of the High Court of the Federal Capital Territory Abuja did take dishonestly the sum of N40,395,400.50 (Forty Million, Three Hundred and Ninety Five Thousand, Four Hundred Naira and Fifty Kobo) only property of the Federal Civil Service Commission without its consent from the Commission's current Account No. 4062040010584 maintained with First Bank of Nigeria Plc Abuja Main Branch vide a Debit Mandate dated 1st November, 2010 and thereby committed an offence punishable under Section 287 of the Penal Code Cap 532 Laws of the Federation of Nigeria (Abuja) 1990.

Count Five

That you, Babatunde Abisuga, Mohammed Ndakupe and Hassan Mohammed Tukur (now deceased) being officials of the accounts Department of the Federal Civil Service Commission sometimes in October , 2010 at Abuja in the Abuja Judicial Division of the High Court of the Federal Capital Territory Abuja did conspire amongst yourselves to do an illegal act, to wit conspired to fraudulently make a false document vis: signatory mandate Ref. No. FC.4055/S108/45 dated 6th October 2010 addressed to the Manager First Bank of Nigeria Plc to operate the account of Federal Civil Service Commission account No. 4062040010584 maintained with First Bank of Nigeria Plc and thereby committed an offence punishable under Section 97 of the Penal Code Cap 532 Laws of the Federation of Nigeria (Abuja) 1990.

Court six.

That you, Babatunde Abisuga, Mohammed Ndakupe and Hassan Mohammed Tukur (now deceased) being officials of the accounts Department of the Federal Civil Service Commission on or about 6th October, 2010 at Abuja in the Abuja Judicial Division of the High Court of

the Federal Capital Territory Abuja did fraudulently make a false document vis: signatory mandate Ref. No. FC.4055/S,108/45 dated 6th October 2010 to operate account No. 4062040010584 maintained with First Bank of Nigeria Plc Abuja main branch purporting the said signatory mandate to have been authorised by the Honourable Chairman, Federal Civil Service Commission which you knew was false and thereby committed an offence punishable under section 364 of the Penal Code Cap 532 Laws of the Federation of Nigeria (Abuja) 1990.

Count Seven

That you, Babatunde Abisuga, Mohammed Ndakupe and Hassan Mohammed Tukur (now deceased) being officials of the accounts Department of the Federal Civil Service Commission sometime in October, 2010 at Abuja in the Abuja Judicial Division of the High Court of the Federal Capital Territory Abuja did fraudulently use as genuine a forged document viz; Signatory Mandate Ref No. FC.4055/S,108 dated 6th October 2010 addressed to the Manager, First Bank of Nigeria Plc Abuja Main Branch to operate the Account No. 406204001058 maintained with First Bank of Nigeria Plc Abuja knowing it to be a forged and thereby committed an offence contrary to Section 366 and Punishable under section 364 of the Penal Code Cap 532 Laws of the Federation of Nigeria (Abuja) 1990.

Count Eight

That you, Mohammed Ndakupe and Hassan Mohammed Tukur (now deceased) being officials of the Accounts Department of the Federal Civil Service commission between October and November 2010 at Abuja in Abuja Judicial Division of the High Court of the Federal Capital Territory Abuja did conspire amongst yourselves to do an illegal Act, to wit conspiracy to fraudulently make false documents viz;Debit Mandate addressed to the Manager First Bank of Nigeria Plc to debit Federal Civil Service Commission Account No. 4062040010584 maintained with First Bank of Nigeria Plc various sums of monies in favour of some companies

and thereby committed an offence punishable under section 97 of the Penal Code Cap 532 Laws of the Federation of Nigeria (Abuja) 1990.

Count Nine

That you, Mohammed Ndakupe and Hassan Mohammed Tukur (now deceased) being officials of the Accounts Department of the Federal Civil Service Commission on or about 12th October 2010 at Abuja in the Abuja Judicial Division of the High Court of the Federal Capital Territory Abuja did fraudulently make a false document viz; Debit Mandate letter dated 12th October, 2010 mandating First Bank of Nigeria plc Abuja Main Branch to debit Federal Civil Service Commission account No. 4062040010584 with the sum of N26,680,716.53 (Twenty Six Million Six Hundred and Eighty Thousand Seven Hundred and Sixteen Naira Fifty Kobo) only purporting the said Debit Mandate to have been authorized by the Federal Civil Service Commission which you knew was false and thereby committed an offence punishable under section 364 of the Penal Code Cap 532 Laws of the Federation of Nigeria (Abuja)

Count Ten

That you, Mohammed Ndakupe and Hassan Mohammed Tukur (now deceased) being officials of the Accounts Department of the Federal Civil Service Commission on or about 12th October 2010 at Abuja in the Abuja Judicial Division of the High Court of the Federal Capital Territory Abuja did fraudulently use as genuine a forged document viz; a debit mandate letter dated 12th october,2010 addressed to the Manager, First Bank of Nigeria Plc Abuja Main Branch mandating the bank to debit Federal Civil Service Commission account No. 4062040010584 with the sum of N26,680,716.53 (Twenty Six Million Six Hundred and Eighty Thousand Seven Hundred and Sixteen Naira Fifty Three Kobo) only knowing it to be forged and thereby committed an offence contrary to section 366 and punishable under section 364 of the Penal Code Cap 532 Laws of the Federation of Nigeria (Abuja) 1990.

Count Eleven

That you, Mohammed Ndakupe and Hassan Mohammed Tukur (Now deceased) being officials of the Accounts Department of the Federal Civil Service Commission on or about 25th October 2010 at Abuja in the Abuja Judicial Division of the High Court of the Federal Capital Territory Abuja did fraudulently make a false document viz; Debit Mandate letter dated 25th October, 2010 mandating First Bank of Nigeria plc Abuja Main Branch to debit Federal Civil Service Commission account No. 4062040010584 with the sum of N42,876,054.58 (Forty Two Million Eight Hundred and Seventy Six Thousand Fifty Four Naira Fifty Eight Kobo) only purporting the said Debit Mandate to have been authorized by the Federal Civil Service Commission which you knew was false and thereby committed an offence punishable under section 364 of the Penal Code Cap 532 Laws of the Federation of Nigeria (Abuja)1990.

Count Twelve

That you, Mohammed Ndakupe and Hassan Mohammed Tukur (Now deceased) being officials of the Accounts Department of the Federal Civil Service Commission on or about 25th October 2010 at Abuja in the Abuja Judicial Division of the High Court of the Federal Capital Territory Abuja did fraudulently use as genuine a forged document viz; Debit Mandate letter dated 25th October, 2010 mandating First Bank of Nigeria plc Abuja Main Branch to debit Federal Civil Service Commission account No. 4062040010584 with the sum of N42,876,054.58 (Forty Two Million Eight Hundred and Seventy Six Thousand Fifty Four Naira Fifty Eight Kobo) only knowing it to be forged and thereby committed an offence contrary to section 366 and punishable under section 364 of the Penal Code Cap 532 Laws of the Federation of Nigeria (Abuja)1990.

In proof of it's case against the defendant, the prosecution relied on evidence of it's three witnesses, PW1, Alhaji Farouk Suleman, PW2 Abdullahi M. Mohammed and the PW3 Balat Tsadu. The prosecution also relied on evidence elicited from DW1 under cross examination and documentary evidence tendered by the parties.

The defendant testified as DW1 in his defence and called no other witness.

On 22nd October, 2013 the prosecution called his first witness Alhaji Farouk Suleman who testified as PW1.

The three prosecution witnesses are from the Bureau De Change where the monies in question were converted to US Dollars. And they testified on the forex transaction with defendant.

The three prosecution witnesses essentially testified inter alia that the defendant approached them for exchange of Naira to US Dollars equivalent. The the commission then transferred the required Naira sums to their Bank Accounts. They in turn changed the Naira sums into Dollars and handed over to the defendant and one Abu Dania another staff of the Commission. The prosecution tendered in evidence receipts for the Dollars sums issued. The prosecution witnesses also testified that the defendant informed that the required US Dollars was for foreign travel of members of staff.

The evidence of PW1 (Alhaji Farouk Suleman) under cross examination by 1st defendant is summarised hereunder as follows:

He is the Chief Executive officer of Fasman Holdings and runs the company. The monies credited to his account on 15th October 2010 is N26,680,716. His signature is not in these documents but it was signed by his company representative. That the documents were prepared and the monies also given out at his instruction.

Under cross examination by 2nd defendant, PW1 further testified that:

He was not arrested by EFCC but that he was invited and he made a statement.

Exhibits A1-B2 are receipts for monies received by individuals as representatives of Companies/Institutions. Exhibits A3 and B1 were received by Daniel Abu and Exhibit C is in Abu Daniel's name.

From Exhibits A1-B2, the amounts are over $10,000.00 dollars. He cannot remember if they reported to the Intelligence Agency because the person in charge left his employment abruptly. He was not at any time arrested or prosecuted for this. He was told that the monies are for official purpose, the accused never told him, he is paying for consultancy, but that it was for purpose of official travel. He did not at any time do consultancy work for the Federal Ministry of Civil Service Commission.

He has never been convicted by any Court in respect of the monies he paid to them and cannot remember reporting to the Financial Intelligence Agency.

On 9th December, 2014 the prosecution called his second witness Abdullahi M. Mohammed who testified as PW2.

The evidence of PW2 (Abdullahi M. Mohammed) under cross examination is hereunder summarised as follows:

That he made a statement at E.F.C.C office on 16th December,2010 and was given bail on self recognisance. He has been doing the business of buying and selling of currencies since 2008 till date.

He knows the law or guidelines regulating the trade of Bureau De Change.

There is a limit to which an individual can buy foreign currency, which is $5,000.00 dollars.

The alerts he said he received were in the name of Federal Civil Service Commission. At the time he received those monies in the name of Federal Civil Service Commission, he didn't execute any contract with the Commission. He did not issue any receipt to the 2nd defendant person. He

made profits from both transactions. When he was invited by EFCC he didn't return the profit he made to the EFCC.

He does not know why the said Mr. Abu is not standing trial in this case.

That the limit for Federal Ministry to transact business depends on what they want to use it for or how many people want to use it.

Mr. Abu and 2nd defendant came on behalf of Federal Civil Service Commission and he gave them the money . He is not standing any trial nor has he been tried in connection with his role in this transaction.

On 28th October, 2016 the prosecution called his third witness Balat Tsadu who testified as PW3

The PW3 (Balat Tsadu) gave evidence on 28th October, 2016 and 1st December, 2016. Under cross examination he further testified thus:

He received money into GTB Account from Federal Civil Service Commission. When he got the alert from the Commission, he changed the money into Dollars. The alert he got did not say the money came from defendant.

The reason he is in Court is that he got money from Federal Civil Service Commission as requested, changed it into Dollars and sent it back to them.

He has changed forex for many organisations when they want to travel they give him Naira and he gives them Dollars. And over all these years nobody has called him to come and testify against anybody in Court. He has not been called anywhere to come and give evidence against the person that came with the defendant to collect the money from him. The only reason he has been called here is because he changed Dollars for the Federal Civil Service Commission. He did not give the defendant any receipt nor acknowledgment for the collection of the money.

At the close of prosecution’s case, the Defendant opened his defence and gave evidence on oath on the 17th of September, 2019 and 22nd June, 2020 He testified as DW1.

The summary of the evidence of DW1 is as follows:

He was deployed to Federal CSC in 2006. He was there from 2006 to 2011 at Account department as an Accountant. He knows Hassan Mohammed Tukur, who was his Director Finance. Babatunde Abisuga was Assistant Director, Pay Office Federal CSC. Abu Daina was a cashier in Federal Civil Service Commission but he doesn't know where he is presently.

He was directed by his late Director to meet Ibrahim El Rufai at FBN as the Account Officer. He doesn't know where he is now and is not aware he is late.

They were investigated by EFCC, that is, the late Director Babatunde Abisuga, Abu Daina and himself. It was following the investigation that he wrote Exhibits M1 to M7.

The credit balance of the Account in FBN that was not dormant was over N128 million Naira. It was overhead account.

That he knows Alhaji Farouk Suleiman PW2, Alhaji Bala Tsadu, (PW1), the owner of Niger Link Bureau De Change. And he also knows Alhaji Abdulahi Mohammed the PW3. Abu Daniel and himself collected some Dollars from Farsman Bureau De Change. He collected it and gave it to Abu Daniel for safe keeping in the Commission's safe.

As part of his official duty then he contacted the M.D. of Fasman, Niger link and Teawuk all Bureau De Change where the forex transactions were one. (Looking at Exhibit J-E payment mandate). The sum that was transferred to the three companies in the payment mandate, Exhibit J-E. Himself and Babatunde Abisuga are the Signatories of the mandate letter, they are also the signatories to Exhibits K and L.

It is correct he said the Bank Account Officer of the Commission, El-Rufai, demanded for N5 million. His director, late Hassan Tukur told him that El-Rufai demanded for N5m.

He cannot remember if he mentioned in his statement that he was put in charge of Asian Zone and he was to disburse N20 million when the time

comes. He wasn't given any money. The money was still with the cashier at the time he was told of the N20 million.

The Director brought less than the sum the cashier said was in the safe to E.F.C.C. Then they were left in detention because they were told that it's one case and that all the money must be returned. The investigators were taking sides with Director as he was to retire in December.Then Mr. Babatunde Abisuga, Abu Dania and himself signed an undertaking that they would pay and they were released. And it took him almost three years to pay the $58,000.00 (Fifty Eight Thousand Dollars)

They wrote many statements at the EFCC. They told the Investigators that the money was for promotion exam. Sometimes, the investigators would say they do not want the statement written in another way and asked them to rewrite it. He wrote so many statements and some are not before the Court.

It was because of time constraints that due process wasn't followed in the process of collecting the money. The procedure is that Voucher would be raised and sent to audit, it would be audited and then payment authorised. But because of time lag this procedure was not strictly followed. But the procedure was later regularised and vouchers raised.

He is aware of e-payment practice in civil service. At the time they were sourcing the esta code in Dollars, they in the account department did not know who would be travelling. Usually there are representatives from other Government offices. Those in civil service were not allowed to open domicillary account and esta codes are given to those travelling in Dollars.

The money was not given to him as personal money. It was given to him for disbursement to those travelling. And at the time it was given to him, he did not know who and who was travelling. The money was still in custody of the cashier of Federal Civil Service Commission in the safe at the time they were invited to the E.F.C.C. If it was his personal money, he would have spent it, and not kept it in the Commission's safe.

That the purpose written on the mandate is 'Consultancy'. And that the consultancy those companies rendered is to source Dollars.

At the close of evidence both parties filed, exchanged and adopted their written arguments.

The defendant's address was filed on 29th July, 2020 and counsel on behalf of the defendant formulated one issue for determination which is:

"Whether the prosecution has proved the ingredients of the alleged offences against the defendant beyond reasonable doubt".

The prosecution reacted to defendant's final written address by filing it's own final written address on 8th October, 2020 wherein a sole issue for determination was distilled thus:

"Whether the prosecution has proved the essential ingredients/elements of the offences alleged against the defendant beyond reasonable doubt to warrant him being found guilty and consequently convicted"

The defence on the 14th October, 2020 filed a reply on points on points of law to the prosecution written address.

All the written addresses were adopted on behalf of parties.

This court has considered and notes the extensive arguments of the parties in their respective addresses. These arguments are all before the court and would be further referred to hereafter where found necessary.

I have considered the charge before the court, the plea of the defendant, the case of prosecution, the defendant's defence, documentary evidence, the written and oral submissions of both counsels.

Having done the aforementioned, I am of the view that the main issue arising for determination herein is:

Whether the prosecution has proved the instant charge against the defendant beyond reasonable doubt.

The charge against the defendants is made up of twelve counts. For the purpose of this judgment, they would be considered in three categories of similar offences.

Count 1,5 and 8 will be considered simultaneously. Same applies to Counts 2,3 and 4 and Counts 6,7,9,10,11 and 12 respectively.

I would start with count 2,3 and 4 which comprises the offence of taking dishonestly certain sums of money without consent of the Federal Civil Service Commission, punishable under section 287 of the penal code. The said section provides;

"whoever commits theft shall be punished with imprisonment for a term which may extend to five years or with fine or both."

Apparently, the above is the penalty section for the offence of theft codified in preceding section 286 of penal code thus;

"1. Whoever, intending to take dishonestly any movable property out of the possession of a person without that persons consent, moves that property in order to take it is said to commit theft.

2. Whoever dishonestly abstracts, consumes or uses any electricity or electric current is said to commit theft."

The above definition of theft is to the effect that in order to complete the offence, the property in question must be movable and there must be present in order to constitute theft, certain actions in the conduct of the defendant vis: intention to take dishonestly out of possession of a person and without that person's consent. This is the basis for which the ingredients of theft have been distilled in several authorities such as:

F.R.N V. A. A. NUHU (2015) LPELR-2601 (CA) PG. 24-25 as follows:

"With regards to the offence of theft under the provisions of section 287 of the penal code law of Kaduna state, the essential elements are

i. that the property stolen was movable property and was in the possession of a person;

ii. that the accused person moved the property while in possession of that person without the consent of the person

iii. that the accused person did so in order to take the property out of the possession of that person with intent to cause wrongful gain to himself or wrongful loss to that person."

See also: OYEBANJI V STATE (2015) LPELR -24751 (SC) PG. 17 para D-F

AYENI V. STATE (2016) LPELR - 40105 (SC) PG.25-26 para F-B

The offence of theft has also been described in both BLACKS LAW DICTIONARY 10TH EDITION & ONLINE CONTEMPORARY DICTIONARY to be synonymous with stealing.

BLACKS LAW DICTIONARY 10TH EDITION:

THEFT:

"The wrongful taking and removing of another's personal property with the intent of depriving the owner of it; larceny.

"Broadly, any act or instance of stealing, including larceny, burglary, embezzlement, and false pretenses. Many modern penal codes have consolidated such property offence under the name 'theft".

ONLINE DICTIONARY:

THEFT:

"the act of stealing; the wrongful taking and carrying away of the personal goods or property of another; larceny."

The above definitions are also deducible from the case of FRN V. NUHU (SUPRA). For purpose of elucidation on authorities cited which are mostly predicated on the Criminal Code, it is pertinent to observe that, the ingredients of the offence as codified in the Penal Code and Criminal Procedure Code are similar.

Be that as it may what is imperative in this instance is to examine the credible evidence before the court whether it reflects the existence of any of the aforementioned ingredients of the offence of theft against the defendant.

In the three counts of the charge, the items allegedly taken are all sums of money, ostensibly therefore, they are movable and were evidenced to be in the possession of Federal Civil Service Commission (hereafter referred to as the Commission) in their bank account.

Apparently also the evidence of all the witnesses including the defendant, is that himself together with the erstwhile 1st and 2nd defendants, caused the said sums of money to be moved from the bank account of Federal Civil Service Commission to the three Bureau De Change and converted to US dollars. These aforementioned pieces of evidence are not in doubt. What remains for consideration therefore, is whether these sums of money were intentionally taken dishonestly by the defendant without consent of the Commission in order for the defendant to cause wrongful gain to himself.

The argument of the prosecuting counsel is that the sums of money were taken without the consent of the Commission. The evidence before the court has to be examined for support of this to argument. None of the witnesses testified that the monies were taken without the consent of the Commission. All the persons responsible for the transfer of the Naira sums to the Bureau De Change and who eventually collected the exchanged US Dollars sums were staff of the Commission. They also acknowledged the receipt of the Dollars in their respective capacity as staff of the commission.

The three prosecution witnesses actually testified that the defendant had informed them that the Commission needed the money changed for the purpose of foreign travel of their staff. The defendant himself narrated in his evidence the sequence of the directive for the transfer and exchange of the said sums. The documents were tendered in support of his evidence. Suffice it to say that the aforementioned address of counsel in the

circumstance, cannot take the place of credible evidence before the court. This is the basic position of the law which has been reechoed in several decided cases. See:

OLAGUNJU V. ADESOYE & ANOR (2009) LPELR-2555 (SC)P.38, Para D.

ADEGBITE &ANOR V.AMOSU (2016) LPELR-40655 (SC) P.10, Para. B

CHIOKWE V. STATE (2012) (SC) 5 NWLR PT.1347 PG. 295 or LPELR- 19716 PG. 23 Para. A

Where PETER-ODILI, JSC reiterated as follows:

"It needs be reiterated that submissions of counsel however beautiful or enticing cannot take the place of evidence. This is because address of counsel to be accepted and utilized must be a reminder to court on evidence proffered. On its own, address of counsel cannot stand"

The prosecution has therefore failed to establish by credible evidence before the court that the said sum of money was exchanged and collected by the defendant without the consent of the Commission. This is even more so when the defendant under cross examination, testified that the normal procedure for obtaining such sums for travel was not followed because of time constrains and urgency. And that the process was thereafter regularized and vouchers raised. There is no evidence adduced disputing or challenging this information in anyway.

Suffice it to say that with the glaring evidence showing otherwise, I cannot agree with the submission of prosecuting counsel that the monies were taken out of the Commission's possession without her consent.

The next element to consider is whether there's indication of dishonesty or fraud in the taking of the sums of money. The prosecution witnesses led no evidence of dishonesty on the part of the defendant, whether directly or indirectly. The argument of prosecution that the Permanent Secretary and Chairman of Commission were not aware of and did not authorize the

transactions does not emanate from the evidence before the court. The defendant in Exhibit M3, one of the statements stated that the file in respect of the instant transaction was only passed to Central Pay office. This on its own is not an equivocal assertion that the Permanent Secretary and Chairman were not aware of the transaction. Even if that were the case evidence would still be required to establish the impropriety and dishonesty of such transaction. The prosecution's argument on their submission that the fact that due process was not followed is an indication of fraudulent or dishonest intention cannot stand, due to the absence of any evidence disputing, controverting or challenging the evidence of the defendant on the explanation of what transpired in this respect.

Also to be determined is the question whether the defendant collected the sums of money for wrongful gain to himself. It is undisputed in evidence that the US dollars he obtained from the Bureau De Change were all kept and retrieved from the safe of the Commission in custody of Mr. ABU DANIEL, the Cashier. Suffice to say in view of these undisputed pieces of evidence, I find no evidence of taking the sums of money for wrongful gain as allegedly implied in the charge against the defendant.

It is worthwhile at this juncture to examine the argument of the prosecution that the defendant made a confessional statement admitting that he benefitted the said sums of money as alleged in the Charge. I have considered all the extra judicial written statements of the defendant before the court and on this note I make particular reference, inter alia, to Exhibits M4, M6 and M7.

The question begging for answer by the argument of the prosecuting counsel is whether the court can convict solely on the fact that the defendant made refund of monetary sums and based on his statement, Exhibits M6, where he stated as follows

"… In addition to my last statement I wish to state that I benefitted the sum of N30,078,000.Twenty five million twenty eight thousand was paid by me and I undertake to pay the balance in three weeks time from this date 11/4/11 I am a signatory to the payment mandate I signed this

mandate that was paid. I brought the sum of One hundred and thirty three thousand dollars to the Commission which is part of the original money which is the refund of money benefitted."

It is well settled that for the court to convict a defendant, based on his written statements only, such a statement must be direct, positive, true and unequivocal of the facts that satisfy the ingredients of the offence he is accused of confessing to having committed. See :

HARUNA V FEDERATION (2012) LPELR-7821 (SC) PG. 27-28 Para E-C

AKINRINLOLA V. STATE (2016) LPELR-40641 (SC) P.52, Para. B-E

ADELEKE V. THE STATE (2013) 16 NWLR PT. 1381 PG. 556 or (SC) LPELR- 20971 PG. 41 Para B-F.

In the circumstance such as is presented before the court herein, where the prosecution is relying solely on purported confessional statement to establish a crime, the court is duty bound to test the truth of the said confession. See authorities cited hereinbefore (supra). See also

SUNDAY V. STATE (2017) LPELR-42259(SC) PG. 34-35 Paras. C-A.

The confession in M6 according to the argument of the prosecuting counsel is the inference from the world "benefitted" used by the defendant therein that he refunded the sum benefitted. What remains to be considered is whether in the light of other credible evidence before the court, the court can safely convict on this basis without any other evidence corroborating this statement. Defendant testified that, sometimes after writing his statement the investigators would tell him they did not want it written in that way, that he should write it in another way. That as a result of this he ended up writing several statements.

A scrutiny of evidence before the court clearly reveals the denial of the offences by the defendant. In his evidence he acknowledged that a certain sum of US dollars was distributed to him for onward disbursement to staff

for foreign travel. He revealed further in his undisputed evidence, inter alia, that the said sum given to him was kept by the cashier in the Safe of the Commission. That at the time he did not know exactly who and who was to travel abroad. No evidence was given by the complainant to dispute, challenge nor controvert the testimony of the defendant even after protracted opportunity to do so. In the end, the complainant was finally foreclosed more than five years sequel to when the defendant was first arraigned before this court. This leaves this court with no option but to doubt the existence of any contradictory evidence nor available evidence to corroborate prosecution's argument that the words benefitted used the extra judicial statement, Exhibit M6, is tantamount to an admission of guilt apropos of the charge before the court. The situation before the court clearly casts a doubt on the argument of prosecuting counsel on the guilt of the defendant by virtue of the extra judicial statement as alleged.

The position of the law in circumstance such as this is very clear that such doubt must be resolved in favour of the accused person. The offence of theft cannot be based on presumption nor established from mere speculations and conjecture. I find support for this reasoning in the cases outlined hereunder:

<u>OKONJI V. STATE (1987) LPELR-24779 (SC) PG.26 Para E-F.</u>

"It is the trite law that where there is doubt in the mind of the court in a criminal matter it ought to be resolved in the favour of the accused person."

<u>THE STATE V. FATAI AZEEZ (2008) LPELR-3215 (SC) PG.41</u>

<u>AKEEM AFOLAHAN V. STATE (2017) LPELR-43825 (SC) PG. 31-32 Par C-A.</u>

It is also trite that it is better for ten guilty persons to be set free than for an innocent man to be convicted for an offence he did not commit. Hence the need for caution in the finding of guilt.

Suffice it to say that the essential elements of a crime vis; a guilty conduct and a guilty mind have not been established in the circumstance as required by law. See

<u>BABALOLA & ORS V. THE STATE (1989) LPELR- 695 (SC) P. 45, Paras A-E</u>.

In the light of the foregoing therefore, the prosecution has failed to discharge the burden placed upon her by law to prove the offence as charged in Count 2,3 and 4 against the defendant beyond reasonable doubt. He cannot in the circumstance be convicted of the said crimes. I therefore so hold.

The next group to be considered are Counts 6,7,9,10,11&12 on making false document and using genuine a false document.

The offence of making false document and forgery have been defined in SECTIONS 362 and 363 of the PENAL CODE respectively. Concomitantly, SECTIONS 364 and 366 have expounded the penalty for aforementioned offences.

SECTION 362:

A person is said to make a false document-

a)Who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document or makes any mark denoting the execution of a document with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed or at the time at which he knows that it was not made, signed, sealed or executed; or

b)Who without lawful authority dishonestly or fraudulently by cancellation or otherwise alters a document in any material part thereof after it has been made or executed either by himself or by any other person whether such person be living or dead at the time of such alteration; or

c)who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document knowing that such person by reason of unsoundedness of mind or intoxication cannot or that by reason of deception practised upon him he does not know the contents of the documents or the nature of the alteration.

SECTION 363:

“Whoever makes any false document or part of a document, with intent to cause damage or injury to the public or to any person to support any claim or title or to cause any person to part with property or to enter into any express or implied contract or with intent to commit fraud or that may be committed, commits forgery; and a false document made wholly or in part by forgery is called a forged document.”

SECTION 364:

“Whoever commits forgery shall be punished with imprisonment for a term which may extend to fourteen years or with fine or with both.”

SECTION 366:

“Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forge document, shall be punished in the same manner as if he had forged such document.”

The prosecution witnesses again in this regard had nothing to say in respect of forgery. There’s actually no oral nor documentary evidence before the court relating to the offences of making false document, forgery nor using as genuine forged documents.

In order to sustain a charge under SECTION 364 and 366 of the PENAL CODE the prosecution has the burden to prove the essential ingredients of the offences. These ingredients are deducible from the said sections and have been captured aptly by the court of appeal in:

FEDERAL REPUBLIC OF NIGERIA V. MAGAJI IBRAHIM & ANOR (2013) LPELR-24231 (CA) PG. 21-22. as follows:

"The issue under consideration relates to counts 11,13,15,17 and 19 of the charge on the allegation of making false documents and counts 12,14,16,18 and 20 on using as genuine forged documents under section 366 of the penal code. The three requirements the prosecution is to prove under section 364 are as follows:

"i. That the Accused made, signed, sealed or executed the document in question or any part of it; or that it was made by someone else.

ii. That it was made under the direction or with the knowledge of the Accused person,

iii. That the Accused made it with some specific intent or dishonestly or fraudulently."

The three requirements to be proved for the offence of using as genuine forged documents, under section 366 of the penal code are as follows:

"i. That the Accused used a document claiming it to be a genuine one

ii. That the Accused knew or had reason to believe that the document was forged

iii. That the Accused did so fraudulently or dishonestly."

See also;

ALAKE V. STATE (1992) LPELR- 403 (SC) PG. 10 Para B-C where the Supreme court per KUTIGI JSC restated the position of law that it must be proved in a charge of forgery that the defendant forged the document in question.

There's nothing in the evidence of the prosecution that overtly or remotely indicates that the defendant made a false document nor used as genuine a false document. The defendant has not by any evidence been identified with these alleged offences. In addition I refer to and adopt the analysis on the charge of theft earlier made above on absence of evidence to sustain the offence charged.

It is trite that the standard of proof in a criminal trial is proof beyond reasonable doubt. See

SECTION 135 OF THE EVIDENCE ACT

AGU V.STATE (2017) LPELR-41664 (SC) PG. 25 Para B-C where his lordship RHODES-VIVOUR JSC postulated that:

"Section 135 of the Evidence Act states that where the commission of crime is in issue the standard of proof required before a conviction is sustained is proof beyond reasonable doubt"

AJAYI V. STATE (2013) 9 NWLR PT. 1360 PG. 589 LPELR-19941 (SC) PG. 43 Para B-C

ADEKOYA V. STATE (2017) LPELR-41564 (SC) PG. 8 Para. A-E

The evidence before the court having failed to discharge the burden of proving the said offences cannot sustain the charge. I find that the prosecution has failed to meet the requirement of law to prove the offences of making false document and using as genuine forged documents as charged beyond reasonable doubt. And I therefore so hold.

The last to be considered are Counts 1, 5 and 8 which conveys the offence of criminal conspiracy. The relevant Section 97 of the PENAL CODE is reproduced hereunder for clarity.

SECTION 97

"(1) whoever is a party to a criminal conspiracy other to commit an offence punishable with death or with imprisonment shall where not express provision is made in this Penal Code for the punishment of such a conspiracy be punished in the same manner as if he had abetted such offence.*"*

The evidence of prosecution witnesses before the court is that the defendant approached them for exchange of various (Nigerian) Naira sums to (US) dollars. Three prosecution witnesses testified to the effect that they exchanged the said sums to US dollars and handed over same to the

defendant and another person named, ABU DANIA who both acknowledged receipt of same. Pursuant to this line of evidence, Exhibits A1, A2, A3, B1, B2 and C were admitted in evidence through PW1 and PW2. All the prosecution witnesses also testified inter alia that they exchanged the said sums for the purpose of official travel for staff of Federal Civil Service Commission as requested by the defendant. The PW1 testified that his company did not render any consultancy service to federal civil service commission.

In order to successfully establish the commission of the offence of criminal conspiracy, the existence of the ingredients of the offence must be shown in the alleged conduct of the defendant(s). The elements of the offence of criminal conspiracy have been well set out and analyzed in a plethora of decided cases.

Prosecution in order to get conviction for the offence of conspiracy must establish the element of agreement to do something which is unlawful or lawful by unlawful means. See:

DAVID OMOTOLA & ORS V. THE STATE (2009) 7 NWLR PT. 1139 Pg. 148 or LPELR- 2663 (SC) Pg. 63-64 Paras E-A

"In order to get conviction on a count of conspiracy, the prosecution must establish the element of agreement to do something which is unlawful or to do something which is lawful by unlawful means. Conspiracy is an offence which is difficult to prove because it is often hatched in secrecy. Circumstantial evidence is often used to point to the fact that the confederates had agreed on the plan to commit the crime. There must be an overt act from which to infer the conspiracy."

See also

IBRAHIM ADEYEMI V. THE STAE (2017) LPELR-42584 (SC) Pg. 6-8 Paras. D-B.

Essentially in the case of ADEYEMI V. STATE (SUPRA) the Supreme Court reiterated the elements of the offence of criminal conspiracy, though in an armed robbery case which is similar as follows:

i)‘’Where the agreement is other than an agreement between two or more person to do or cause to be done, some illegal act or some act which is not illegal by illegal means.

ii)Where the agreement is other than an agreement to commit an offence, that some acts beside the agreement was done by one or more of the parties in furtherance too the agreement,

iii)Specially that each of the accused individually participated in the conspiracy.’’

The defendant denied conspiring with anyone to commit any criminal act as alleged by the complainant. None of the prosecution witnesses testified in respect of any agreement between the defendant and themselves or anyone to carry out any illegal act or any act whatsoever by illegal means.

The defence counsel in his final address referred to defendant’s Exhibits M1 to M7 as confessional statements to the offence, made by defendant. I have gone through the said statements, particularly Exhibits M3, M4 and M6 and do not find any allusion to or agreement between himself and any other person to commit the criminal act in respect of the offences as alleged.

A confession as indicated in the Evidence Act is an admission made by any person charged with a crime stating or suggesting the inference that he committed the crime. See

SECTION 28 OF EVIDENCE ACT 2011 (as Amended)

JOHN V. STATE (2016) LPELR-40103 (SC) PG. 13 Para D-F.

ALAO V. STAE (2015) LPELR-24404 (SC) PG. 22 Para B-C.

GIRA V. STATE (1996) 4 NWLR PT. 443 PG. 375 LPELRR-1322 (SC) PG. 18 PARAS. B-D

With regard to the offence of conspiracy, it is committed where two or more persons agreed to do an unlawful act or do a lawful act by unlawful

means. The defendant's complicity in the agreement to carry out the act must be established to the satisfaction of the court. See

JOHN V. STAE (SUPRA) at page 18-19 para F-C

BUSARI V. STAE (2015) LPELR- 24279 PG. 24 -25 PARAS A-B & PARAS. E-F.

"Conspiracy is an agreement of two or more persons to do an act which is an offence to agree to. Evidence of direct plot between conspirators is hardly capable of proof. The bottom line of the offence is the meeting of the minds of the conspirators to commit an offence and meeting of the minds need not be physical. Offence of conspiracy can be by what each person does or does not do in furtherance of the offence of conspiracy. See NWOSU VS STATE (2004) 15 NWLR Part 897 page 466; ODUNEYE VS STATE (2001) 2 NWLR Part 697 Page 4311, ADEJOBI VS STATE (2001) Part 1261 at 347."

The prosecution in the instant case has not satisfied the court of the defendant's complicity in any action or decision taken towards the actualization of the alleged offences. That the defendant partook in the conspiracy, cannot be established in this instance, a fortiori, when no criminal conduct has been successfully attributed to him. I find support for this reasoning in the case of:

ANTHONY IGHELE V. THE STATE (2018) LPELR-43929 (CA) PG. 9-10 Para G-B

NELSON FRIDAY V. THE STATE (2016) LPELR-40638 (SC) PG. 19-20 Paras. G-E

"Conspiracy is an agreement by two or more persons to do or cause to be done an illegal act or a legal act by illegal means. In Stephen's Digest of the Criminal Law, it is defined as "When two or more persons agree to commit any crime, they are guilty of conspiracy whether the crime is committed or not." lt is not necessary to complete the offence that any one thing should be done beyond the agreement or in furtherance of the

agreement. See R v. A Spinall 2 QBD (1876-77) page 45 at pages 58-59. The gist of the offence of conspiracy is the meeting of the minds of the conspirators, It is not easily capable of proof for conspirators hardly invite people to witness their assent. It is a matter of inference from certain criminal acts of the people concerned. See Njovens v. State (1973) 5 SC 17 at 9-90. There must be the criminal intent of two or more people, the execution of which will result in the actual crime."

Suffice to say in the final analysis that the prosecution has not successfully proved any of the alleged offences against the defendant beyond reasonable doubt. The inherent doubt occasioned by the evidence presented before the court would have to be resolved in favour of the defendant. See:

OKONJI V STATE (supra)

AFOLAHAN V. THE STATE (supra)

And the whole essence and merits of the requirements of proof beyond reasonable doubt is to guide against conviction and sentence of innocent persons.

Where the prosecution fails to adduce evidence sufficient to establish the guilt of the defendant, then the Court would under such circumstance have no option than to absolve him of guilt. This is in line with the time honoured principle that it is better that ten guilty person's escape Justice than for one innocent man to be punished for an offence he did not commit. See:

SHEHU V. THE STATE (2010) LPELR-3041 (SC) Pg 22-23 Paras. C-D.

Where his lordship Ogbuagu JSC reiterated while applying this principle as follows:

"…it is now firmly settled that it is an elementary proposition, that suspicion however strong will not found or lead to a conviction. In other words, it cannot take the place of legal proof. I agree with the submission

in paragraph 5.6 page 10 of the Appellant's Brief of Argument and this is also now firmly settled in a line of decided authorities, that it is better for ten guilty persons to escape than one innocent person to or should suffer. In other words, it is better to acquit ten guilty men, than to convict an innocent man. In the case of SAIDU V. THE STATE (1982) 4 SC 41@ 69-70, Obaseki JSC stated inter alia, as follows:

"it does not give the court any joy to see offenders escape the penalty they richly deserve but until they are proved guilty under the appropriate law in our laws courts, they are entitled to walk about in the streets and tread the Nigeria soil and breathe the Nigerian air as free and innocent men and women."

On his part Sir Matthew Hale is quoted as remarking that:

"it is better that 5 criminals escape justice rather than one innocent person to be punished for an offence he did not commit."

"So be it with the appellant. In the circumstances of the evidence before the court which are borne out from the records. I will give benefit of my doubt in favour of the Appellant and render my answer to issue 2 of the Appellant, in the Negative."

See also:

ONWE V. STATE (2017) SC LPELR-42589 pg. 58 para D-E

EKPE V. STATE (1994) LPELR-1088(SC) Pg. 9 paras. B-D.

In line with the above position of the law, this Court cannot rely on the evidence of the prosecution, which falls short of the requirement of proof beyond reasonable doubt.

Consequently and in line with section 309 of the Administration of Criminal Justice Act 2015, the defendant, MOHAMMED NDAKUPE is hereby found not guilty of the offences of CRIMINAL CONSPIRACY, DISHONESTLY TAKING MONEY, FRAUDULENTLY MAKING FALSE DOCUMENT nor USING AS GENUINE FORGED

DOCUMENT under SECTIONS 97, 287, 364 and 366 of the PENAL CODE as reflected in the Amended Charge. He is therefore accordingly discharged and acquitted of all the Counts of the Charge against him.

Signed

Hon. Justice M.E. Anenih

Appearances:

Sylvanus Tahir Esq for prosecution

A.O. Agbolahor Esq for the Defendant.