IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT ABUJA
ON MONDAY 18TH DAY OF DECEMBER 2020

BEFORE THEIR LORDSHIPS

HON. JUSTICE O. A. ADENIYI: PRESIDING JUDGE
HON. JUSTICE BINTA MOHAMMED: HON. JUDGE

CHARGE NO. CR/105/13
APPEAL NO: CRA/9/18

BETWEEN:

IDRIS MAHMOOD … … … … … … … … … … APPELLANT

AND

COMMISSIONER OF POLICE … … … … … RESPONDENT

JUDGMENT

(DELIVERED BY HON. JUSTICE O. A. ADENIYI)

Upon First Information Report filed on 19/08/2013, the Appellant [and 1 another] stood trial for offences of Joint Act and forgery contrary to **sections 79** and **364** of the **Penal Code Act;** before the Chief

Magistrate Court of the Federal Capital Territory, sitting at Karu, and presided over by His Worship, **O. Oyeyipo, Chief Magistrate.**

The brief facts of the case, as gathered from the record of Appeal, are that the Appellant was a staff of the Federal High Court. At the material time, he was a Litigation Officer and worked as a Bailiff attached to Court No. 6, Abuja Division, presided over by His Lordship, **Hon. Justice A. F. A. Ademola** (now retired). It happened that one **Dr. Sani Teidi** was arraigned before His Lordship, **Ademola, J** (now retired), for criminal offences and was granted bail. The Appellant [with the 2nd Defendant at the lower Court], were alleged to have acted jointly to forge two letters purportedly written on the letter headed papers of the Federal Ministry of Lands, Housing and Urban Development, addressed to the Federal High Court of Nigeria; which were letters purported to be in response to earlier letters written by the Federal High

Court for purposes of verification and confirmation of the authenticity of two certificates of occupancy which the surety to the said **Dr. Teidi** provided to satisfy the bail conditions imposed by the Court upon grant of bail to the said **Dr. Teidi**. It was purportedly found out that the said letters of verification were forged by the duo of the Appellant and the 2nd Defendant and on which basis they were charged before the Chief Magistrate's Court.

At the plenary trial, the prosecution called four (4) witnesses and tendered a number of documents in evidence as exhibits, including affidavits of facts deposed to by the Appellant.

In a considered judgment delivered on 18/01/2018, the Appellant was found guilty of the offence of forgery and was sentenced to eighteen (18) months imprisonment.

Aggrieved with the conviction and sentence, the Appellant lodged the instant appeal against the judgment of the lower Court *vide* Notice of Appeal filed on 12/02/2018, containing four (4) grounds of appeal.[1]

In the brief of argument filed on behalf of the Appellant on 03/07/2018, **Olusola Egbeyinka, Esq.**, of learned Appellant's counsel, distilled four (4) issues from the grounds of appeal, namely:

1. ***Whether failure of the learned trial Chief magistrate to compel the Respondent to produce the GSM MOBILE TECHNO PHONE handset which contained details of the recorded telephone conversation between the Appellant and Danladi Ademu, the discharged and acquitted 2nd Defendant before the trial court is not a gross violation of section 36(6)(b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) Third Alteration Act?***

[1] See pages 344-351 of the records

2. ***Whether the learned trial Chief Magistrate erred in law when he held that the provision of section 167(d) of the Evidence Act, 2011 (as amended) is inapplicable having regard to the fact that the Respondent in whose custody the GSM MOBILE TECHNO PHONE handset which contains details of the recorded telephone conversation between the Appellant and Danladi Ademu (the discharged and acquitted 2nd Defendant) is being kept as exhibit notwithstanding the refusal of the Respondent to produce the said GSM MOBILE TECHNO PHONE handset at the trial?***

3. ***Whether the learned trial Chief Magistrate rightly convicted and sentenced the Appellant to a term of 18 months' imprisonment when the Respondent did not establish all the elements of the offence of forgery against the Appellant?***

4. ***Whether the prosecution proved beyond reasonable doubt the offence of forgery against the Appellant***

having regard to the evidence led at the trial as well as facts elicited from all witnesses under cross examination?

On its part, the Prosecution/Respondent framed two issues for determination in the brief of argument filed on 20/09/2018. The issues are namely:

1. ***Whether the prosecution has proved its case beyond reasonable doubt to secure conviction of the Appellant.***

2. ***Whether the Appellant can complain of denial of fair hearing at a later stage of the trial when he failed to utilize same when he had the opportunity to do so.***

We had carefully considered the totality of the arguments canvassed by learned counsel both for the Appellant and the Respondent in the briefs of arguments they respectively filed. It is to be noted that the four issues for determination formulated by the Appellant's learned counsel were distilled from the four grounds of appeal filed. The same goes for the two

issues for determination distilled by the Respondent's learned counsel.

However, upon a consideration of the records of appeal and the totally of the materials placed before this Court by the parties, we are of the firm opinion that the issues that have arisen in the determination of this appeal can be compressed into two, namely:

1. ***Whether Ground 1 of the Appellant's grounds of Appeal is not incompetent having regard that it challenges the interlocutory decision of the trial Chief Magistrate's Court of 21/04/2017, with respect to which the Appellant has not lodged an appeal?***

2. ***Whether or not, on the basis of the evaluation of the evidence placed before the learned trial Chief Magistrate, the Appellant was not rightly convicted of the offence of forgery as charged?***

In re-framing the issues for determination in this appeal, it is noted that issues (2) to (4) as distilled by the Appellant's learned counsel and the two issues formulated by the Respondent's learned counsel, are conveniently incorporated in issue (2) we have formulated in the foregoing.

We have also carefully considered and taken due benefits of the totality of the arguments canvassed in the briefs of arguments filed by the respectively learned counsel; to which we shall make specific reference as we deem needful in the course of this judgment.

DETERMINATION OF ISSUES

ISSUE ONE:

The Appellant, by motion on notice filed on 22/02/2017,[2] prayed the trial Chief Magistrate's Court for the principal relief set out as follows:

[2] See page 66-76 of the records

> ***"An Order of this Honourable Court compelling the Complainant/Prosecution/Respondent in this criminal trial to produce from its custody before this Honourable Court the TECHNO PHONE HANDSET of the 1st Defendant/Applicant containing recorded conversation of the 4th day of August, 2013, between the 1st Defendant/Applicant and the 2nd Defendant/Respondent in respect of this criminal trial."***

As a background to the circumstances that led to the filing of the said application, the case of the Appellant, as also revealed by his evidence-in-chief in his defence,[3] is that upon the grant of bail by the **Hon. Justice A. F. A. Ademola,** (now retired) of the Federal High Court, Abuja, to one **Dr. Sanni Shuaibu Teidi,** who was arraigned before that Court, he was summoned by one of his superiors in charge of bail perfection, to dispatch two letters (made by the **PW2** and admitted as **Exhibits C1 and C2**), to the Federal

[3] Pages 241-251 of the records

Ministry of Lands, Housing and Urban Development (Federal Ministry of Lands, for short), at Mabushi, Abuja, for purposes of verifying the authenticity of two Certificates of Occupancy brought by the two sureties of the said **Dr. Teidi**, in order to fulfil the bail conditions. He made two visits to the said Federal Ministry of Lands. On his first visit, which he made alone, on Friday, 26/07/2013, he was informed that the letters were inappropriately addressed. Upon the letters being corrected in his office, he repeated the visit to the Federal Ministry of Lands on Monday, 29/07/2013. This time around, the 2nd Defendant, who claimed that the said **Dr. Teidi** was his benefactor, and who he came in contact with after the Court had granted the bail, and who hung around the Court premises, offered to give him a lift to the place. His evidence is further that, the following day, 30/07/2013, the 2nd Defendant called him on the phone to inform him that the replies to the said letters

were ready; that he told the 2nd Defendant that he would go and pick the replies by himself; but that the 2nd Defendant offered to pick the letters on his behalf if he would be allowed so to do, to which he acceded; that the 2nd Defendant later called to inform him that he had picked the letters, which he brought to him and handed to him in a brown envelope at the premises of the Federal High Court. The said letters were admitted by the trial Court as **Exhibits F1** and **F2**.

Upon satisfying himself that the letters truthfully emanated from the Federal Ministry of Lands, he handed the same to his superior in the office (the **PW3**).

The Appellant's case is further that on the same 30/07/2013, he was made to depose to two affidavits in respect of the verification of the genuineness of the said Certificates of Occupancy

(which the **PW2** had also tendered as **Exhibits D1** and **D2** respectively in the course of trial).[4]

The documents were later presented before the learned **Ademola, J,** who doubted the authenticity of the letters purportedly obtained from the Federal Ministry of Lands. He confronted the Appellant in the presence of the **PW3** and other staff if he was sure that the letters were genuine, but he did not respond one way or the other.

The learned **Ademola J,** directed that an investigation be carried out, which resulted in the Federal Ministry of Lands writing a letter to the Federal High Court (tendered by the **PW1** as **Exhibit A**) disclaiming the letters purportedly written by the Ministry to verify the said Certificates of Occupancy.

The Police got involved. The Appellant was arrested. He made statements purporting to implicate the 2nd

[4] See page 194 of the records

Defendant. According to the Appellant, on the day a sting operation was orchestrated by security agencies to arrest the 2nd Defendant, he called him (the 2nd Defendant) on the phone and requested that they met somewhere in Area 1, Abuja. The 2nd Defendant turned up. It was on Sunday, 04/09/2013. He spotted the 2nd Defendant and he entered his (the 2nd Defendant's) car.

The Appellant further testified that he then challenged the 2nd Defendant as to why he gave him fake reply letters from the Federal Ministry of Lands and he explained to the 2nd Defendant the circumstances of how it was discovered that the letters were fake. The 2nd Defendant neither admitted nor denied the allegation. It was in the course of their conversation inside the 2nd Defendant's car that the security agents came on the scene and arrested the 2nd Defendant.

Unknown to the 2nd Defendant, the Appellant had recorded the conversation both of them had inside his car on his phone. According to the Appellant, he informed the superior Police Officer at the SARS' Office, at Abattoir, Abuja, that he had evidence in his phone, which he played to him; and it was at that point that the phone was collected from him.

The testimony of the Appellant with respect to his recording of the telephone conversation between the 2nd Defendant and him in his phone on 04/08/2013; and his testimony that the telephone was retrieved from him by the Police, is corroborated by the **PW1**, the Police Investigating Inspector **John Otache**.

The **PW1's** testimony in this regard, as also gathered from the records,[5] is that he listened to the said recorded telephone conversation in the Appellant's phone, after which he registered the phone with the **Police Exhibit Keeper.**

[5] See pages 171-185 of the records

Now, the position, as further captured by the record of Appeal is that the prosecution did not make use of the said phone in the course of trial. It is further revealed that the Appellant opened his defence by testifying in person on 30/01/2017. Then, on 22/02/2017, the Appellant filed the motion referred to in the foregoing. The application was filed before the Appellant's sole witness testified on 17/03/2017.

The Court took the application on the same 17/03/2017; after the Appellant closed his case; but before the 2nd Defendant opened his defence.

The learned trial Chief Magistrate delivered a considered Ruling on 21/04/2017, whereby he struck out the application.[6]

It is not on record that the Appellant formally appealed against that interlocutory Ruling of the

[6] See pages 277 – 282 of the records

learned trial Chief Magistrate at that stage of the proceedings.

Nevertheless, trial proceeded. The 2nd Defendant testified and called one witness.

In his final written address filed on 11/10/2017,[7] the Appellant's learned counsel again dwelt on the issue of the Appellant's application for the Respondent to produce his said mobile phone to enable him prepare for his defence.

In his judgment, the learned trial Chief Magistrate held, with regards to the same issue, as follows:

> ***"On the first issue raised by the 1st Defendant's counsel whether the refusal by the complainant/prosecution to produce in evidence before the Honourable court the recorded conversation as contained in a G.S.M TECHNO PHONE between the 1st and 2nd Defendants is not a gross violation of section 36(6) of the 1999 C.F.R.N. I***

[7] See pages 96 – 113 of the records

have looked at the record of this instant action and I am unable to find any piece of evidence showing the refusal of the complainant/prosecution to hand over the TECHNO MOBILE PHONE to the 1st defendant/Applicant, all that is in the record is a motion on notice filed by the 1st Defendant/Applicant praying this court for an order compelling the complainant/prosecution/Respondent to produce from its custody a TECHNO PHONE handset which motion No. M/02/17 dated 21/02/17 and filed on 22/02/17 was struck out on 21st April, 2017 in a considered ruling delivered by this court. In that ruling, this court had opined that the 1st Defendant had the opportunity to subpoena the relevant authority in custody of any document which the defence required for its defence but this was not done. I must state that the 1st Defendant ought to have subpoenaed the Exhibit keeper who the PW1 said he registered the communication he listened to between the defendants which was recorded by with (sic) the phone of the 1st Defendant which make or model was not even

mentioned and interestingly during the cross-examination of the PW1 on the 5th May, 2014, the learned defence counsel for the 1st Defendant, Sola Egbeyinka was silent on the issue of any recording by a phone talkless a TECHNO PHONE HANDSET. This issue No. 1 being hinged on the constitutional provision of section 36(6) C.F.R.N. 1999 I hold is misconceived and of no moment. This is because the 1st Defendant had every opportunity to benefit from the constitutional provision but he failed to take advantage and cannot be heard to complain now. I hold the authority of OKOYE V C.O.P (Supra) is distinguishable from the instant action under reference. Interestingly, the 1st Defendant had been represented by the same counsel since the 19th February, 2014 till date and he cross-examined the PW1 on 16th June, 2014. See KALU V F.R.N & ORS (2012) LPELR-9287(CA)."

Now, issue (1) of the issues for determination in this appeal, as formulated by the Appellant's learned

counsel, is directly lifted from ground (1) of the grounds of Appeal. Ground (1) of the grounds of Appeal states as follows:

> ***"The Learned trial Judge erred in Law when he failed to advert his mind to the express provision of SECTION 36(6)(b) of the 1999 Constitution of the Federal Republic of Nigeria (As Amended) Third Alteration Act by failing to compel the Respondent to produce the GSM MOBILE TECHNO PHONE Handset which contained the recorded telephone conversation between the Appellant and DANLADI ADEMU, the discharged and acquitted 2nd Defendant in CHARGE NO. CR/105/2013 in respect of the offence charged."***

Now, the particulars of ground (1) of the grounds of Appeal also state, *inter alia*, as follows:

> ***"(vii) That the Learned trial Judge wrongly refused to compel the Respondent to produce the GSM TECHNO PHONE HANDSET utilized by the Appellant***

to record the oral conversation he had with the Co-Defendant (now discharged and acquitted) despite the fact that the Appellant filed an application in that respect on the 22nd day of February, 2017.

(viii) That the Learned trial Judge ignored the glaring fact that the Appellant had in the course of the criminal trial filed an application on the 22nd day of February, 2017, requesting the Respondent to produce the GSM TECHNO PHONE HANDSET in its custody wherein the learned trial Judge dismissed the said application on the 21st day of April, 2017."

It is therefore not in question that the crux of ground (1) of the Appellant's grounds of Appeal is a frontal challenge of the decision or the exercise of the learned trial Chief Magistrate's discretion, in refusing the Appellant's motion on notice to compel the complainant/prosecution/respondent to produce the Appellant's Techno Mobile phone, upon his application, as contained in the Ruling of 21/04/2017.

The position of the law with respect to this state of affairs is clear. A party is entitled, nay encouraged to appeal an interlocutory decision of a Court alongside with the judgment of the substantive suit in order to mitigate delay in trial proceedings. However, this procedure is allowed where the Appellant follows the laid down requirement. The authority of *Borno State Urban Planning and Development Board, Ministry of Land and Survey, Borno State & Anor Vs. Bams Investment Nigeria Limited*,[8] provides an articulate position of the law in this regard, where it was held as follows:

> ***"The Appellants did not file an appeal against the Ruling at the time it was delivered and they incorporated the appeal in the notice of appeal filed against the final judgment on the 25th of February, 2014, one year after the Ruling was delivered. It is not objectionable, and in fact it is encouraged, for an***

[8] (2017) LPELR-43290(CA)

appellant to incorporate his appeal against an interlocutory decision as part of the substantive appeal against the final judgment. In doing so, however, it was incumbent on the Appellants to just seek and obtain an order of extension of time to appeal against the said Ruling outside the prescribed time limit. It is only thereafter that the ground of appeal against the Ruling incorporated in the final notice of appeal will be competent - Onwe Vs Oke (2001) 3 NWLR (Pt. 700) 406, Royal Exchange Assurance (Nig) Plc Vs Anumnu (2003) 6 NWLR (Pt. 815) 52, First All State Securities Ltd Vs Adesoye Holdings Limited (2013) 16 NWLR (Pt. 1381) 470, Jev Vs Iyortom (2014) 14 NWLR (Pt. 1428) 575. In Ogigie Vs Obiyan (1997) 10 NWLR (Pt. 524) 179 the Supreme Court made the point thus:

> *"...Although a party can include an appeal against a ruling on an interlocutory application when he comes to appeal against the final judgment, and this is to be encouraged in order*

to avoid unnecessary delay by appealing separately, there is a procedure to be followed in order to meet the unavoidable technicalities involved. By Section 25(2)(a) of the Court of Appeal Act 1976, the period prescribed for appealing against an interlocutory decision is 14 days, while the time prescribed for appeal against a final decision is three months. In order to marry two appeals together one has to obtain leave to appeal out of time against the interlocutory ruling. Clearly, this has not been done in this case. Therefore, the appeal against the ruling of the learned trial Judge, which contains the applicability of the Land Use Act or Bendel State Legal Notice No 22 of 1978 as to whether the dispute is situate in an urban area or rural area so as to determine the trial Judge's jurisdiction, is incompetent.'"'

In the present case, the provision of **s. 52(2)** of the **High Court Act** is applicable. It requires notice of

appeal to be filed with respect to the decision of the Magistrate's Court being appealed against, before the expiration of **thirty (30) days** after the decision is given.

The provision of **Order 50 Rule 1** of the High Court of the FCT (Civil Procedure) **Rules**, relating to appeals from District and Area Courts, also states as follows:

> ***"Except for interlocutory appeals which shall be brought within 15 days, every appeal shall be brought by notice of appeal lodged in the lower court within 30 days of the decision appealed from and served on all other parties affected by the appeal."***

However, in the present case, even though the Appellant has incorporated an appeal against the Ruling of the learned trial Chief Magistrate, of 21/04/2017, in his Notice of Appeal; he however failed to apply for extension of time to appeal against

the said Ruling in the instant appeal against the final judgment.

Again, as can be clearly seen, the Notice of Appeal filed by the Appellant on 12/02/2018,[9] failed to indicate that the appeal was against both the interlocutory decision of the learned trial Chief Magistrate of 21/04/2017 as well as the final judgment of 12/01/2018.

The inevitable implication and consequence is that ground (1) of the grounds of Appeal, from which the Appellant formulated issue (1), as set out in the brief of argument, is incompetent. We so hold.

We further hold that the totality of arguments canvassed by the Appellant's learned counsel with respect to issue (1) as formulated in his issues for determination would amount to total irrelevance insofar as the instant appeal is concerned.

[9] See pages 344-353 of the records

In the circumstances, issue (1) as set out, is accordingly resolved against the Appellant.

ISSUE TWO

Essentially, this issue is to determine whether or not the learned trial Chief Magistrate rightly convicted and sentenced the Appellant, on the basis of the evidence placed before him.

It seems to us, from our understanding of the Appellant's grievances by the instant appeal, and the state of the evidence led at the trial, which the learned trial Chief Magistrate correctly evaluated, that it is not in contention between the parties in the instant appeal that indeed acts of forgery were committed and the same was proved by circumstantial evidence led by the prosecution, in that, according to the letter, **Exhibit A**, written by the Federal Ministry of Lands and Housing, the letters, **Exhibits F1** and **F2**, purporting to emanate

from the Federal Ministry of Lands and Housing did not originate therefrom, leading to a conclusive inference that the letters were forged.

The findings of the learned trial Chief Magistrate on the offence of forgery against the Appellant, contained in the judgment now on appeal, are also reproduced as follows:[10]

> ***"The only piece of evidence that weight (sic) strongly in this trial on points in the direction of the 1st defendant and no other. In fact the gossamer thread in criminal trials revolves round the 1st Defendant who deposed to exhibits D1 & D2 from which I had earlier quoted paragraph 3 in this judgment. From the evidence adduced, I find established against the 1st Defendant all the essential ingredients of the offence of forgery contrary to section 364 of the Penal Code Law. That is because the facts of Exhibits D1 & D2 shows***

[10] See pages 332-334 of the records

the dishonest and fraudulent intent of the 1st Defendant by causing it to be believed that Exhibits F1 and F2 were the genuine replies to the letters of verification (Exhibits C1 & C2) which were written by the Federal High Court to the Federal Ministry of Lands, Housing and Urban Development to confirm the authenticity of title documents (C of O) submitted to the Federal High Court No. 6 presided by Hon. Justice A. F. A. Ademola in fulfilment of the conditions in the grant of bail to Dr. Sanni Shuaibu Teidi who stood trial before it. There is no doubt that Exhibits F1 and F2 were made by the 1st Defendant with the intent to commit fraud by deceiving the Court (F.H.C) as to the genuineness of those documents submitted to the Federal Ministry of Lands, Housing and Urban Development (F.M.L.H.U.D.) for verification...

With respect to the 1st Defendant, IDRIS MAHMOOD, I hold that from the evidence led at this trial and tendered Exhibits more particularly

Exhibits D1 and D2, I find present and established against the 1st Defendant all the ingredients that constitute the offence of forgery contrary to section 364 of the Penal Code Law (sic). The evidence led has established that Exhibits F1 and F2 first came to the limelight when they were conveyed by the 1st Defendant to the Federal High Court authority and in aid of which the 1st Defendant further deposed to Exhibits D1 and D2 stating that F1 and F2 were the authentic replies from the Federal Ministry of Lands, Housing and Urban Development (F.M.L.H.U.D.) when he knew they were not but for luck that ran out against the 1st Defendant he would have succeeded in deceiving the authorities of the Federal High Court in believing that Exhibits F1 & F2 were authentic."

In our esteemed view, the learned trial Chief Magistrate properly evaluated the evidence adduced before him and came to the right conclusion that the Appellant indeed committed the offence of forgery for

which he was charged. Ordinarily, the expectation ought to be that the Federal Ministry of Lands and Housing should directly despatch its responses to the inquiries from the Federal High Court, by letters addressed to the writer of the letters from the Federal High Court. However, in the instant case, the Appellant chose to obtain the said reply letters, **Exhibits F1** and **F2**, from the Federal Ministry of lands and Housing. He took the letters to his boss at the Federal High Court. He never disclosed to anyone in the office that it was a third party that assisted him in receiving the letters from the Federal Ministry. He took full responsibilities for the letters and that was why he confidently deposed to the Affidavits of verification, **Exhibits D1** and **D2**, by which he purported to certify the fidelity of **Exhibits F1** and **F2.** As such, when, *vide* **Exhibit A**, the Federal Ministry of Housing, disclaimed **Exhibits F1** and **F2** and confirmed that the letters did not emanate from the Ministry, every circumstantial evidence

pointed to the Appellant, and no one else, as the procurer of the fake **Exhibits F1** and **F2**. We so hold.

As the learned trial Chief Magistrate rightly found, the Appellant evinced his dishonest intent when he deposed to the Affidavits of verification, **Exhibits D1** and **D2** with the criminal intent of causing his employers to believe that the letters **Exhibits F1** and **F2** were genuine documents, when he knew that they were not.

As it is well known, the evaluation of evidence is primarily the function of the trial Court. It is only where and when it fails to evaluate such evidence properly or at all that the appellate Court can intervene and itself evaluate such evidence. On the other hand, where the trial Court has satisfactorily performed its primary function of evaluating evidence and has correctly ascribed probative value to it, the appellate Court has

no business interfering with the findings on such evidence.[11]

The Appellant's learned counsel also contended that there was no evidence before the learned trial Chief Magistrate that it was the Appellant that personally collected the fake letters, **Exhibits F1** and **F2** from the Federal Ministry of Lands and Housing. This indeed is beside the point. What is not in dispute is that it was the Appellant, who delivered the letters, **Exhibits C1** and **C2**, written by his employers, Federal High Court, to the Federal Ministry of Lands and Housing. He was also the one that brought back the fake responses, **Exhibits F1** and **F2**, which he posed to his employers as purported genuine replies from the Federal Ministry of Lands and Housing. He did not disclose to his employers that it was the acquitted 2nd Defendant who assisted him to receive **Exhibits F1** and **F2**. The acquitted 2nd Defendant was not a staff of the Federal

[11] China Goe Eng. Co. Vs. Nambative [2001] 2 NWLR (Pt. 698) 529

High Court. The Appellant's story that it was he, who collected the letters and gave to him, is clearly incredible. We so hold.

Every circumstantial evidence therefore pointed to the Appellant to the extent that even if he did not personally procure the fake documents, he must procured someone else to do so. The learned trial Chief Magistrate's finding that there were cogent and compelling evidence before him from which he came to the conclusion that the Appellant committed the offence of forgery contrary to **s. 364** of the **Penal Code** cannot be faulted.

It must be stressed that there is always a presumption of correctness with respect to the findings of trial Court. The burden rests on the Appellant who challenges the findings to displace the same. See *Moses Vs. State*.[12]

[12] [2006] 11 NWLR (Pt. 992) 458

In the instant appeal, the Appellant has failed to discharge the burden on him to displace the presumption that the findings of facts of the learned trial Chief Magistrate that resulted in his conviction and sentence, were perverse as contended in the grounds of appeal and as argued by the Appellant's learned counsel.

The Appellant's learned counsel again raised the issue of the applicability of the provision of **s. 167(d)** of the **Evidence Act,** as was done in his final address before the trial Court. We make reference to Ground 2 of the grounds of Appeal.[13]

The contention of the Appellant's learned counsel is that the learned trial Chief Magistrate erred in law when he failed to invoke the provision of **s. 167(d)** of the **Evidence Act** against the Respondent for the reason that even when the **PW1** admitted that the Police had

[13] Page 348-349 of the Records

custody of the Appellant's GSM Techno Mobile phone, which was recovered from the Appellant in the course of investigations. The **PW1** testified that as claimed by the Appellant, the mobile phone contained a recorded conversation between the Appellant and the acquitted 2nd Defendant. The **PW1** claimed that he listened to the conversation and registered the phone with the Police **Exhibit Keeper.**

The Appellant's learned counsel thus submitted that the refusal of the Respondent to produce the phone at the trial must lead to the presumption that if the Respondent had produced the mobile phone containing the recorded conversation between the Appellant and the acquitted 2nd Defendant, it would have been unfavourable to the prosecution's case.

The decision of the learned trial Chief Magistrate on this issue is reproduced as follows:[14]

[14] Page 329 of the Records

"On the second issue raised, section 145(1) of the Evidence Act deals with the rule as to presumptions by the court and clearly the court will not invoke any of these provisions, particularly that of 167(d) of the Evidence Act where it has not been shown that the evidence has been withheld this is because what has not been asked for and which was not given cannot be said to have been withheld. It must be noted that in practice if a notice to produce is served on a party who fails to produce as requested then the party that served the notice is at liberty to put in secondary evidence of what was sought to be produced but in the case of a subpoena being served and failure to comply with it will automatically lead to the issuance of a committal warrant for disobedience to the orders of the court and that is why the 1st Defendant ought to have subpoenaed whoever was in custody of whatever document it requested."

Section 167(d) of the **Evidence Act** provides as follows:

> ***"167. The court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business, in their relationship to the facts of the particular case, and in particular the court may presume that -***
>
> > ***(d) Evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."***

There is nothing on the records that reveals the actual content of the much touted Appellant's mobile phone other than the oral account given by the Appellant in his testimony. It is an elementary principle of the law of evidence that oral testimony of the contents of a document is inadmissible in the absence of the document itself. See the provision of **s. 128(1)** of the

Evidence Act and the authority of *Gudusu Vs. Abubakar*.[15]

In the circumstances of the present case therefore, it will be speculative to hold that the contents of the Appellant's said telephone conversation with the acquitted 2nd Defendant was not tendered by the prosecution because if it had been produced, it would have exculpated the Appellant of the offence of forgery. As it is well known, Courts do not act on speculation but on hard evidence produced before it. See *Zabusky Vs. Israeli Aircraft Ind*.[16]

We are therefore on *firma terra* with the learned trial Chief Magistrate that the provision of **s. 167(d)** of the **Evidence Act** is inapplicable in the circumstances of the instant case and as such cannot be invoked in favour of the Appellant.

[15] [2017] LPELR-43007(CA)
[16] [2008] 2 NWLR (Pt. 1070) 109 @ 133

On the basis of the foregoing analysis therefore, we again resolve issue (2) as set down for determination in the instant appeal against the Appellant.

On the whole, we hereby hold that the instant appeal is lacking in merit and in substance. We hereby affirm the conviction and sentence handed down by the learned trial Chief Magistrate to the Appellant for the charge of forgery for which he stood trial. The appeal is accordingly dismissed. We make no orders as to costs.

HON. JUSTICE O. A. ADENIYI
(Presiding Judge)
18/12/2020

HON. JUSTICE B. MOHAMMED
(Hon. Judge)
18/12/2020

Legal representation:

Sola Egbeyinka, Esq. (with **Fatima Ibrahim (Miss)**) – *for the Appellant*

S. R. Mahmud, Esq. – *for the Respondent*