IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT APO

THIS 3RD DAY OF MARCH, 2025

BEFORE HIS LORDSHIP HON. JUSTICE JUDE.O.ONWUEGBUZIE

SUIT NO.: FCT/HC/CR/582/21
MOTION NO.:M/

BETWEEN:

FEDERAL REPUBLIC OF NIGERIA----------COMPLAINANT/RESPONDENT

AND

SHIRU BABA PETER..……..……..DEFENDANT/APPLICANT

RULING

INTRODUCTION

This is criminal charges that bothers on a three (3) count charge of intent to defraud and issuance of dud cheques. Hearing commenced, the Prosecution called their first witness (PW1) Akande Gbemisola the investigation police officer (IPO), who testified that sometimes in January 2021 this matter was assigned to her table. That the petition was submitted by one Deji Oladetoyibo on behalf of the norminal complainant one Mr. Kayode Omotosho, who is now late. PW1 stated that the petitioner alleged that the Defendant approached the nominal complainant to borrow the sum of N10,000,000 in order to clear his goods at Apapa worf lagos to pay back in a month time and subsequently issued two post dated cheques of N25,000,000 and N9, 000,000 and that when the said cheques were presented for payment they were returned unpaid due to insufficient funds. That upon the receipt of the petition, the nominal complainant was called to come and shed more lights to the petition. That letters of investigation were written to various agencies including GTBank. That responses were received and analysed. That the response from Gtbank shows that the nominal complainant now late, transferred the sum of

N10,000,000 in two trenches of N5,000,000 each, to the Defendant and also shows how the cheques were presented went through clearing and was returned unpaid. That subsequently the Defendant invited and he gave his voluntary statement in the presence of the team of EFCC investigation officers. That the Defendant stated that he actually collated the money from the nominal complainant and that the said money was not meant for the clearing and that he also issued those cheques to pay the said N10,000,000. That after the statement he was released on bail to a reliable surety.

After the PW1's testimony the said petition, the voluntary statement of the Defendant, the said cheques, GTbank's responses and response from Sil Agency were tendered in evidence. The Court admitted them as evidence except the Extra Judicial Statement of the Defendant which was rejected after the test of its voluntarilines through a Trial Within Trail proceeding was not obtained voluntarily in accordance with the provisions of Evidence Act 2011 and Administration of Criminal Justice Act, 2015 which are the extant laws in this respect.

At the end of the PW1;s examination in Chief, the PW1 was cross-examined by the Defence Counsel. The Prosecution then closed their case on the testimony of their sole witness. The matter was adjourned to defence.

Then by a Notice of No Case Submission dated the 27th day of March, 2024 and filed on the 28th day of March, 2024, the Defendant prayed the Court to uphold the his submissions on the no case submission.

COURT'S ANALYSIS

In the address of the Defendant, he formulated a sole issue for the determination by this court to wit:

> Whether the Prosecution has made out a Prima Facie Case against the Defendant for him to enter a defence.

The Prosecution on the other hand distilled a sole issue as well for the consideration by this court which is:

> Whether from the overwhelming oral and documentary evidence, the Prosecution has made out a case which will require some explanation from

> the Defendant as to why he should not be found guilty for the offence of obtaining money by false pretence and issuance of dishonoured cheque.

I have read through the submissions of both counsels, the court thinks that the proper issue to determine in this case is the issue submitted by the Defence Counsel. Therefore, the Court adopts the issue donated by the Defence Counsel as the issue for determination.

The Defendant through his Counsel submitted before this Court that the Prosecution brought three Counts charge against the Defendant alleging the issuance of dud cheques on the charges. The Prosecution, called one witness PW1, the investigating police officer (IPO) who gave evidence and tendered the extra judicial statement of the nominal complainant and closed its case after cross examination. The court rejected the extra judicial statement of the Defendant sought to be tendered by the Prosecution upon a successful challenge of the voluntariness of same by the defence in a trial-within-trial.

The Defence Counsel submitted that a no case submission is properly made and upheld when there has been no evidence to prove an essential elements of the alleged offence or when the evidence adduced by the prosecution has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it. He cited the case of Ibeziako v. COP (1963) 1 SCNLR 99, and Ekpo v. State (2001) FWLR (Pt. 55) 454. That all the law requires of the honourable court to determine at this stage is whether the prosecution made out a prima facie case and not to evaluate evidence, that he humbly submit that there is no evidence against the Defendant.

It was the argument of the Defence that the prosecution through the IPO, PW 1 wrongly tendered the extra judicial statement of the nominal complainant who was not called upon to give evidence. Recently and emphatically in 2016, the Court of Appeal in AFAM OKEKE v The STATE (2016) LPELR-40024(CA), held per Helen Ogunwumiju, JCA in his leading judgement thus

> The extra judicial statement of a witness in a criminal trial is inadmissible as evidence for either side. The admissible evidence is the evidence on oath in open court by the witness which is subject to cross examination by the adverse party. The only time when an extra judicial statement of a witness is

admissible is where a party seeks to use it to contradict the evidence of a witness already given on oath.

The Counsel went further that for the avoidance of doubt on what an "extra judicial statement" is, at page 148 of Babalola's Law Dictionary, it is defined as: "A statement written or made outside the court." He cited also AJUDUA v FRN (2017) 2 NWLR (Pt. 1548) 1.

The Defence Counsel further submitted that, OKEKE's decision on the principle does not stand alone, for as far back as 1989, the Supreme Court had in the case of ESANGBEDO STATE (1989) 4 NWLR (Pt.113) 57 at 66 para, F, held per Nnaemeka-Agu, JSC (of blessed memory) as follows:

> We cannot look at the extra-judicial statements of the PW1, PW2 PW4 and PW9, which were not tendered as exhibits during trial, because those statements cannot be legal evidence...Even in the court of trial, the only proper use that could have been made of those extra-judicial statements of witnesses was to have used them for cross-examination of those witnesses in order to discredit their testimony.

Again in January 2001, the same apex court in The STATE v OGBUBUNJO (2001) LPELR-3223(SC) held thus:

> Extra judicial statements which remain in that category however credible they may appear, cannot be used as evidence in a trial. Learned Counsel for the appellant has contended, and this is conceded by Counsel to respondents that the statements of PW2 and PW6 relied upon by the Court below are extra-judicial statements, which are inadmissible as evidence in the proceedings.

It is was the Defence Counsel humble submission that from the above authorities that Exhibit EFCC 2 is inadmissible in evidence and same should be expunged from the record. The nominal complainant did not give any evidence on oath to support the allegations and was not cross examined. The Administration of Criminal Justice Act 2015 provides that where the nominal complainant in a charge is not present the charge must be struck out. Even if the court will look at

Exhibit EFCC 2, the nominal complainant in the inadmissible extra judicial statement stated that he was given a postdated cheque, then went on to contradict himself by saying that the cheque was not dated but when he wanted to present the cheque he called the defendant who came and inserted a date. During cross examination of the IPO who tendered the inadmissible extra judicial statement containing the contradiction, she was asked whether she has before the court the proof of the call log from the phone service provider, and she answered in the negative, as there is no such shred of evidence.

The PW1 during cross examination stated that she was not privy to the alleged facts that culminated to the charge. PW 1 said in cross examination that what she knew about the case is what the nominal complainant told her. PW1 tendered mere photocopies of the alleged cheques. Clearly endorsed on the cheque is the fact that the original purported cheques were with the prosecution but prosecution failed to tender the alleged purported cheque.

Further under cross examination, the Defence Counsel submitted that the PW1, who is the IPO was asked whether she compared the hand writing on the cheque with that of the nominal complainant and the defendant to observe that the cheque was not written or issued by the defendant. But that the hand writing on the cheque is that of the nominal complainant. The PW1 answered that she did not and that she is not a forensic expert. And she did not present any forensic report or evidence to show that the defendant wrote or issued the cheque.

Still under cross examination the Defence contended that the IPO, PW1 was asked whether she presented to the court any call log from the defendant's telephone service provider that the nominal complainant called the defendant and he told the nominal complainant to go ahead and present the cheque to the bank. IPO, PW1 answered in the negative that she does not have any such call log, neither did she present any to the court in proof of the allegation.

The Defence Counsel further contention was that there is no prima facie case or any case whatsoever presented to the honorable to warrant that the defendant will be called upon to defend. The alleged cheque is not before the court, the photocopies of the cheque tendered was not issued by the defendant, clearly by a simple comparison of the hand writing on the photocopies of the cheques and that

of the nominal complainant, it will stand out that the nominal complainant wrote and issued that cheque himself with the active knowledge of the prosecution. The Defence then urged the Court to compare the hand writings of the nominal complainant on the photocopy of cheque and EfCC 2. The Counsel relied on section 101(1) of the Evidence Act 2011, and asked why will the prosecution not tender a forensic report/evidence of a hand writing expert to prove the issuer or writer of the cheque.

The Counsel further argued that the whole gamut of the evidence of the IPO, PW 1, are all hearsay evidence. The IPO parroted what the nominal complainant told her and no more. That there is no shred of evidence from any investigation to support the charge. That hearsay evidence is inadmissible in law. The prosecution is merely trying to help a nominal complainant recover debt. And as have been said by the courts, severally, that the prosecution is not a debt recovery agent.

It is was the Defence final submission that there is no prima facie case made out against the defendant to warrant him to enter a defense. That there is no evidence to prove any of the essential element of the alleged offence. That the evidence adduced by the prosecution has been so discredited as a result of the cross examination on the record. And finally that the evidence of the prosecution is so manifestly unreliable that no reasonable tribunal could safely convict on it. The Counsel relied on IBEZIAKO V. C.O.P (SUPRA). That what is clearly evident is that the nominal complainant did not give evidence, this is contrary to the Administration of Criminal Justice Act, 2015. The evidence of the IPO, PW1 is hearsay evidence and inadmissible in law. That the extra judicial statement of the nominal complainant tendered by prosecution is inadmissible in law. That the defendant did not issue or write the cheque. That the cheque in question was not tendered in evidence. That the tendered photocopies of cheques were not issued or written by the defendant, and same were never presented to any bank as stated by the IPO, PW1 during cross examination.

The Defence then urged the Court at this stage is to determine whether the prosecution made out a prima facie case and not to evaluate evidence, even then there is no evidence before his lordship to evaluate. He cited DABOH v. STATE (1977) 11 NSCC 309 at 315; TONGO v. COP (2007) 12 NWLR (Pt. 1049) 523. He further urged the court to take note and to rule accordingly that there is before

the court no legally admissible evidence linking the defendant with the commission of the alleged offence with which he is charged. And that the reasonable, valid, proper and just decision is to discharge and acquit the defendant as there is no evidence against him.

The Prosecution on the other hand submitted that at this stage the court does not involve itself with the determination of the guilt or innocence of the Defendant which the counsel to the Defendant has been erroneously leading this court to hold. That this Honourable Court is only enjoined to determine whether the prosecution has made out a prima facie case; as it does not involve the evaluation of evidence or the consideration of the credibility of the witness. In support thereof, he referred the court to the cases of ALEX V. FRN (2018) LPELR-43709 (SC); STATE V EMEDO (2001) 12 NWLR (PT. 726) 131; EKPO V STATE (2001) 7 NWLR (PT 712) 292.

In R v COKER 20 NLR 62 the court held that:

a. The meaning of the submission of no case to answer is that there is no evidence on which, even if court believe it could not convict.

b. The question whether or not the court does believe the evidence does not arise, nor is the credibility of witnesses the issue at this stage.

c. The submission should be limited to a statement that one or more of the essential elements of the offence, there is no evidence on which, if the court believe it, it could convict.

The Prosecution went further that the essential element of a case is defined in ONAGORUWA VS THE STATE (1993) 9 NWLR (PT. 303) P.49 @ 85, PARAS C-D as "an element without which the offence cannot be sustained in law. It is an inevitable indispensable and important element of the offence. "Per TOBI, JCA.

The elements of the offence of issuance of dud cheque are as follows:

1. The defendant must have obtained credit by means of a cheque.

2. The cheque must be presented for payment within three months from the date on the cheque.

3. The cheque must have been dishonoured due to insufficient funds standing to the credit of the drawer.

The counsel cited ABEKE V STATE (2007) 9 NWLR (PT. 1040) 411 @ 436

It was the question of the prosecution that at this stage, could it be said that there is no evidence so far adduced by the prosecution to support the essential elements of the case against the Defendant?

The counsel submitted that a review of the evidence adduced by the prosecution reveals that prosecution has adduced essential elements to require the Defendants to offer some explanation to the court.

The prosecution then referred the court to the evidence of PW1 cited in paragraph 2.1 above and the content of the extra judicial statement of the nominal complainant admitted as Exhibits EFCC 2 which are summarily reproduced here:

> PW1, (AkanleGbemisola). She is one of the investigation officer assigned to the case. He testified that the Economic and Financial Crimes Commission received a petition from the Nominal Complainant, MrKayodeOmotosho, for a case of issuance of dud cheques and obtaining money by false pretence against the Defendant. She stated that the petitioner alleged that the Defendant approached him for a loan of N10,000,000.00 in order to clear his goods at Appa Wharf in Lagos with the agreement to play back in one month. She further stated that the petitioner alleged that the Defendant issued two post dated cheques in the sum of N2,500,000.00 and N9,000,000.00 which was presented but returned unpaid due to insufficient funds in the account of the Defendant.

The prosecution contended that PW1 also tendered the extra judicial statement of the nominal complainant duly marked as Exhibit EFCC2. The extra judicial statement of the nominal complainant clearly states that the Defendant represented to have goods at the Lagos port for clearing and requested for the sum of N10,000,000.00 to consummate same. That based on the belief of the representation, the nominal complainant deposited the sum of N10,000,000.00 into the account of the Defendant who then issued two postdated cheques in the total sum of N 11,500,000.00 inclusive of interest of N1,500,000.00. He also stated that

the Defendant gave him fake documents of a property which he had already sold to another person. That upon presentation of the cheques at the bank within three months of issuance, the cheques were declined due to insufficient funds in the account of the Defendant.

That the above facts which were culled from the records are in all fours with the elements of the offences as postulated above.

That before he starts with the analysis of whether the prosecution has made out a case requiring the defendant to enter a defence, it is apposite to clear the air as to several misconceptions and misrepresentations by the defendant in the No Case Submission made on his behalf by counsel.

That at paragraph 3.4 and 3.7 of the undated Written Address on No Case Submission, the counsel for the Defendant stated that the PW1 was unable to present any call log showing that the nominal complainant called the defendant to insert dates on the cheques. There is no basis for this argument as the fact whether a call was placed by the nominal complainant to the defendant is not relevant at this stage of the no case submission.

That also, at paragraph 3.5 and 3.9 of the Written Address of the Defendant, counsel alluded that the evidence of the PW1 is hearsay and that the cheques (Exhibits EFCC 3A & 3B) are photocopies. That it is disappointing that defence counsel failed to cite any legal authority why the court shouldn't admit the secondary evidence of the cheques despite the fact that the PW1 laid the proper foundation before same were duly admitted. More so, that the defence didn't object to the admission of the documents at the stage when the prosecution sought to tender them. Please refer to the case of FRN V USMAN (2012) 3SC (PT 1) 128 at 150-152, where the apex court held "...that evidence by a police officer of what a prospective witness told him in the course of investigation is admissible".

That furthermore, at paragraph 3.6 and 3.8 of the Written Address, the defendant alluded that there was no forensic analysis to compare the handwriting on the cheques with that of the defendant as the latter did not issue the cheques. He posited that the defence is trying to jump the gun. That the defence counsel cannot use a written address to manufacture evidence. That it is the argument of the prosecution that if the defendant intends to bring the above facts into this matter,

they should do so during their defence, and not in a Written Address which by all means cannot take the place of evidence on record. He referred this honourable court to ANDREW & ANOR V. INEC & ORS (2017) LPELR-48518 (SC); DODO V SOLANKE (2006) 9 NWLR (PT.986) 447 @ 471.

That the final argument or issue raised by the defence is that the extra judicial statement of the nominal, complainant duly admitted without objection as Exhibit EFCC 2 is inadmissible. He erroneously quoted the case of AFAM OKEKE VvTHE STATE (2016) LPELR-40024 (CA) and ESANGBEDO v STATE (1989) 4 NWLR (PT. 113) 57. It is the prosecution's submission that the above cases are not in all fours with the facts in the present matter before your Lordship. In those cases, the witnesses, that is PW2 in the case of AFAM OKEKE and PW1, PW2 and PW4 in the case of ESANGBEDO were all witnesses in the trial.

That however, in this present case, the nominal complainant whose statement was admitted is deceased and cannot be called as a witness or was never called as a witness. So, the question is whether the statement of a witness who was never called to testify can be admitted in evidence? To answer, he referred the court to the case of OKORO v STATE (1998) 14 NWLR (PT 584) 181 SC, where the apex court held that the extra judicial statement of a person not called as a witness is admissible.

It was the prosecution's contention that all the above quotes are clearly misconceptions of the meaning of No Case Submission or when an obligation arises from this matter. We have reiterated, respectfully, that a no case submission may be properly made and upheld:

1. When there has been no evidence of the alleged offence.

2. When the evidence adduced by the prosecution had been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

3. When the provision of section 303 of Administration of Criminal Justice Act (ACJA) is complied with.

The Counsel referred the court to the cases of ONAGORUWA VS. STATE (1993) 7 NWLR (PT 303) 49 @ 56 and UBANATU VS. C.O.P (2000) 2 NWLR (PT 634) 115 @141.

The prosecution further submitted that a no case submission means that from the evidence adduced by the prosecution, the Defendants have no case to answer and should not be called upon to defend himself. By a no case submission, the Defendants are submitting that the prosecution has not made out a prima case against him requiring his defense.

He submitted with respect that a prima facie case means that there is ground for proceeding. Prima facie is not the same as proof beyond reasonable doubt which comes later when the court has to find whether the Defendant is guilty or not.

The evidence against the defendant discloses a prima facie case when it is such that if uncontroverted and if believed, it will be sufficient to proof the case against them. that the prosecution has tendered documents which shows that the defendant issued dud cheques to the nominal complainant and did falsely represent that he had goods at Lagos Port for clearing thereby obtaining money from the nominal complainant.

He submitted most respectfully that the evidence adduced established a clear prima facie case against the defendant to warrant this Honourable Court to call upon him to enter his defence to the charge. He further argued that for what constitutes a prima facie case, the Supreme Court citing with approval the case of DURU V. NWOSU (1989) 1 N.W.L.R (Pt.113) 24 at 43, Nnamani, J.S.C. held in the case of UBANATU V. C.O.P (Supra) at 129 esp. paras. B-E as follows:

> It seems to me the simplest definition is that which says that "there is a ground for proceeding". "In other words, that something has been produced to make it worthwhile to continue with the proceeding. On the face of it, 'suggests that the evidence produced so far indicates that there is something worth looking at".

He cited ABACHA vs. STATE (2000) 11 N.W.L.R (Pt. 779) at Pg. 437 esp. 445-446, MOHAMMED v. STATE (2007) 7 N.W.L.R (Pt. 1032) S.C 152 P.162, Paras. F-H.

H finally urged the Honourable Court to find and hold that there is a prima facie case against the Defendant for which his defence is paramount.

On the Defendant's Reply on Points of Law; The Defence Counsel posited that section 131 (1) of Evidence Act 2011 provides:

> (a) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exist.
>
> (b) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. It is the burden of prosecution to adduce evidence and not the defendant of to show why he is not guilty as being suggested by prosecution's address.

The Defence contented in this point of law that the written submission of the prosecution is so terribly misleading and seeking to take the place of fact, evidence and law. That this is offensive to law and justice. He submitted that it is trite that address of counsel, no matter how brilliant is never a substitute for evidence needed to prove a case. He relied on ALIUCHA V. ELECHI (2012) LPELR 7823 (SC); And OYEYEMI V. OWOEYE (2017) LPELR 41903 (SC).

That the issues raised by the prosecution amounts to asking the defendant to show he is not guilty of the allegation. The prosecution's address did not consider that hearsay evidence of PW1 is not admissible in law.

That the nominal complainant who alleged to the PW1 some purported facts, was not presented to court to give the evidence. And as such was not presented for the cross examination for veracity. Section 214(2) Evidence Act 2011.

That PW1 who heard the allegation of the nominal complainant who did not give evidence must then adduce evidence as to the allegation. This was never done. The PW1 under cross examination was asked whether she investigated to ascertain who wrote/issued the cheque. Further whether there is proof before the court that Defendant issued the cheque. She answered that she is not a forensic expert and that she does not have any proof/evidence before the court that defendant issued the cheque. That the evidence of the allegation for dud cheque is that defendant issued the cheque. There is no evidence that defendant issued the cheque. So how

then can the defendant who did not issue the cheque be called upon to enter a defense of an allegation without any shred of proof/evidence.

The Counsel argued further that like all the paragraphs of the prosecutions written address, particularly 3.6, 3.7, 3.8, 3.9 and 3.10. the case exited in paragraph 3.10 is not on all fours and grossly misleading. The other paragraphs (3.7, 3.8 and 3.9) are challenging the position of the law and no evidence of any judicial authority setting aside the authorities cited for this.

That paragraph 3.11 of the prosecutions address is exactly the events, position of evidence and proceedings herein, which is the case of the defendant.

The Defence concluded by urging the court to hold that there is no prima facile case, no grounds for proceeding against the defendant, and the defendant cannot in law be called upon to defend a mere allegation when there is no evidence. The purported unsubstantiated hearsay evidence of prosecution has been so discredited by cross examination. And finally, he most humbly urged the court to discharge and acquit the defendant as there is no evidence to proceed on.

COURT'S DECISION

I have carefully noted the submissions, arguments and contentions of both counsels in this case. The position of the law is very clear. It is settled by a chain of authorities that a submission of "no case" to answer may be properly made and upheld in the following circumstances as correctly stated by the lower Courts:-

1. When there has been no evidence to prove an essential element in the alleged offence;

2. When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it. I derive my authority from the case of **AJIBOYE & ANOR v. STATE (1995) LPELR-300 (SC) (Pp. 8 paras. C).** The above principle of law was also succinctly held in the following case **Ibeziako v. Commissioner of Police (1963) 1 All NLR 61 (1963) NNLR 88; (1963) 1 SCNLR 99; Ajidagba & Ors v. I.G.P. (1958) 3 FSC 5; (1958) SCNLR 60; Okoro v. The State (1988) 5 NWLR (Pt. 94) 255; Adeyemi v. The State (1991) 6 NWLR (Pt. 195) 1.**

This Court is in agreement with the position and arguments of the Prosecution Counsel at paragraphs 3.1, 3.2, and 3.3 of the prosecution's written address in opposition to the Defendant's no case submission.

The argument of the Defence counsel at paragraphs 3.2, and 3.3 of his written submission in the No Case Submission, albeit the position of the law, however, the court would discountenance such submissions because, it is the opinion of this Court that such submissions no matter how well, are very premature to uphold at this stage of the trail.

I find refuge in the case of **AJIBOYE & ANOR V. STATE (supra)** where in Per Kutigi JSC (as he then was) stated that;

> **It must be recognised that at the stage of a no case submission, the trial of the case is not yet concluded. At that stage therefore, the Court should not concern itself with the credibility of witnesses or the weight to their evidence even if they are accomplices. The Court should also at this stage be brief in its ruling as too much might be said which at the end of the case might fetter the court's discretion. The Court should again at this stage make no observation on the facts. (See for example R v. Ekanem (1950) 13 WACA 108, Chief Odofin Bello v. The State (1967) NMLR 1, R. v. Coker & Ors 20 NLR 62)." Per KUTIGI ,J.S.C in ajiboye & anor v. state (1995) LPELR-300(SC) (Pp. 6 paras. A).**

Accordingly the no case submission of the defence is hereby dismissed. The Defendant is hereby called upon to put up his defence to this charge.

This is the ruling of the court.

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Hon. Justice Jude O. Onwuegbuzie

Appearances:

1. Tochukwu Nwazota Esq. for the Defence.
2. Samuel Chime Esq. for the Prosecution.