IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT ABUJA

THIS WEDNESDAY, THE 14TH DAY OF OCTOBER, 2015

BEFORE: HON. JUSTICE A. I. KUTIGI – JUDGE

SUIT NO: FCT/HC/CR/37/10

BETWEEN:

FEDERAL REPUBLIC OF NIGERIA…..... COMPLAINANT

AND

BASHIRU OLUMUYIWA……ACCUSED

JUDGMENT

The Accused Person was charged on a five counts charge all bordering on criminal breach of trust punishable under **Section 312 of the Penal Code Law, Cap 532, Laws of the Federation of Nigeria.**

At plenary hearing, the Prosecution called five(5) witnesses and tendered ten(10) set of documents, in order to prove the charge. All the prosecution witnesses were duly cross examined by learned counsel to the Accused Person.

After the close of the Prosecution's case, learned counsel to the Accused Person announced his intention to make a no-case-to answer submission on behalf of the Accused Person. The court took written arguments of learned counsel on both sides with respect thereof; and by a considered Ruling delivered on 10th July, 2012, the court dismissed the accused person's submissions of no-case-to answer. Thereafter, the Accused Person entered his defence. He testified in person but called no further witness(es) and also did not tender any document(s) in evidence. He was equally cross-examined by the learned counsel for the prosecution, after which the Accused Person closed his defence.

Parties thereafter filed and exchanged their final written addresses.

In the final address filed on behalf of the Accused Person dated 8th August, 2014 but filed on 11th May, 2015, two issues were raised as arising for determination, namely:

1. **Whether the Prosecution case as instituted, was initiated by due process of commencing criminal proceedings?**

2. **Whether the Prosecution has been able to prove the charges against the Accused Person beyond reasonable doubt.**

The prosecution in turn filed its final written address on 18th May, 2015 but dated 15th May, 2015 in which only one issue was formulated as arising for determination thus:

"Whether the Prosecution has proved the essential ingredients of the offence of criminal breach of trust against the Accused Person beyond reasonable doubt."

Now issue (1) (supra) raised by learned counsel to the Accused Person on the competence of the charge due to absence of a signature of the prosecuting counsel or issuing authority clearly lacks any legal validity. I have taken due recourse to the records of court and both the original charge upon which the accused was initially arraigned and the final amended charge filed with leave of court and which the Accused Person again pleaded to, were all duly initiated and signed by the learned prosecuting counsel. This appear to me to have knocked off the bottom of this contention. Also, learned counsel to the Accused Person did not furnish the court with his own copy of the amended charge or indeed any charge sheet which he contends was not signed; and even if the court was minded to inquire into the validity of the contention, it is difficult, if not impossible to meaningfully determine the point of objection without a perusal of the said **"faulty"** charge. I cannot see how a written address can provide any factual basis or template to support such contention which now amounts to speculative posturing. The court cannot act in a vacuum and or engage in any such speculative exercise.

It is however curious that this point was never raised at any time during plenary hearing when the Accused Person pleaded to the initial charge and the subsequent amended charge. It appears now too late in the day to raise such objection. In law, even where such objection may be availing,

and not as in this case which clearly lacks any supporting root, the proper time to raise the objection to such perceived irregularity is either when the charge is about to be read and or after the charge has been read to the accused and this most be done promptly. See **F.R.N V Adewunmi (2007)10 N.W.L.R (pt.1042)399; Okaroh V. The State (1990)1 N.W.L.R (pt.125)128 at 136 to 137.**

Issue 1 raised by the Accused Person cannot in the circumstances be availing or germane and is accordingly discountenanced.

Now I have carefully considered the charge in this matter, the evidence adduced by parties and the written addresses filed by the learned counsel herein to which I may refer to in the course of this judgment where necessary. It seems to me that the single issue for determination in this matter and which requires the most circumspect of consideration is whether the prosecution has proved the charge against the accused person beyond reasonable doubt to warrant a conviction for the offences charged. Now, it is not a matter for dispute that the charge accused person is facing involves the alleged commission of crimes. Under our criminal justice system and here all parties are in agreement, that the burden or onus is clearly on the prosecution to prove the guilt of the accused persons beyond reasonable doubt. See **Section 135(1) of the Evidence Act.** The position of the law, as provided for by **Section 135(2) and (3) of the Evidence Act,** needs restatement, that the burden of proving that any person has been guilty of a crime or wrongful act is, subject to **Section 139 of the Act,** on the person who asserts it; and that if the prosecution proves the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt is shifted on to the Accused person.

In shedding more light on the statutory responsibility and expectation of the prosecution to prove its case beyond reasonable doubt, the Supreme Court held in **Mufutau Bakare V. The state (1987)3 SC 1 at 32,** per Oputa, JSC (now late) as follows:

"Proof beyond reasonable doubt stems out of a compelling presumption of innocence inherent in our adversary system of criminal justice. To displace this presumption, the evidence of the prosecution must prove beyond reasonable doubt, not beyond the shadow of any doubt that the person accused is guilty of the offence

charged. Absolute certainty is impossible in any human adventure including the ministration of criminal justice."
See also **Lortim V. State (1997)2 N.W.L.R (pt.490)711 at 732; Okere V. The State (2001)2 N.W.L.R (pt.697)397 at 415 to 416; Emenegor V. State (2009)31 W.R.N 73; Nwaturuocha V. The State (2011)6 N.W.L.R (pt.1242)170.**

It is also well settled that in a criminal trial, the prosecution could discharge the burden placed on it by the provisions of **Section 135(2) and (3) of the Evidence Act,** to prove the ingredients of an offence, and invariably the guilt of an Accused Person beyond reasonable doubt, in any of the following well established and recognized manners, namely:

1. By the confessional statement of the accused which passes the requirement of the law; or

2. By direct evidence of eye witnesses who saw or witnessed the commission of the crime or offence; or

3. By circumstantial evidence which links the Accused Person and no other person to or with the commission of the crime or offence charged.

See **Lori V. State (1980)8 8-11 SC 18; Emeka V. State (2011)14 N.W.L.R (pt.734)668; Igabele V. State (2006)6 N.W.L.R (pt.975)100.**
Being therefore mindful of the well settled principles as espoused in the authorities cited in the foregoing, I shall proceed to examine the instant charge in the light of the evidence adduced by both the prosecution and the Accused Persons, in order to determine whether or not the prosecution has established the charges against the Accused Person beyond reasonable doubt.

I consider it appropriate for purposes of clarity and ease of understanding to restate the five(5) counts charge against the Accused Person thus:

"1. **That you, Bashiru Olumiyuwa on or about the 5th day of February, 2008 at Abuja within the Abuja Judicial Division of the High Court of the Federal Capital Territory being entrusted with an Oando share certificate valued at Three Hundred and Ten Thousand Naira (N310,000.00), property of one Mr Enoman Oton given to you for the purpose of stock trading, sold the shares and dishonestly**

converted the proceeds to your own use and thereby committed an offence punishable under Section 312 of the Penal Code Law Cap 532 Laws of the Federation of Nigeria (Abuja) 1990.

2. **That you, Bashiru Olumiyuwa on or about the 5th day of February, 2008 at Abuja within the Abuja Judicial Division of the High Court of the Federal Capital Territory being entrusted with Thirty Three Thousand Naira (N33,000.00), property of one Mr. Enoman Oton given to you for the purpose of stock trading, did dishonestly convert same to your own use and thereby committed an offence punishable under Section 312 of the Penal Code Law Cap 532 Laws of the Federation of Nigeria (Abuja) 1990.**

3. **That you, Bashiru Olumiyuwa sometime in February, 2008 at Abuja within the Abuja Judicial Division of the High Court of the Federal Capital Territory being entrusted with the sum of Two Hundred and Twenty Eight Thousand Naira (N228,000.00) property of one Mr. Enoman Oton given to you for the purpose of purchasing insurance shares did dishonestly convert same to your own use and thereby committed an offence punishable under Section 312 of the Penal Code Law Cap 532 Laws of the Federation of Nigeria (Abuja) 1990.**

4. **That you, Bashiru Olumiyuwa sometime in February, 2008 at Abuja within the Abuja Judicial Division of the High Court of the Federal Capital Territory did dishonestly convert to your own use the sum of Eight Thousand Naira(N8,000.00) property of one Mr. Enoman Oton given to you for the purpose of purchasing Central Security Clearing System (CSCS) pin number and thereby committed an offence punishable under Section 312 of the Penal Code Law Cap 532 Laws of the Federation of Nigeria (Abuja) 1990.**

5. **That you, Bashiru Olumiyuwa sometime in February, 2008 at Abuja within the Abuja Judicial Division of the High Court of the Federal Capital Territory being entrusted with an Oceanic Share Certificate valued at Six Hundred and Fifty Seven Thousand Naira (₦657,000.00) property of one Mr. Enoman Oton given to you for the purpose of stock trading sold the shares and dishonestly converted same to your own use and thereby committed an**

offence punishable under Section 312 of the Penal Code Law Cap 532 Laws of the Federation of Nigeria (Abuja) 1990."

All the above counts as stated earlier border on alleged criminal breach of trust. It is noted here that the Accused Person was charged with these counts under **Section 312 of the Penal Code Act (P.C.A)** which is the punishment section for criminal breach of trust. It provides thus:

"Whoever commits criminal breach of trust shall be punished with imprisonment for a term which may extend to seven years or with fine or with both."

Whereas it is **Section 311 of the Penal Code Act** that defines Criminal Breach of Trust. It provides as follows:

"Whoever, being in any manner entrusted with property or with any dominion over property, dishonestly misappropriates or converts to his own use that property or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits criminal breach of trust."

In order to establish an offence of Criminal Breach of Trust, an essential element that must be proved by the prosecution is that set out in Section 16 of the Penal Code Act. It provides thus:

"A person is said to do a thing "dishonestly" who does that thing with the intention of causing a wrongful gain to himself or another or of causing wrongful loss to any other person."

Learned counsel for the prosecution has relying on the above provisions succinctly set out the salient ingredients that must be present for an offence of criminal breach of trust under Section 311 Penal Code Act to be established. They are:

" (a) **That the accused was entrusted with property or with dominion over it.**

(b) **That he;**

(i) Misappropriated it; or
(i) Converted it to his own use.
(iii) Disposed of it.

(c) That he did so in violation of:

(i) Any direction of law prescribing the mode in which such trust was to be discharged.
(ii) Any legal contract expressed or implied which he made concerning the trust; or had made concerning the trust; or
(iii) That he intentionally allowed some other persons to do so as above.

(d) That he acted dishonestly."

The issue now is whether or not the prosecution has proved the above salient ingredients of the offences against the Accused Person. It is therefore critical to now streamline the substance of the case made out on the record. Now on the evidence, the case of the prosecution in substance is that the complainant who testified as PW1 engaged in the business of speculative trade in stocks with the Accused Person. The trade or business required an investment of about N1,000,000 with dividend to be paid at an agreed percentage within a period of three months. PW1 stated that to make up the investment sum, he gave the following share certificates to Accused Person to sell, to wit; Oceanic Bank share certificate valued at N310,000 vide **Exhibit P2(1)** and Oando Plc share certificate valued at N657,000 vide **Exhibit P2(2).** He then added the sum of N33,000 in cash to make up the N1,000,000 which the Accused Person acknowledged receipt of vide **Exhibit P1(2).**

PW1testified that he further gave the Accused Person the sum of N228,000 vide **Exhibit P1(3)** to buy insurance stocks and another N8,000 to buy what was called a "pin number of central security clearing system" (CSCS) which enabled the customer or client to check his or her stock trading without reference to the stock broker.

It is the case of PW1 that the Accused Person collected all these sums but he never received the expected returns on the investment. Also that the

Accused Person did not carry out or execute the assignment to buy the shares and the CSCS pin number and that he never received back any of the moneys he gave for these assignments. PW2 and PW3 in substance corroborated the narrative of the complainant. The PW4 and PW5 were in court to confirm that the share certificates **Exhibit P2(1) and (2)** were indeed sold vide **Exhibits P6 and P7.**

On the part of the Accused Person, the substance of his narrative is that his company engages in stock trading business and that they had a product called speculative investment which meant you invest in shares in the capital market. They trade in it on behalf of the client and give returns. He stated that he met PW1 who proposed investing ₦1,000,000 in the speculative business but that he did not have physical cash. PW1 however had shares in two companies. He then proposed to PW1 that they value the share certificates and when they did, there was a shortfall of N33,000 which PW1 paid him to make up the N1,000,000. He then issued **Exhibit P8(1)** which is the first agreement between them which spells out the returns PW1 will get in three(3) months. The Accused Person stated that after they entered into the agreement, the capital market became volatile and verification of share certificates also became difficult. That his duty was to take the share certificate to the register for verification and that part of the documents given to them by PW1 was authority to receive cash or payment for the certificate. He stated that unknown to them, the signature on the form attached to the Oando certificate was not regular.

That with respect to the Oceanic share certificate, it was verified and sold a few days before the expiration of the speculative investment term. That after the sale but before the release of the cheque, the stock broking firm they used called PW1 to confirm whether he, PW1 authorised the sale and whether the cheque be released to them. PW1 told them to stop action and that he will come to Lagos. That he and PW1 then went to Lagos in June where he (PW1) signed for the cheque and paid same into his account as it was issued in his name. That when they returned to Abuja and they could not now fully implement the terms of the initial investment, because of the difficulties in getting the certificates cleared, they agreed to roll-over as stated in the second agreement **Exhibit P8(2).**

The Accused stated that there was another colleague, PW3 in the office of the complainant who invested ₦500,000 but who wanted to terminate the relationship. He then suggested that since the value of the Oceanic Bank

shares collected by PW1 is ₦657,000 while the return on investment for the first three months was ₦259,301, he asked him to give PW3 ₦400,000 so that he can use the balance as his return on investment for the first three months, thereafter they agreed to roll-over for another three months.

He stated that the basis for the roll-over is the ₦400,000 PW1 gave PW3 and the value of the Oando certificate when realised. That he never converted any Oando shares as he the complainant got a return on his investment. That the balance of ₦259,301 is what he got as his profit from the first investment. That the second investment or roll-over was to lapse in September but that before then, PW1 had reported the matter to EFCC.

I have given the substance of the position of parties on both sides of the aisle. The critical question now as already alluded to is to situate the evidence within the threshold set by law and determine whether or not the prosecution has proved the constituent elements of the alleged offences in the charge against Accused Person. I had earlier similarly stated the ingredients or elements to be established to sustain the allegation of criminal breach of trust. I need not repeat them.

Before delving into the substance, it appears important to state that on the evidence that the relationship between the complainant and Accused Person was drawn out creating challenges in terms of precisely denoting what parties agreed to and most importantly the application of the terms so agreed on. For me the best approach in the context of the facts of this matter and particularly where the documents in the matter appear to form part of a long drawn transaction, then the documents should be construed together and not in isolation to fully appreciate their legal purport.

I find support for this in the decision of **Royal Exchange Nig Ltd & Ors V. Aswani Textile Ind. Ltd (1991)2 N.W.L.R (pt.176)639 at 669D** where **Tobi J.C.A (as then was)** stated thus:
"Where documents form part of a long drawn transaction, such as in the instant case, they should be interpreted not in isolation but in the context of the totality of the transaction in order to fully appreciate their legal purport and impact. That is the only way to find out and determine the real intention of the parties. A restrictive and restricted interpretation which does not take cognisance of the total package of the transaction in which the documents are integral part cannot meet the justice of the case"

Similarly in **Nwobi V. Anukam (2001)14 WRN 38 at 39 CA, the Court of Appeal per Nsofor J.C.A** stated that in giving effect to the agreement of contracting parties, the court has a duty not only to look at what the parties wrote or said but also at what they did, their conduct or **"Modus Operandi**".

Finally the **Supreme Court in Omega Bank Nig Plc V. O.B.C Ltd (2005)All FWLR (pt.248)1964 per Musdapher JSC** instructively stated clearly and in unambiguous terms that in finding parties intendment, much as a court should not make out a contract where none exist or make one for the parties, courts should seek to uphold commercial bargains made by parties wherever possible recognising that parties often record the most important agreements in crude and summary fashion. That courts should construe any contractual document broadly and fairly without being too astute or subtle in finding defects and that once it is satisfied that there was an ascertainable and determinate intention to contract, it should strive to give effect to that intention looking at the intent and not the mere form.

I will endeavour to be guided by these instructive decisions.

Now in this case, it is not in dispute on the evidence that the various sums stated in the five(5) counts charge were entrusted to the accused person for clearly defined purposes as contained in the charge sheet. I shall treat counts 1, 2 and 5 together because of their shared factual connection and then counts 3 and 4. Now the amounts contained in counts 1, 2 and 5 being value of 2 share certificates and actual physical cash were entrusted to Accused Person by PW1, the complainant to enable him engage in speculative stock trading on behalf of the complainant with returns to be paid at an agreed percentage at the end of three months. On the evidence, there is really no dispute on these facts. The sums of ₦310,000 and ₦657,000 covered by counts 1 and 5 was the value accused himself agreed they placed on the Oando Plc share cerficiate, **Exhibit P2(1)** and the Oceanic Bank certificate, **Exhibit P2(2)** which were handed over to Accused Person to sell to make up the N1,000,000 investment that PW1 made in the speculative business.

Even with the valuation of the two share certificates, there was still a shortfall of ₦33,000 covered by count 2 which complainant now gave to the accused in cash to complete the ₦1,000,000 investment. The Accused

acknowledged receipt of this investment of ₦1,000,000 vide **Exhibit P1(2)** and the two agreements executed between parties, **Exhibits P8(1 and 2)** which cover two periods attest to this entrustment. I only wish to state here that these agreements between parties ordinarily constitutes the basis for the mutual reciprocity of legal obligations between them, but as I already alluded to, where the transaction is drawn out as in this case, the approach of the court must necessarily be all encompassing to meet the justice of the case. I shall return later on to this point.

Counts 3 and 4 on the other hand and the amounts contained therein were also given for specific assignments, to wit buying of shares and purchasing of a central security clearing system (CSCS). The accused admitted collecting these sums in evidence. Indeed by **Exhibit P1(3),** the Accused Person acknowledged receipt of the sum of ₦228,000 for the purchase of shares. There is therefore no question that the Accused Person was entrusted and had dominion over the sums covered by all the counts. The next constituent ingredient to consider is whether he misappropriated these sums or converted it to his own use or disposed of same in violation of any legal contract expressed or implied which he made concerning the trust; or had made concerning the trust. And he must have done so dishonestly. I had also early stated the provision of **Section 16 of the Penal Code** on what dishonestly entails. I need not repeat same.

Once again in resolving this issue, it is to the entirety of the evidence we must resort to. I once again start with counts 1, 2 and 5. As stated earlier these counts have a shared factual nexus in that the sums therein cumulatively formed the basis of the initial investment of N1,000,000 made by the complainant and given to the Accused Person for stock trade. The relationship was reduced into writing; here it must be emphasised that there are two agreements, the initial agreement and the roll-over agreement. In view of its relevance to the determination of these counts, I incline to reproduce the relevant portion of the initial agreement vide **Exhibit P8(1)** as follows:

"SPECULATIVE CONTRACT NOTE

By the order of Mr. ENOMAN u. Oton

Date: 5th March, 2008 **Terminal Date: 5th June, 2008**

CSCS Account No:

Contract Note No: 000235

Security: Speculation for 3 months

Other Terms and Conditions: The Cheque for the investment is receivable 5 days after the terminal date. The amount receivable shall be the principal value plus the returns as analysed below:

Principal Amount	**1,000,000**
Period of Investment	**3**
Rate Per Month	**9%**
Expected Rate of Returns for the Period	**0.27**
Gross Returns for the Period of Investment	**270,000**
Statutory Deductions	
Contract Stamp	**203**
Commission	**7,425**
Sec Fees	
NSE Fees	**1,890**
CSCS Fees	**810**
VAT @ 5% on Commission	**371.25**
NET Amount of Return	**259,301.25**
TOTAL AMOUNT RECEIVABLE AT THE END	**1,259,301.25"**

I will refer to the 2nd agreement later on. For now, the above as stated earlier constituted the basis or contains the terms to regulate the relationship. By the above exhibit, the ₦1,000,000 investment by

complainant has a tenure of three(3) months commencing on 5th March, 2008 and ending on 5th June, 2008. The return receivable is clearly indicated therein. On the evidence, it is not in dispute that this ₦1,000,000 investment was not made or given to Accused Person wholly in cash. Indeed there are two elements to the payment(s) made by complainant. There is the physical element or cash of ₦33,000 while the balance to make up the total amount of ₦1,000,000 was to be obtained from the sale of Oando and Oceanic share certificates of complainant vide **Exhibits P2(1) and P2(2).**

It appears to me logical that the execution of this first agreement must necessarily be predicated on the sale or receipt of the value of the share certificates. This for me is a necessary and logical consequence of the agreement. The commencement date of the speculative trading on the agreement reads 5th March, 2008 but without the receipt of the value of the two share certificates, the returns expected by 5th June, 2008 would clearly be far-fetched and or unrealistic.

The question then that arises is when was the value of the two share certificates actually realised? Relevant here is the evidence of PW4 and PW5 who work respectively for Oceanic Registrars and First Registrars Ltd. They were summoned to court to give evidence in respect of the share holding of complainant in Oceanic Bank and Oando Plc respectively. PW4 confirmed the shareholding of complainant in **Exhibit P2(2),** the share certificate and stated that the shares of complainant was verified on 15th May, 2008 and same was sold on 20th May, 2008. This position is confirmed in all material particulars by **Exhibit P7** a letter from Oceanic Registrars dated 27th May, 2010 written to Head of Operations EFCC in response to their enquires over the sale of the said Oceanic Bank certificate. On the evidence, the value of the share certificate was ₦675,000.

It is clear from the above that the value of this share certificate which is a fundamental component of the speculative trading transaction was only realised after two months into the relationship with a couple of days remaining for the three months tenure of the initial investment to lapse. It is also in evidence by the accused that even after the sale of this share certificate, the stock broking firm in charge of the sale called on the complainant and enquired whether he authorised the sale and whether they should release the cheque. The complainant told them to stop the

issuance of the cheque and called upon the Accused Person and told him what happened. That they then went together in June to Lagos where complainant signed for the cheque as it was issued in his name and he paid same into his account.

Under cross-examination, the complainant did not in substance challenge this narrative, only that they went to Lagos in May to collect the proceeds which he paid into his account. Notwithstanding the slight difference with respect to when parties actually went to Lagos to collect the proceeds, what is however clear and which cannot be denied is that the value of this share certificate which is an important component of the investment was collected by the complainant himself some few days before the tenure covered by the first agreement, **Exhibit P8(1)** was to lapse. Let me leave this point for now and now deal with the second component or share certificate of Oando which also forms another pillar of the transaction.

On this point, PW5 stated clearly that further to the enquires by EFCC over the status of the share certificate of PW1 with Oando, they responded vide **Exhibit P6** and stated that from their records, the share certificate of complainant was lodged into the CSCS depository and sold by Hedge Securities Ltd on 20th August, 2008 and 8th July, 2008 respectively. It is therefore clearly not difficult to see that the very basis or foundation of the initial investment covered by **Exhibit P8(1)** has been severely compromised by the trajectory of the above narrative. I really cannot see it in any other light. If the two share certificates of PW1 or complainant were to be sold and the proceeds used to invest, it goes without saying that without the proceeds, there is no way that the investments can be made in the first place. In this case, the Oceanic Bank share certificate was only verified on 15th May, 2008 and sold on 28th May, 2008 about 6 days to the end of the agreement in **Exhibit P8(1)** which has a terminal date of 5th June, 2008. On the other hand, the Oando share certificate was sold on 8th July, 2009, more than a month after the expiry of the terminal date of 5th June, 2008 on **Exhibit P8(1).** This date when the Oando Certificate was sold is even about a month into the roll over agreement in **Exhibit P8(2)** dated 11th June, 2008. I will shortly too deal with the second roll-over agreement. In the circumstances, it is difficult to fathom any valid basis for the allegation of dishonest misappropriation or conversion at this point. The proceeds of sale of the share certificate was never fully realised or utilised within the three months of **Exhibit P8(1).**

At this point, in my view, it was open to the parties to determine the relationship in view of the apparent difficulties but this did not happen; rather parties willingly agreed to continue with the relationship which detracts in my opinion from any consideration of impropriety. Here I accept the narrative of Accused Person that with the very late accrual of the proceeds of the share certificate, he pleaded with the nominal complainant or PW2 to roll-over the agreement and he will bear the loss arising from the returns expected by complainant from March to June covered by **Exhibit P8(1).**

The complainant on the evidence accepted this arrangement which led to the roll-over agreement executed by parties **Exhibit P8(2)** which started in June and was to end in September. It is however equally important and instructive to understand the dynamics of this second arrangement. As stated earlier, the value of the Oceanic share certificate of ₦675,000 was received directly by complainant. The accused then pleaded with complainant to pay or give ₦400,000 to PW3, Mrs Margareth Allah Yafi, who was on a similar scheme with accused person but who wanted out of the relationship; the complainant agreed. The difference between N675,000 and N400,000 amounted to returns which accused forfeited to the complainant notwithstanding the fact that on the evidence, he cannot really be faulted on the delay in realising the proceeds of the share certificates. The N400,000 given by complainant to PW3 and the value of the Oando share certificate which was then yet to be realised provided the basis for the second agreement or what is called the roll-over agreement, **Exhibit P8(2).** The agreement contains similar terms as **Exhibit P8(1)** with a commencement date of 11th June, 2008 and a terminal date of 10th September, 2008. It is clear to me and I hold that the complainant accepted the roll-over because:

1) He realised and accepted that there were difficulties or challenges in getting the proceeds of his share certificates which affected the initial agreement and particularly the expected returns.

2) He clearly benefited not withstanding these difficulties. The balance of N275,000 after the N400,000 he gave PW3 still remained with him till date.

Now on the evidence, the complainant said he kept this balance of ₦275,000 because the accused abused the relationship. This contention

with respect is tenuous and bereft of credibility. If there was an abuse of the relationship as alleged by complainant, why then continue with the relationship? If indeed there was an abuse, why pay PW3 N400,000 from the proceeds of the sale of Oceanic Bank share certificate to allow for continuation of the relationship? I just wonder. The complainant appears to me intelligent and with a discerning disposition and therefore it is difficult to accept that he continued in a relationship where trust was lacking or where the relationship was **"abused."** It is also difficult to accept his narrative that he simply kept the balance of N275,000 of the N675,000 Oceanic Bank share certificate proceeds after giving N400,000 to PW3 for no apparent reason. I also do not accept that he gave the N400,000 to PW3 out of sympathy for the accused. These in my opinion, are all good business decisions taken by complainant within the context of the relationship with the paramount objective of still making his profit or returns. He clearly benefitted by the N275,000 accused forfeited over the first transaction and then agreed for a roll-over as contained in **Exhibit P8(2).** I am certain that the complainant did not conceive that the sum of ₦275,000 is a gift and in any event there is no evidence to support it. I am in no doubt that this amount represented or was to be used by complainant as a return on his first investment covered by **Exhibit P8(1)** which I have severally stated never materialized in the first place due to difficulties in getting the value of the share certificates as and when due and as originally contemplated by both parties when they entered into the agreement.

I here clearly do not accept the testimony of PW1 or complainant on this point. The testimony of the accused that the amount was to be used as a return on complainants first investment to allow for the roll-over appear to me reasonable, more plausible and consistent with the initial agreement and the roll-over which complainant agreed to. Let me perhaps be prolix here for ease of comprehension and clarity. By **Exhibit P8(1),** the principal amount invested was N1,000,000 while the total amount receivable at the end of 3 months was N1,259,301.25. A substantial portion of the investment was to be realised from sale of share certificates. Because of challenges, only one share certificate was sold at an amount of N675,000 and at the end of the first three months tenure. In normal situations, this was what was to be rolled over in addition to the proceeds of the Oando share certificate whenever sold. The complainant agreed to give out N400,000 out of the amount on the prompting of accused person and kept N275,000. In real terms, instead of the N675,000 of the Oceanic share certificate and a key component of the investment to be rolled- over, only

N400,000 was invested by complainant from the Oceanic share certificate contrary to the express or clear agreement of parties and the balance of ₦275,000 was kept by the complainant as his returns on the first investment. The complainant therefore benefitted even without any investment or trading on stocks been undertaken. It is therefore difficult to situate any wrong doing with respect to this first transaction and the trajectory of the facts and evidence which I have evaluated above.

Now with respect to the second roll-over agreement **Exhibit P8(2),** I had earlier stated that it has the same or similar terms with **Exhibit P8(1).** It is also similarly titled **"speculative contract note"** with a commencement date of 11th June, 2008 and a terminal date of 10th September, 2008. At this point and on the evidence, it is taken that the value of the Oceanic Bank certificate has been realised even if what was actually given to accused was ₦400,000 out of the proceeds of the sale which is ₦675,000. On the evidence by **Exhibit P6,** the value of the Oando share certificate was only realised on 8th July, 2008 about a month into the second agreement. What was expected of accused here was to carry out the terms of agreement as encapsulated in **Exhibit P8(2).**

Now it is not in dispute that at the terminal end of this agreement on 10th September, 2009 that the complainant has not received either the principal amount invested or the expected returns but does this without more translate to criminal breach of trust within the purview of the law? I have carefully read the evidence of the prosecution witnesses, and I cannot situate precisely any elements of conversion or misappropriation particularly in the context of this drawn out relationship. The history and or facts of the relationship and the challenges cannot be wished away or discounted with. I do not accept that failure to perform a contract without more translates to conversion or misappropriation. Inherent in those offences is the necessary element of dishonestly taking someone else's money or property with the intention of causing wrongful gain to himself or another or causing loss to any other person. These cannot be determined in a vacuum or on conjectures no matter how plausible. There is nothing in evidence to show whether these moneys were actually invested or not in the speculative stock trading exercise. There is similarly nothing before the court indicating that the moneys were put into other ventures to the benefit of the accused person or another. The fact of failure to pay the investment and return cannot without more be enough.

The Prosecution I believe ought to have done more particularly in view of the nature of the business accused person is engaged in which is speculating on stocks and which the accused has described as volatile and unpredictable. Indeed the agreement of parties is titled **"speculative contract note"** which suggests to me that the precise parameters or details or facts of how the agreement would ultimately pan out is unknown and left to the dictates of market forces. Where a business is conducted on such imprecise parameters, this too must be factored in construing such agreement and some allowance given for performance. In this case on the evidence, barely 5 days after the terminal date for the performance of the contract, the complainant wrote the petition, **Exhibit P3a** to the EFCC. Where therefore agreements of this nature are not fully realised, it will be better particularly in the context of the facts of this case to resort to civil remedies to recover the investment rather than make it a subject of a criminal trial or action.

With respect **to counts 1, 2 and 5** on the charge, I have not been placed on a comfortable position to hold that the counts were proven beyond reasonable doubt. I agree that reasonable doubt does not mean beyond every shadow of doubt See **Mufutau Bakare V. The State (1987)3 SC 1 at 32; Sule Ahmed (Alias Eza) V. The State 8 NSC R 273; Miller V. Minister of Pensions (1947)2 All ER 372.** It is however firmly established that the burden of the prosecution is only discharged when the essential ingredients of the offence have been established and the accused is unable to bring himself within the defences or exceptions countenanced by the law generally or the statute creating the offence. See **Oteki V. A.G Bendel State (1986)2 NWLR (pt.24)658.**

Therefore while proof beyond reasonable doubt needs not attain the degree of absolute certainty, it must however attain a high degree of probability excluding any other conceivable hypothesis than the accused guilt. The authorities are clear that the accused be acquitted if the set of facts elicited in evidence is susceptible to either guilt or innocence in which case doubt has been created. Mere allegations, no matter how believable, does not amount to proof required in law to prove such allegations. In **Mbanengen Shande V. The State 22 NSCQR 756 at 772-773;** *Pats Acholonu J.S.C of blessed memory* instructively stated as follows:

"When an accused is being tried for any case whatsoever, because of the principle of law ingrained in our Constitution that he or she shall

be presumed innocent, it behoves of the Court to subject every item of facts raised for or against him to merciless scrutiny. Nothing should be taken for granted as the liberty of the subject is at stake. Where there is a doubt in the mind of the Court either as to the procedure adopted or failure to address on very important latent issues that assail or circumscribe the case, the Court should acquit and discharge. Although the standard of proof is not that of absolute certainty (that should be in the realm of heavenly trials) the Court seised of the matter must convince itself beyond all proof that such and such had occurred. It is essential to stress times without number that the expression proof beyond all reasonable doubt- a phrase coined centuries ago and even ably applied by the Romans in their well developed jurisprudence and now verily applicable in our legal system, is proof that excludes every reasonable or possible hypothesis except that which is wholly consistent with the guilt of the accused and inconsistent with any other rational conclusions. Therefore it is safe to assume that for evidence to warrant conviction, it must surely exclude beyond reasonable doubt all other conceivable hypothesis than the accused's guilt. The accused should be acquitted if the set of facts elicited in the evidence is susceptible to either guilt or innocence in which case doubt has been created".

As stated earlier, the prosecution ought to have done more as the disposition of prosecution here appears to be that the accused must prove his innocence on these counts. See **Section 36(5) of the 1999 Constitution.** In **Okoro V. State (1989)12 SCNJ 199,** the Supreme Court stated thus:

"It is both the constitutional duty imposed on the court and the right conferred on accused by the constitution to ensure the purity of the criminal justice administration, that the innocence of the accused is maintained inviolate... where no case has been made out by the prosecution, asking him to answer to the charge against him is a reversal of the constitutional provision by asking him to establish his innocence. The protection of the accused, presumed to be innocent cannot be curtailed by the strength of the case founded on suspicion, however strong. A conviction must be founded on evidence establishing the guilt of an accused beyond reasonable doubt. See also Garba V. State (2011)14 N.W.L.R (pt.1266)98."

The principle is settled that where the prosecution has not discharged the burden placed on it by law such that there are elements of doubt, such doubt must necessarily be resolved in favour of accused. We only need add that any scenario which is vague or nebulous and which gives room for speculation will not suffice and would amount to failure of proof.

For the prosecution to secure conviction for the offence of criminal breach of trust, it must necessarily prove the entrustment and the dishonest misappropriation which are critical ingredients of the offence. Here as much as I have sought to be persuaded, I was not so persuaded, that dishonest misappropriation was creditedly established. See **Oladejo V. State (1994)6 N.W.L.R (pt.348)129. Counts 1, 2 and 5** have accordingly not been established. I so hold.

With respect to **counts 3 and 4,** there is no dispute that these sums were as stated earlier entrusted in the hands of Accused to carry out clearly identified assignments. With respect to count 3, and by **Exhibit P13,** the accused acknowledged receipt of the sum of ₦238,000 to purchase shares for the complainant. In all his statements particularly **Exhibit 4(1) and 4(2)** dated 24th October, 2008 and 28th October, 2008 he confirmed that he was given this amount to buy shares. On count 4, the Accused under cross-examination conceded that he was given the sum of ₦8,000 to get a pin number called the central security clearing system (CSCS).

In evidence, the prosecution led unchallenged evidence through PW1 and PW2 to the effect that these assignments were not executed despite the sums given and received. In response to these allegations, the accused said he executed the assignments. With respect to the purchase of the shares, he said he bought same but absolutely no evidence of this sale was furnished in court. This clearly is a matter within his knowledge and the burden was on him to show evidence of payment for the stocks or presentation of the share certificate where available. By **Exhibit P1(3),** he received money for the purchase of shares from complainant on 13th March, 2008. I find it curious that years after the alleged purchase, there is absolutely no evidence of this purchase. I clearly do not accept that transactions of this nature are carried out without any documentary evidence to back them up. If stocks were indeed bought, there must be evidence to support such transaction. The contention by Accused Person that evidence of the purchase was sent to complainant's phone through CSCS system is clearly bare speculation bereft of credibility. In his

statements **Exhibit P4(1),** the accused had alluded to the fact that he could not open a CSCS account for the complainant because of signature issues. There is nothing in his statements saying whether the account was at any time opened. It is therefore difficult to accept his testimony that the information or evidence of purchase was sent to complainant through the CSCS system. If also the evidence of purchase is with Hedge Securities Ltd as alleged, he dealt with them and so should get the documents. He did not. Now contrary to is testimony at trial, in his statements, **Exhibit P4(1)** dated 24th October, 2008, he had given a completely contradictory narrative to the one given in court. He stated thus:

"…He further gave me a sum of ₦228,000 to buy some insurance stocks for him which I could not buy because the verification and opening of CSCS account was delayed for signature problem. I however reinvested the money in shares…"

His further statement vide **Exhibit P4(2)** dated 28th October, 2008 also makes clear allusion to his failure to buy the stocks. The above is clear. The law generally is that where a witness gives evidence in court which is inconsistent with a previous statement made by him, in respect of the same issue, the testimony is to be treated as unreliable while the statement is not regarded as evidence upon which the court can act. See **Oladejo V. State (1987)3 N.W.L.R (pt.61)364 at 427; Eyop V. the State (2012)LPELR-20210(CA).** This is the clear position in this case.

I am in no doubt here that on the evidence that the accused person has misappropriated this amount to his benefit. The dishonest intent here clearly lies in the brazen failure to buy the stocks contrary to the agreement for absolutely no justifiable reason(s) which has occasioned gain to the accused and loss to the complainant. Also the dishonest intent lies in the contradictory and self defeating assertions to explain why the assignments were not carried out and ultimately in not returning the amounts but keeping same for no apparent reason. This is not a situation like the earlier counts 1, 2 and 5 where there was a clear and precise difficulty in the sale of the share certificates which inured to create doubt to the benefit of the Accused Person. Here if there should be a problem at all, it is perhaps that of availability of the products. I only need say here that the accused never made such a case. Even at that, where the product is not available, then the complainant ought to have been informed and his moneys returned subject then to whatever directives he may give. To however refuse to

carry out the specifics of a transaction and then keep the money and also keep silent cannot in my opinion be honourable or salutary.

At the risk of prolixity but for purposes of clarity, the case made by Accused Person on this issue is that he actually bought the shares but he did not put forward anything to establish purchase which completely undermines the fact of purchase. The undeniable fact which I find is that there has not been any purchase and the moneys given yet to be returned. The case of Accused Person here has been left to merely speculative rhetoric bereft of substance. The contradictory assertions by Accused Person as to whether he bought or did not buy the shares only served to undermine whatever credibility he had with respect to this allegation or count.

The same position holds true for the N8,000 given to Accused Person in count 4 for the purchase of a Central Security Clearing System (CSCS) Pin Number. Here too the Accused who said he bought the CSCS pin number did not furnish court with the number or evidence that he paid for the number and where he made the payment. Indeed contrary to his oral evidence that he gave a number to the complainant, his statements. **Exhibits P4(1) and P4(2)** all indicate that he did not get the pin number for the CSCS account because according to him, there was a **"discrepancy with the signature of complainant."** It is difficult to see how this contention can have any validity when the complainant is around and available to correct whatever alleged **"discrepancies"** that may exist in his signature. Here too it is obvious that the accused did not appropriate the sum of N8,000 as directed or agreed. This amount has not been paid back at any time and the complainant has not had benefit of the said pin number. I am in no doubt here that on the facts that the accused has intentionally caused wrongful loss to complainant and gain to himself and dishonestly too. The Accused Person has clearly not acted in a forth right manner with respect to these two counts. I also note in conclusion that the final address on behalf of the Accused Person did not at all proffer arguments on this counts which perhaps is an indication that they don't have really much to urge on those counts. On the whole, I am satisfied that counts 3 and 4 has been proved by the prosecution beyond reasonable doubt. On the basis of the foregoing therefore, I have come to the conclusion that the prosecution has crossed the legal threshold and proved beyond reasonable doubt all the elements in proof of **counts 3 and 4**.

In the final analysis and for the avoidance of doubt, the judgment of the court is that the Prosecution was unable to succeed in proving the charge against the Accused Person with respect to **counts 1, 2 and 5.** I accordingly find the accused person not guilty on those three counts and he is discharged and acquitted accordingly. With respect to **counts 3 and 4,** I hold that the Prosecution has succeeded in proving the charge laid against the Accused Person in those two counts and accordingly, I hereby find and pronounce him guilty as charged.

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Hon. Justice A.I. Kutigi

SENTENCE

I have carefully considered the plea in mitigation by the Accused Person and ably supported by his counsel. Now in considering the plea, I am obviously guided by the clear provisions of the law which provides the punishment for these offences. The punishment under **Section 312 of the Penal Code Act** range from imprisonment or fine or both. Whatever discretion that may be exercised by court must be such obviously allowed by law. It is trite law that the sentence of a court must be in accordance with that prescribed by the statute creating the offence. The court cannot therefore impose a higher punishment than that prescribed for the offence neither can a court impose a sentence which the statute creating the offence has not provided for. See **Ekpo V. State (1982)1 NCR 34.**

Now my attitude when it comes to sentencing is basically that it must be a rational exercise with certain specific objectives. Some of these objectives have now been expressly provided for under the new Administration of Criminal Justice Act 2015 vide **Sections 311(2) and 401(2) of the Act.** It could be for retribution, deterrence, reformation etc in the hope that the type of sanction chosen will put the particular objective chosen however roughly into effect. The sentencing objective to be applied and therefore the type of sentence to give may vary depending on the needs of each particular case.

In discharging this no doubt difficult exercise, the court has to decide first on which of the above principles or objective apply better to the facts of a case and then the quantum of punishment that will accord with it.

In this case, if the objective is deterrence and reformation for the young convict and I presume they are, then the maximum punishment for the two counts he was found guilty on as provided for in the penal code appear to me particularly excessive in the light of the facts of this case. The convict is also a first offender and there is nothing to show that he has had problems with the law in the past.

In the same vein, it is a notorious fact that crimes of this nature now appear to be prevalent in our clime and the courts as preventive tools in the criminal justice system must not be seen to encourage criminal acts of this nature by giving light sentences. I am equally mindful of the fact or the general principle that the essence and aim of punishment is not necessarily to ruin or destroy the offender but to reform and deter others who may have like minds.

I have similarly noted the notorious fact that the prison system despite improved efficiency is still faced with enormous challenges not only in terms of structural capacity but also its reformatory capabilities. While all the above have clearly weighed on my mind, the basic underlying and indeed the most important variable for me is that a price or consequence must be paid for inappropriate behaviour.

Having weighed all these factors, I incline to the view that a light sentence is most desirable in the circumstances and would achieve the noble goals of deterrence and possibly reforming the Accused Person towards a pristine part of moral rectitude.

Accordingly with respect to COUNT 3 of the charge, the provision of **Section 312 of the Penal Code Act** under which the Accused was charged and convicted imposes a term of imprisonment which may extend to seven years or with fine or with both.

Accordingly, on COUNT 3, I hereby sentence the Convict to a term of six months imprisonment but with an option of fine in the sum of ₦100,000 only.

On COUNT 4 of the charge, the provision of **Section 312 of the Penal Code** under which the Accused was charged and convicted imposes a term of imprisonment which may extend to seven years or with fine or with both.

Accordingly on COUNT 4, I hereby sentence the Convict to a term of 2 months imprisonment but with an option of fine in the sum of ₦10,000 only.

In addition pursuant to the provision of **Section 78 of the Penal Code** and which is now reinforced by the provisions of **Sections 314 and 319 of the Administration of Criminal Justice Act (ACJA) 2015,** the court is permitted to order for payment of compensation to the victim where the interest of justice permits in addition to the punishment already meted out on the convict. I only need add that the convict himself during his plea for mitigation has prayed that he be allowed to pay the sums under the two counts of the charge that he was found guilty.

In the circumstances and pursuant to the above provisions, the convict is ordered to also pay the sum of N236,000(Two Hundred and Thirty Six Thousand Naira) only to Mr. Oton Enoman which is sufficient restitution.

The sentences are to run consecutively.

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Hon. Justice A.I. Kutigi

Appearances:

Mary A. Onoja for the Prosecution.

Lawrence O. Ukpia, Esq., with D.O. Irabor (Mrs) for the Accused Person.