IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT ABUJA

THIS MONDAYTHE 8th DAY OF JUNE, 2015.

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO FCT/HC/CR/30/10

BETWEEN:

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

AND

1. **DR. GODWIN ADEOGBA**
2. **HON. SIMON ADEYANJU** }...............................**ACCUSED PERSONS**
3. **BENJAMIN EROMOSELE**

JUDGMENT

The accused persons were initially arraigned before this court along with one Zac Ade as 4th Accused on 15th day of March 2010 on a nine(9) count charge.

The charge bordered variously on criminal conspiracy, dishonest misappropriation and conversion of various sum of money punishable under **Sections 97(1), 309 and 312 of the Penal Code Law, Cap. 522 Laws of the Federation** respectively.

The Accused persons all pleaded not guilty to the charge. Thereafter the matter proceeded to trial on 1st June, 2010. The prosecution called 5 witnesses and tendered 14 exhibits in evidence. They were in-turn cross-examined by all learned counsel for the Accused persons. The case of the prosecution upon application by all counsel to the Accused persons was closed by order of court on 22nd February, 2012 in the light of the rather unacceptable and lengthy period it was taking for the prosecution to fully present its case.

With the closure of the prosecution's case, all learned counsel for the respective Accused persons elected to make a no-case to answer submission on behalf of the Accused persons.

The court took written arguments of learned counsel on both sides of the aisle thereof; and in a considered Ruling on 18th October, 2012, the said Zac Ade, the 4th Accused was discharged pursuant to **Section 191(3) of the Criminal Procedure Code** upon the success of his no case submission. The 1st to 3rd Accused persons were also discharged on counts 1, 4 and 7 which bordered on conspiracy but were required or called upon to enter their defences in respect of counts 2, 3, 5, 6 and 8.

As stated earlier, the prosecution called 5 witnesses. With the discharge of the 4th Accused, I will proceed to give or state the substance of the evidence of the witnesses as is relevant to the case of the remaining three Accused Persons.

PW1, P.Y. Okala testified on 1st June, 2010 to the effect that he knows only three of the accused persons, Dr. Adeogba, Hon. Adeyanju and Mr Eromosele. He stated that there is a company known as Wise Health Services, a Health provider and he is a shareholder and a signatory to the account of the company. PW1 stated that the company has an account it operates, and by the mandate given to him, the 1st Accused as M.D and the 2nd accused, they were all signatories of the company account and any two of them could sign and the bank will honour such signatures. He stated also that on or about 2007, they discovered that the company money has been disbursed to the following persons, Hon. Adeyanju (2nd accused) who has his own company, Mr. Eromosele (3rd accused) who also has his own company and also to one Mr. Zac Ade. PW1 stated further that during the annual audit exercise, it was discovered that various sums went into their hands and at the board meeting, they tried to handle it internally but this was not possible hence the matter was reported to the EFCC. He testified that though a signatory to the accounts, he did not sign any of the cheques for payments to the above named persons. He stated with reference to a question on authority to disburse on the accounts, that the Managing

Director, Dr. Adeogba ought to present the request to the board and the board has to give or refuse its approval. He also stated he never witnessed any such board meeting where such matter was presented and approval given by the board.

Under cross-examination by counsel to the 1st accused, PW1 stated that the company has about six accounts with various banks. He stated also that the illegal withdrawals from the account of the company can only be found in the auditor's report and that if the withdrawals were legal, they won't be in court. PW1 stated also that he would not know the months the withdrawals were made but it was about 2007/2008. PW1 confirmed that moneys were disbursed to the accused persons personally or in their company's name. PW1 stated that three of them are signatories to the account but any two are acceptable. He denied signing any of the cheques. PW1 confirmed that there was an audit made of the company's account. PW1 confirmed also that it was when the auditor's carried out their exercise, that the withdrawals were confirmed.

Under cross-examination by counsel to the 2nd accused, PW1 stated that he became a shareholder in 2006. He agreed that he wrote a letter on 16th December, 2005 confirming his admission as a shareholder. PW1 stated that he cannot remember that there was a board meeting to confirm him as a shareholder. A Certified True Copy of his letter of acceptance as a shareholder dated 12th December, 2005 was admitted as **Exhibit "P1".** PW1 denied that an extraordinary meeting was held to confirm his shareholding. PW1 stated that he does not know that minutes are recorded and filed at the C.A.C. That minutes are kept with the M.D and filed. He stated that no special resolution was filed at C.A.C confirming his shareholding. The Certified True Copy of the special resolution of Wise Health Services dated 16th December, 2005 was admitted as **Exhibit "P2."** PW1 stated that he is not aware of any decision on brokerage. PW1 stated being aware that over ₦52Million was paid to Mr. Familusi, but he cannot say the precise details of the payment but that the Managing Director, Dr. Adeogba is in better position to say the details, PW1 confirmed that the payment of ₦52Million to Mr. Familusi were discussed severally.

Under cross-examination by counsel to the 3rd accused, PW1 said that he does not know about the payments in the counts contained in the charge but that there are records of them in the company. PW1 stated that he attended almost all the board meetings as a shareholder and director. PW1 stated that he was made a director between 2007 and 2008 at a meeting at Ilesha. PW1 stated that there was an investment of ₦41Million as there was a standing policy of the board for such investment to be made and that the board was aware of this investment of ₦41Million.

PW2 is Suleiman Bakari. His evidence is that he is an operative with the EFCC attached to bank fraud unit at their Abuja Office. He stated knowing the accused persons when their office received a petition on the 14th May, 2009 written by one Barrister Obiajule on behalf of the directors of Wise Health. The accused Persons were invited and their statements taken after the cautionary statements were recorded and the accused were then released on bail. He stated also that they went to the company for investigation, they got some documents like cheque books, minutes of meetings of board of directors of the company and on getting these documents, they went to Corporate Affairs Commission. That they also went to NHIS where they got the original list of universities attached to the company. PW2 stated further that they got the statements of accounts from Stanbic IBTC, the company's banker; they also went to the firm of the auditors that audited the company and got the Certified True Copy of the audit report of the company.

PW2 testified that in the course of their investigations they found out that:

1. The 1st accused made payment of ₦10,000,000(Ten Million Naira) to the 2nd accused through the company's account.

2. In the bank statements, the 2nd accused collected a cheque of ₦5Million signed by the 1st accused.

3. There was issuance of ₦10Million Naira cheque to the 3rd accused but it was not cashed; there is also payment of about ₦6Million to 3rd accused

signed by 1st accused. The money was said to be for consultancy which through their investigations they found out that it was not rendered. The 3rd accused undertook to refund the ₦6Million.

PW2 stated also that in the course of their investigations, they found out the original universities allocated to the company by NHIS which shows that nobody solicited for "lifes" from any of the universities.

The following documents were tendered through PW2 as follows:

1. The petition dated 13th May, 2009 was admitted as **Exhibit P3**

2. The letter dated 25th August, 2009 from National Health Insurance Scheme was admitted as **Exhibit P4.**

Under cross-examination by counsel to the 1st accused, PW2 stated that he has been in the service for 3 years and confirmed being familiar with the mode of operation of the EFCC. He also confirmed that Wise Health maintains an account with Stanbic IBTC and that the 1st and 2nd Accused Persons and Barrister Okala are the signatories to the account. He stated also that any two of the signatories can sign for withdrawal from the company's account. He does not know when the account was opened or the total amount in it. That he cannot remember when the withdrawals were made from the account.

Cross-examined by counsel to the 2nd accused, PW2 confirmed that the 2nd accused was arrested on 11th June, 2009 upon a petition. PW2 also confirmed seizing certain documents including the original brokerage agreement signed with the company when they conducted a search in his premises but that the 2nd accused collected all the documents as they have the record of receipt. PW2 denied being furnished with all minutes of meetings and stated that the relevant **minutes where the approval for the loan and brokerage was given was not given to them**. He stated also that he was aware meetings were held but does not know about the dates of 2nd January, 2005, 19th April, 2005 and 15th June, 2005. That he is not aware that in one of these meetings, the company approved brokerage for purposes of acquiring **"lifes."** PW2 stated also that from the NHIS record,

it shows that nobody secured any **"lifes"** with the 4 universities. He agreed that there are many H.M.Os in Nigeria but is not aware of a competitive market for **"lifes."** PW2 confirmed that there was a petition against their office for receiving ₦500,000. He denied that the charge against the accused was filed out of malice and because of the petition against their office by 2nd accused. He **confirmed that he did not extend their investigations to the universities** which 2nd accused claimed he got for Wise Health.

Under cross-examination by counsel to the 3rd accused, PW2 confirmed that the 3rd accused collected about ₦6Million for consultancy service. PW2 confirmed that he cited a cheque where the 3rd accused received such amount. He stated that he did not investigate whether 3rd accused carried out the consultancy services because the **3rd Defendant promised to refund the money for consultancy services.** PW2 stated also that he is not aware from investigation at NHIS that the Niger Delta States accredited **"lifes"** to Wise Health.

PW3 is Fulani Kwajafa. His evidence is that he is a retired police commissioner, pensioner and now businessman. He knows the three accused persons but does not know Zac Ade. He stated that he is a director with Wise Health and they have a Board of Directors and that they hold regular board meetings. He stated also that where there is proposal for major expenses, the board will meet and authorize the Managing Director to execute it. He stated further that since the inception of the company from 2004 to 2010, no annual general meeting was held when 1st Accused was the Managing Director and that accounts were not audited. He stated also that during the tenure of the new Managing Director after 1st Accused left the company, it was discovered that some amount of money was spent without the approval of the board and when the report of the audit was out, it highlighted that the 1st accused has engaged some brokers for the lives of people and the audit found that the universities given to Wise Health was part of the universities allegedly brokered by certain people.

PW3 testified that when the chairman went through the audit report, he discovered the irregularities and raised a query to the 1st accused which he replied to the chairman and they were given copies. That in his copy, PW3 on his own discovered that the 2nd accused applied for a loan of ₦5Million to settle personal matters and the 2nd accused gave a postdated cheque in event of failure; the money was paid to him and until the query was raised, there was no record of refund. He stated that the 2nd accused applied for upfront payment of 50% for delivery of universities which was approved by the Managing Director (1st accused). ₦1Million was given in cash to the 2nd accused and ₦6Million in cheque. That the 2nd accused promised to refund the money in case of failure; he also issued a postdated cheque. He stated also that the 3rd accused applied to deliver nine of the Niger Delta States at N4Million each and that 3rd accused demanded 50% payment which is N16Million. N6.23Million was paid to him in cash and a cheque of N10Million was issued but it was not cashed as the company had no money in the account.

PW3 stated also that the 4th accused applied for ₦5Million to deliver brokerage in respect of universities not mentioned. ₦4.5Million was approved and paid to a company he was buying a house from but that he did not deliver any university.

PW3 testified also that he attended most of the board meetings and there is no where in the proceedings to indicate that any of these people were engaged as brokers, how much more approval of expenses by the board as these are major expenses. He stated that the company is a health provider and not a loan giver. He also stated that none of the board members had a hint that they were serving as brokers to the company until the audit report disclosed the same. PW3 confirmed taking part in a meeting of 18th April, 2005, where the idea of brokerage was discussed and they asked the 1st accused to go ahead; that is the only aspect of the brokerage PW3 is aware of and there was no time that their names were mentioned in relation to any brokerage.

Under cross-examination by counsel to the 1st accused, PW3 confirmed being a shareholder of Wise Health. He also confirmed that it was the 1st

accused who brought the idea of forming the company. He could not remember when he became a shareholder but it is sometimes in 2005. He further confirmed that the company maintains accounts with Skye Bank, Aso Savings and Loans, Bank PHB and IBTC. He stated that at the time they petitioned EFCC, he does not know how much they have in these accounts as he is not a signatory to the company's account and could not know when the accused made any withdrawal in these accounts. He confirmed attending most meetings of the board. He also confirmed that in one of the meetings, the idea of brokerage was muted and they asked the 1st accused to follow up to get the brokers but he never came back with a response. He further confirmed that he got to know about the issue of brokerage as a result of the audit report by the external auditors. He stated not knowing the name of the firm of auditors but the auditor is one Dr. Abuya.

Cross-examined by counsel to the 2nd accused, PW3 stated that he cannot remember when the company was accredited, and cannot remember the date the company was affiliated by NHIS. PW3 stated that he does not know when the 1st capitation payment by NHIS to the company was made and does not know the amount paid. PW3 stated that it is not only Wise Health that acquired **"lifes"** in universities, that there are 10 other HMO's. PW3 stated that apart from the board meeting in April, 2005, there was no other meeting that he attended that mentioned brokerage. He would not know of any powers given to 1st accused to look for brokerage. He denied being given any mandate by Mr Fajemisi and a cheque of ₦500,000 to prosecute this suit. PW3 stated that he was not aware of the brokerage agreement between the company and 2nd accused. He also stated that all deposits with banks were approved by the board.

Under cross-examination by counsel to 3rd accused Person, PW3 confirmed attending most of the board meetings. PW3 said he is not aware that in the meeting of 19th May, 2009, there was any discussion associated with difficulties in getting accredited with NHIS; or discussions on the political undertones of accreditation or that the ministerial committee of Ministry of Health be lobbied. PW3 is also not aware of minutes of meeting where the Managing Director executed brokerage agreement with others.

That the Managing Director brought a proposal on the issue and they told him to follow up. He is aware that the 3rd accused applied for consultancy service when investigations into this matter commenced. He confirmed the approval for the disbursement of the sum of N41Million to IBTC on the 10th October, 2008 but is not aware of disbursement of a cheque of N40Million to Mr. Onu on 24th March, 2009.

PW4 is Seun Daudu. His evidence is that he is an accountant with Wise Health Services and knows the Accused Persons; that sometimes in October, 2009, he was invited by EFCC to explain what he knows about some transactions with Wise Health in relation to some payments made to 2nd, 3rd and 4th accused persons. He stated that on 1st December, 2006, the 2nd accused applied for a short term loan from Wise Health through his company Remisco International to the 1st accused (the Managing Director), the 1st accused minuted it to the former Assistant General Manager, Finance and Accounts who issued a cheque to the tune of N5Million and was delivered to 2nd accused. As a collateral, the 2nd accused issued a cheque dated 19th January, 2007 for N5Million as a repayment for the loan.

On the 5th October, 2007, the 3rd accused applied for a mandate to secure social Health Insurance Scheme with Niger Delta states to the 1st accused and an approval was given to release the sum of N16,250,000 to the 3rd accused in his company's name, Intelligent Development Group Ltd. The said ₦16,250,000 was given to him in 2 different cheques of N10,000,000 and ₦6,250,000. The latter cheque cleared when presented but that of ₦10Million did not clear due to lack of funds in the account of Wise Heath. The 3rd accused issued a cheque of ₦16,250,000 as a collateral when he made the initial application to secure the mandate.

In November, 2007, the 2nd accused wrote an application for N7Million to secure social health insurance contract with Benue State and some other universities. A cheque of ₦1Million was issued and the cash was given to him. PW4 stated that another cheque of ₦6,000,000 was written in favour of his company, Remisco International Ltd., and as a form of collateral, he issued a cheque of ₦7Million. That the former Managing Director authorised the payments and they cannot disregard his instructions. The

cheques too were signed by the 2nd Accused who is a signatory to the account.

The following documents were tendered through PW4 as follows:

1. A UBA Plc cheque No:75305507 dated 19th January, 2007 was admitted as **Exhibit "P5."**

2. A UBA Plc cheque No: 79001184 with the sum of N7Million was admitted as **Exhibit "P6."**

3. The application for grant of soft loan by Zac Ade dated 21st February, 2006 was admitted as **Exhibit "P7."**

Under cross-examination by counsel to the 1st accused, PW4 stated that he started work with Wise Health on 5th January, 2006. PW4 stated that the head of accounts received the cheque of ₦5Million, while the others were received by him. He collected the cheques as collateral and made payments based on the instructions of the Managing Director even though it is not the practice.

Cross-examined by counsel to the 2nd accused, PW4 stated being aware and confirmed that the 2nd accused made an application for the loans which he gave collateral. He also confirmed that the application was made through the 1st accused. He stated that the application for loan was granted and converted for brokerage services by the company. It was converted to brokerage by the 1st accused in the application but does not know what it means. He stated that the major source of revenue comes from NHIS. He denied that the revenue to NHIS is free gift. He also denied rendering services to NHIS but to health care providers and care recipients or lifes. He further denied that lifes are secured through the efforts of Wise Health, but all lives were given by NHIS. PW4 stated that it is not correct that lifes are secured by efforts of the company or Wise Health. PW4 denied that the two applications by the 2nd accused were converted to brokerage service, that it was only the ₦5Million that was converted, while the ₦7Million was for the 2nd accused to secure social health insurance contract for the company; that was what is on the

application. He stated that he knows that his company was given 8 universities, but he denied that the 2nd accused secured most of the lives as before now, the lives were allocated to the company since 2005, while the transactions took place in 2006 to 2007.

Under cross-examination by counsel to the 3rd accused, PW4 stated that he would not know if the application by the 3rd accused was to render consultancy services but the application is to secure a mandate for social health insurance contract in nine Niger Delta States. That Niger Delta States were not part of those given to their organisation. PW4 confirmed that only 1st accused knows the basis of the cheque of ₦7Million and ₦6,250,000.

PW5 is Dr. Dele Onawumi. He became the Managing Director of Wise-Health on the 1st May, 2008 and took over from the 1st accused person. He stated that when he took over, he observed that the company was in dire financial straits as workers had not been paid for 3 months, capitation payment for members of health institutions were not paid for months. PW5 stated that NHIS pay them for onward payment to health care providers. These payments were to the tune of N50 to N60Million at the time he took over. He stated also that they are indebted to banks for a large sum of money. He cannot remember the exact figures. He stated also that there was absolutely no money to run the company, these were the conditions he met the company and reported to the board of directors at a meeting held on the 6th June, 2008.

PW5 testified that the directors advised him to ensure that the company accounts be audited as for three years now, the accounts had not been audited. He informed them that the auditors had worked on the accounts and the report shall be presented at the next board meeting. PW4 stated also that at the meeting, it was clear that the accounts showed that shareholders equity fund had been eroded to the tune of over ₦193Million and apart from this, the auditors pointed out several lapses in the financial management of the company. PW4 was mandated to investigate and he found out that large sums of money had been given out purportedly as brokerage fees to the accused persons; these were moneys paid without

approval of the board. That these moneys were purportedly paid to secure **"lifes"** but no evidence is available to show that these tasks were accomplished. He further stated that, there was evidence which he extracted that payments were made and collected by the 2nd, 3rd and 4th Accused persons but there was no evidence that these sums of money were refunded. PW5 also testified that he submitted his findings to the chairman of the company and on this basis, the chairman issued a query to the 1st accused (the former Managing Director) whose reply was found to be unsatisfactory by the chairman and the board members. On that basis, a petition was caused to be written to the EFCC to complain on the conduct of the accused persons.

PW5 stated that what health maintenance organisations (H.M.Os) like **Wise Health does is to register people and in their case, these people are employees of Federal Government parastatals.** That the **role of H.M.O's is to pay the health care providers for looking after the lifes of those registered.** That initially the lifes were given to them by the NHIS but later the onus fell on the H.M.Os to look for lives. That throughout his tenure as Managing Director, no lifes were brought by anybody neither can he recollect from an examination of documents at his disposal that any lifes were brought in before his tenure beyond the initial ones given by NHIS. That however during his tenure they were able to secure lifes from Gombe State through two contract workers who were familiar with the terrain in Gombe State. PW4 stated that granting of loan is never part of the duty of the Managing Director.

Under cross-examination by counsel to the 1st accused, PW5 confirmed that the investigation of the transactions were of those that happened before his appointment. PW5 also confirmed going through the paper trail of fraudulent financial dealings. PW5 stated that about 75,000 are the total lifes of those secured but he can't be certain as some people died and are out of their coverage. He also stated that there were letters of complaint severally in writing by NHIS for failure to pay capitation fees and he had to pay the arrears. He confirmed that during his tenure, the company got contractors to secure lifes in Gombe State but that they were actually on

the pay roll of the company and that all those arrangement were in existence before he became Managing Director.

Under cross-examination by counsel to the 2nd accused, PW5 stated that he could not see any approval of brokerage between 1st and 2nd accused. He confirmed having the minutes of the company in his possession. The minutes of meetings dated 26th January, 2005; 19th April, 2005; and 25th June, 2005 were admitted as **Exhibits "P8 (1-3)."**

PW5 looked at the minutes of the board resolution and confirmed that they are the minutes of the meetings. He looked and read all the exhibits that is **Exhibits "P8(1-3)".** He also stated that no where in the **Exhibits "P8(1-3)"** that brokerage payments was approved for the accused persons and it was never mentioned in any of the minutes. His statement was shown to him and admitted in evidence as **Exhibit P9.** He denied being told what he said in court but followed paper trail. He stated that the information was gotten from a careful gleaning of the documents.

Under cross-examination by counsel to the 3rd accused, PW5 stated that he did not see any board approval for payments to the contractors but saw letters by 1st accused and continued to pay with what he saw on the ground. He disagreed that the Managing Director was the alpha and omega of the company. He confirmed that **Exhibits P8(1-3)** gave the 1st accused power to execute the budget of the company as he deems fit. He also confirmed that despite the fact that the company was broke, he made a payment of N41Million by cheque from Stanbic Bank to Aso Savings. The payment was authorised by the board. PW5 made a cheque to one Mr. Sule Onoh on the 24th March, 2009 through Aso Savings and Loans as an investment but can't recollect the board resolution that backed it up. He agreed receiving a reply by the 1st Accused to his Query which was admitted as **Exhibit P10.** PW5 looked at page 5 and read paragraph 9 of the response of the 1st accused.

Pursuant to an order of court granted on 8th February, 2011 and upon an application brought to that effect by the prosecution which was unopposed, PW2 was recalled on 9th February, 2012.

PW2 in his additional evidence stated that he was part of the investigations and that in the course of investigations, they invited Accused Persons to their office and obtained written statements of the Accused Persons which were admitted in evidence as follows:

1. The statements of 1st Accused dated 17th June, 2009, 16th September, 2009 and 15th September, 2009 were admitted as **Exhibits P11a, b and c.**

2. The statements of the 2nd Accused Person dated 11th June, 2009, 12th June, 2009, 13th June, 2009, 14th June, 2009, 18th August, 2009, 16th December, 2009 and 15th October, 2009 were admitted as **Exhibits P12a-g.**

3. The Statements of 3rd Accused dated 15th June, 2009, 18th June, 2009 and 15th October, 2009 were admitted as **Exhibits P13a-c.**

4. The statements of Zac Ade dated 17th June, 2009 and 26th October, 2009 were admitted as **Exhibits P14a and b.**

That after the statements were taken, they got documents from NHIS indicating that some 8 institutions/universities were allocated to the company by NHIS and they contacted NHIS to respond to the issue and that they did.

Counsel who represented 1st and 3rd Accused on the day in question elected not to cross-examine PW2 again.

Cross-examined by counsel to the 2nd Accused, he agreed that he went to the house of 2nd Accused for a search and that they took documents from the house but cannot remember whether one of the documents was a brokerage agreement.

With the evidence of this recalled witness, the prosecution did not call any other witness and as indicated earlier, the case of the prosecution was then closed by order of court.

In defence of the action, all the accused persons testified in person and were all duly cross examined. The 1st accused testified in person as DW1. His evidence is that he has always been a consultant in engineering, health and anything relating to National Planning. Himself and the 2nd accused incorporated Wise Health Services Ltd in 2004. He also incorporated Health Maintenance Organisation (H.M.O) in accordance with National Insurance Scheme. He stated that Wise Health was registered as a private limited liability company but in accordance with the NHIS Act, it has to be accredited as a H.M.O; therefore that Wise Health is in the business of operating as a National H.M.O. That H.M.O acts as intermediary between care givers (hospitals, care providers at all levels) and care recipients. That the H.M.O are there essentially to avoid direct payment between recipients and givers and that they also oversee quality assurance of health care delivery.

He stated that when NHIS was launched in 2005, H.M.O's were classified into 2 types. The first type handled the core federal ministries. He was not interested in that. However that because of his involvement in the formation of NHIS, he became interested in universities because then it was felt that they were difficult to handle and therefore Wise Health became the only H.M.O at that time to be accredited for private Health Insurance by the NHIS.

That Wise Health started the H.M.O of the second group which is the private Health Insurance and that meant they had to source for client based on captive market affiliated to them.

DW1 stated that both PW3 and PW1 were not in the company when the business started. That when he formed the company in 2005, they had series of board meetings in 2004 and 6 meetings in 2005 and both PW1 and PW3 were not part of the board. That the 2nd Accused was however with him throughout.

DW1 stated that they source for lifes by visiting and understanding the environment of the universities, meet with principal officers, the unions especially ASUU and they also liase with NUC by personal visits and

communications. They also arrange for seminars to convince the lecturers who were their targets. He stated also that they had to encourage all the directors to be part of sourcing for lives and for the incentive, they had to initiate a standard brokerage agreement which set the frame work for remunerating such efforts. To achieve all these, he stated that 3 board meetings were held to conclude these arrangements. DW1 stated further that at that time all their clients were Federal Civil Servants so the then President Obasanjo's administration arranged that the Accountant General should pay the H.M.O's through NHIS and the payment was split into capitation fees, service fees and administrative fees. That the agreement was that payment for brokerage fee can only be a percentage of the administrative fee.

On the question as to what would entitle his company to fees from NHIS, he stated that there is the need to explain the difference between allocation and affiliation. That the first group of H.M.Os were allocated core ministries and payment was for covering whosoever is in their personnel record. That in their case, since they were only affiliated to universities, they had to do the registration of the entire staff and they were paid based on the level of registration. That A.B.U for example had 7000 members of staff and it took them almost 2 years to even reach 65% coverage. DW1 stated that the allegations that he connived with 2nd accused to misappropriate ₦5,000,000 and ₦7,000,000 is sickening and unfair because the approval to operate brokerage transaction was given within the first 4 to 5 board meetings, where the people making the allegations were not there particularly, PW3, PW1 and Dr. Fajemise, who was the chairman when DW1 was Managing Director. It is unfair because himself and 2nd accused risked their lifes on the roads, day and night travelling to 8 universities securing lifes. They travelled from Abuja by road to Kaduna, Zaria, Kano and then to Jos and many at times they sleep on the road. DW1 stated further that they travelled down south to Calabar, Porthacourt, Benin and to Lagos to cover other universities.

In respect of the ₦5Million, he stated that a company the 2nd accused was acquainted to was introduced by the 2nd accused because of their activities in helping to secure lives. He stated that they received a letter for a loan to

engage in activities to boost their capacity to secure lives. As the Managing Director, he justified the loan, that it should be part of the remuneration that should come from the brokerage and since the brokerage agreement had not been standardized at the time, DW1 requested that a post-dated cheque be deposited for that amount. He stated also that later after the standardization of the brokerage agreement and the company started receiving their payments, they netted two, meaning the amount due for brokerage fee minus the loan. The brokerage fee due to them was more, so they returned the post-dated cheque. On the ₦7Million, DW1 further stated that at the time the brokerage fee had already become a substantial amount. That the ₦7Million was not regarded as loan but as part payment that was due to the company, Remisco. That 1% was due to Remisco on a monthly basis and as at that time over ₦25Million was due to them. DW1 testified further that Remisco procured 33,217 families from the 8 universities, which is equivalent to 115,000 lives. He stated that based on the lives procured by Remisco, they were taking an advanced payment bond on those lives before they could collect money from NHIS and it was the same NHIS that directed them to where they get the bond.

DW1 stated that the allegation of disbursing N6,250,000 as consultancy fee to the 3rd accused was a result of relationship with the company that has always done intelligence work for Wise Health. The company of the 3rd accused was being used to access a difficult terrain, Niger Delta States. That where you have such difficult terrains, you need more information than usual and that is where intelligence comes in. That this was a period where N.D.D.C was even having problems in the area. That he was trying to go beyond the Federal Civil Service to bring in the oil sector because of the volume of staff there and the communities in the Niger Delta. He therefore commissioned the company of 3rd Accused to look into the Niger Delta with the aim of increasing the lives procured for Wise Health. He stated that eventually, the company of the 3rd accused gave an interim report and based on that report Shell Petroleum Company approached them to help them cover the communities where they have built Fortified Primary Care Centres. He stated further that Wise Health became the

foremost company handling informal sector. DW1 stated that the originators of this allegation stopped the consultancy from continuing because they did not appreciate its importance.

Under cross-examination by counsel to the 2nd accused, DW1 confirmed the execution of brokerage agreement with Remisco, the 2nd accused Persons company and the memorandum evidencing the brokerage agreement is with the company. A Copy of the M.O.U dated 10th December, 2006 between Remisco Group and W.H.S.L was admitted as **Exhibit "D1."** He stated that the company allows him to source for funds and share in the profit.

Under cross-examination by counsel to the 3rd accused, DW1 confirmed that the company of the 3rd accused applied to secure social health insurance programme contract from nine Niger Delta States. He stated that the company earmarked ₦16Million. He stated also they only paid ₦6,250.000 for mobilization, but could not pay for the contract because they did not have the money and the company board later cancelled all informal sector contracts. DW1 stated further that as the Managing Director, he has the power to engage consultants and to design conceptual frame work.

DW1 stated that the 3rd accused facilitated the approved trip by the board for him to travel to Shell Petroleum Portharcourt for purposes of facilitating the communities run by shell. He confirmed that the 3rd accused facilitated the shell transaction and tendered report of his stewardship.

Under cross-examination by counsel for the prosecution, DW1 stated that the meeting over brokerage fees took over three board meetings between January 2005 to June, 2005 and it was at the meeting number five that the standardization of brokerage agreement was approved. DW1 stated that in 2005, they had six board meetings and no board meeting in 2006. They had two board meetings in 2007 which he initiated. The 1st meeting took place in the 1st quarter of the year, while the 2nd meeting was around the 2nd quarter as far as he can remember.

DW1 looked at **Exhibits "P5, P6 and P7".** He stated that these could not be a resolution because they were taken from a board member. **Exhibit P5a** a post-dated cheque covers activity in 2006 when there was no board meeting. **Exhibit "P6"** has no date and by that time the brokerage agreement was in place, and there was no need for any board resolution, while **Exhibit P7** is covered by board resolutions 3, 4 and 5. That the resolutions are normally filed with Corporate Affairs Commission (C.A.C). He confirmed that Wise Health is not a bank. DW1 stated that they do not lend, but they borrow money but when they lend, it is not to the public but to the directors to further elevate the position of the company and therefore they do not charge interest but he (DW1) insist they must leave a post-dated cheque so that they do not expose the company. He stated also that the 8 universities were not allocated but affiliated to them because they were sourced by the company. That as an accredited H.M.O, they can go to the universities as without accreditation, they won't even listen to them.

DW1 stated that in respect of the 9 Niger Delta states, the board truncated the activity on informal sector which affected the Niger Delta States. He stated knowing the 2nd accused as a **chairman and director of Remisco Int'l** but does not know whether the 2nd accused owns the company. He knows 3rd Accused as a Director in his company. He confirmed approving the services rendered by the companys and their payments were based on the brokerage agreement and consultancy services approved by the board. DW1 looked at **Exhibit P4** and confirmed it to be correct as it was signed by the executive secretary. DW1 read **Exhibits P8(2 and 3)** and stated that what is relevant in the exhibits is that it provides a basis for the approval of the brokerage and consultancy services. He stated further that H.M.O business like banking business is not one in which he must go and get approval for anything he does. That having giving the modalities for the payments due to the company, he has to exercise due diligence as Managing Director in the application of these payments. DW1 also read **Exhibit P11a-c.**

DW1 stated that Mr Kwajafa joined the company in 2007 when he paid his ₦1Million and that he attended board meetings after he paid. He denied

that **Exhibit "D1"** (the brokerage agreement) was paid for purposes of siphoning money from W.S.H.L. The 1st Accused then closed his case.

The 2nd Accused testified in person as DW2. His evidence is that 1st Accused was the promoter of Wise Health and they co-founded the company and they invited their friends who have now brought them to court. He stated that himself and 1st accused did not misappropriate ₦5Million and ₦7Million belonging to Wise Health. He stated that they worked for the money by procuring lifes for W.S.H.L, without which there could be no W.S.H.L. He stated also that they worked around 8 universities affiliated to W.S.H.L; that it was a captured market and they have to work to get lifes. He stated further that when affiliation was done, there were no lives, so they have to get them, that is by way of convincing the universities. That they worked to secure 116,260 lives from the 33,217 families from the 8 universities.

DW2 stated that they source for lives by utilization of companies such as Remisco Group and they got 116,260 lives. Remisco was supposed to be paid 10% of the administrative fee. For each of the enrollee or each life would pay N836.5k, so if this is multiplied by the number of lives, what was due to Remisco from July, 2005 to the end of October, 2007 was supposed to be ₦25,271,000:784k but only ₦12Million was paid. DW2 stated that the ₦12Million was the same with ₦5Million and ₦7Million allegedly misappropriated. That at the time they set up W.S.H.L, the company was not liquid and only himself and 1st Accused were there. They had to set up offices in 6 geo-political zones and they had to buy computers and that because there was no money, he had to ask for a loan to enable them get lives so that the company can survive. He looked at **Exhibit "D1"** and confirmed it is the brokerage agreement. DW2 stated further that after being elected the chairman of Wise Health in 2009, he took over from Bayo Fajemisi, he (Fajemisi) sent an E-mail to Mr. Okala (PW1) to ask Dr. Onawumi (PW5) to raise ₦500,000 in one hand and another ₦500,000 and he instructed that this money be taken to EFCC to prosecute them. He got a copy of the letter and he in turn petitioned EFCC who invited him for interrogation and EFCC acknowledged the receipt of the petition. DW1 stated further that he appeared 4 times before the EFCC to make

statements while kwajafa (PW3) also made statements. He stated that Mr. Bayo (former chairman) disappeared because of the petition he wrote and because he wrote for money to be withdrawn from Wise Health in the capacity of chairman when he was then not the chairman.

The following document was tendered through DW2 thus:

1. A letter written by the 2nd accused to EFCC dated 20th July, 2009 was admitted as **Exhibit "D2."**

Under cross-examination by counsel to the 1st accused, he confirmed that the money Mr. Bayo withdrew was to be taken to EFCC by Mr. Kwajafa for their prosecution.

Cross-examined by counsel to the 3rd accused, DW2 confirmed signing a cheque of ₦6,250,000 and also signed nearly 140 cheques every month at that time and the purpose is to secure lives for Wise Health.

Cross-examined by counsel for the prosecution, DW2 stated that the purpose of the N6.25Million cheque was to secure lifes and that it is only the Managing Director that can say how many lifes were secured. That Remisco Company is not his own alone and he introduced the company to Wise Health. DW2 looked at **Exhibit "D1"** and confirmed signing it for Remisco. He also confirmed signing the cheques of ₦5Million and ₦7Million. That it is for the company to look for lifes. DW2 stated that he does not know the procedure for issuance of cheque, he is only signatory to the account. That the ₦5Million came from Wise Health; the essence of the loan was for them to use it to generate more lifes, that if he could not get any lifes, he will return the money that was why it was issued as a loan. He confirmed signing **Exhibits "P5 and P6,"** they are his personal cheques. DW2 stated that there was a board resolution on the cheque of ₦5Million in 3rd, 4th and 5th board meetings. DW2 looked at **Exhibit "P8(2 and 3)"** and stated that the authorization is contained in **Exhibit "P8(3)".** He confirmed tendering **Exhibit "D2"** and stated that the complaint was investigated. He claimed not knowing **Exhibit "D1"** was made for the purpose of siphoning money from Wise Health. DW1 stated that himself

and 1st accused signed the cheques because the 3rd signatory was away to London.

There was no re-examination but counsel to the 2nd Accused indicated that he shall produce the CTC of the memo/articles of association of the company before the end of trial. The case of 2nd Accused was then closed.

The 3rd Accused also testified in person as DW3. His evidence is that he is a consultant involved in transaction and strategy consulting and a principal in Intelligence Development Consulting Group Ltd. He stated having a contract with Wise Health in October, 2007. Further to a discussion with Wise Health and 1st accused as the then M.D, they submitted a proposal to procure social health insurance programme contract for the entire communities in the Local Government Areas across the 9 Niger Delta States and they quoted ₦36Million, but thereafter, the cost of consultancy was reviewed downwards to ₦16.25Million. DW3 stated that in line with the amended contract scope, Intelligence Group, their company developed a template that would enable the social health insurance programme to take place.

DW3 stated that this scope included developing and submitting the frame work document. Further to the payment received in November, 2007 of ₦6.25Million, their company started work and in December, 2007, they sent a detailed 22 page framework document. He stated also that they facilitated several high level sessions, meetings and interactions. Some were official, some informal with N.D.D.C officials, Shell Petroleum to cover 27 communities in Niger Delta States that were impacted by the operations of Shell. That they also arranged high level meetings with Bayelsa Partnership Initiative and the Bill Gates Foundation. DW3 denied receiving the balance, despite several demands for it. DW3 stated that **Exhibit "P13(a)"** was his first statement dated 15th June, 2009 and that after the statement, he was subjected to all manner of torture which made him to make **Exhibit "P13(b)."**

Learned counsel for the 1st and 2nd accused persons elected not to cross-examine 3rd Accused.

Under cross-examination by the prosecution, DW3 stated that he has no position or role in Wise Health. He does not know who approved the cheque of ₦6.25Million but his interaction was with 1st Accused. DW3 could not remember or recollect signing any M.O.U with Wise Health. DW3 stated further that it is not correct that he never rendered any services to Wise Heath for which the sum of N6.25Million was paid to him. That based on empirical evidence on ground, there company carried out its assignment. In **Exhibits "P13(a-c)",** his statements, he confirmed that he volunteered to refund the ₦6.25Million but that the import of his statement is clear that their company carried out the assignment. He confirmed making his statements on the following dates: 15th June, 2009, 18th June, 2009 and 18th June, 2009.

With the testimony of the 3rd accused person, the defence formally closed their defence.

Pursuant to the order of court, the parties filed and exchanged written addresses.

The written address of the 3rd accused person was settled by Ogunleye Lekan Esq dated 16th September, 2014 and filed same date in the Court's Registry. Learned Counsel raised one issue as arising for determination thus:

Whether from the facts and circumstances of this case, the prosecution has made out a case of criminal misappropriation against the 3rd accused person.

The final written address of the 2nd accused person was settled by Biodun Fasakin Esq dated 11th August, 2014 and filed in the court's Registry on the 8th August, 2014. He also formulated a sole issue as having arisen for determination as follows:

Whether the prosecution has proved beyond reasonable doubt that the 2nd accused person is guilty of the offences of criminal misappropriation and conversion of the funds of WHSL as charged?

The final written address of the 1st accused person was settled by Wahab Toye Esq., dated 9th September, 2014 and filed at the court's Registry same date. Learned Counsel similarly raised a lone issue for the determination as follows:

From the facts of this case and the material evidence before the Honourable Court, whether the prosecution has established the offence of criminal breach of trust against the 1st accused person or any of the accused persons beyond reasonable doubt to secure a conviction?

The final written address of the prosecution on the other hand was settled by Joshua Saidu dated 9th October, 2014 and filed same date at Court's Registry wherein he also raised a lone issue in tandem with that formulated by all counsel on the other side of the aisle as follows:

Whether by the quantum of evidence adduced by the prosecution, it could rightly be said that it has proved its case beyond reasonable doubt.

Learned counsel for the 1st accused person filed a reply on points of law to the prosecution's final written address on the 29th October, 2014.

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 persons beyond reasonable doubt to warrant a conviction for the offences charged.

Now, it is not a matter for dispute that the charge accused persons are 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(s).

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 Persons beyond reasonable doubt.

I consider it apposite here for purposes of clarity and ease of understanding to restate the remaining availing counts against the Accused Persons as follows:

"2. **That you Dr Godwin Adeogba and Hon. Simon Adeyanju being directors of Wise Health Nigeria Limited on or about the 1st day of December, 2006 in Abuja in the Abuja Judicial Division of the High Court of the Federal Capital Territory being entrusted with money property of Wise Health Nigeria Limited did dishonestly misappropriate the sum of N5,000,000(Five Million Naira Only) by paying the same to Hon. Simon Adeyanju as mobilization fees for services that were not offered 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 Dr. Godwin Adeogba and Hon. Simon Adeyanju being directors of Wise Health Nigeria Limited on or about the 18th day of October, 2007 in Abuja in the Abuja Judicial Division of the High Court of the Federal Capital Territory being entrusted with money, property of Wise Health Nigeria Limited did dishonestly misappropriate the sum of N7,000,000(Seven Million Naira Only) by paying same to Hon. Simon Adeyanju as brokerage fees for services not rendered 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 Dr Godwin Adeogba being a director of Wise Health Nigeria Limited sometime in October, 2007 in Abuja in the Abuja

Judicial Division of the High Court of the Federal Capital Territory being entrusted with money, property of Wise Health Nigeria Limited did dishonestly allow Benjamin Eromosele to convert the sum of N6,250,000(Six Million, Two Hundred and Fifty Thousand Naira Only) to his own use by paying him same as brokerage fees for Niger Delta States a service he did not render; and thereby committed an offence punishable under Section 312 of the Penal Code Law Cap 532 Laws of the Federation of Nigeria (Abuja) 1990.

6 **That you Benjamin Eromosele sometime in October, 2007 in Abuja in the Abuja Judicial Division of the High Court of the Federal Cpital Territory did dishonestly convert to your own use the sum of N6,250,000(Six Million, Two Hundred and Fifty Thousand Naira Only) property of Wise Health Nigeria Limited which was paid to you as brokerage fees for Niger Delta States a service you did not render and thereby committed an offence contrary to Section 308 and Punishable under Section 310 of the Penal Code Law Cap 532 Laws of the Federation of Nigeria (Abuja) 1990.**

8. That you Dr Godwin Adeogba being a director of Wise Health Nigeria Limited on or about the 12th of December, 2006 in Abuja in the Abuja Judicial Division of the High Court of the Federal Capital Territory being entrusted with money, property of Wise Health Nigeria Limited did dishonestly allow Zac Ade to convert the sum of N4,500,000(Four Million, Five Hundred Thousand Naira Only) to his own use as brokerage fees for eight Federal Universities; a service he did not render and thereby committed an offence punishable under Section 312 of the Penal Code Law Cap 532 Laws of the Federation of Nigeria (Abuja) 1990."

Now with respect to the offence of criminal breach of trust, **Section 311 of the Penal Code Act** provides that:

"Whoever, being in any manner entrusted with property or with a 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 that trust is to be discharged or of a legal contract express or

implied, which he has made touching the discharge of the trust, or willfully suffers any other person so to do, commits criminal breach of trust."

In order to establish an offence of criminal misappropriation or conversion against an accused person, an essential element that must be proved by the prosecution is that set out in **Section 16 of the Penal Code Act.** It provides that:

"**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.**"

Therefore, the prosecution in this instance, is not only required to prove the act of misappropriation or conversion, but must by all means prove that the act was carried out with a dishonest intention by the accused persons to cause wrongful gain to themselves or another or a wrongful loss to any other person. See **Bakare & Ors V. The State (1968)1 All NLR 394.**

All counsel in their respective final addresses are adidem that in order to establish an offence of criminal breach of trust, the prosecution is required to prove the following ingredients:

a. That the accused was entrusted with property or dominion over it.

b. That he dishonestly:
    i) Misappropriated it; or
    ii) Converted it to his own use;
    iii) Used it; or
    iv) Disposed of it;

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

See the cases of **Onuoha V. State (1988)3 N.W.L.R (pt.83)460 and Hon. Ibrahim & Ors V. Commissioner of Police (2010) LPELR 8984 CA.**

Having properly set out the key ingredients of the offence of criminal breach of trust, the simple, albeit, delicate task the court is to undertake now is to examine the evidence led by the 5 prosecution witnesses in the light of the legal ingredients required to establish the offences for which the accused persons were charged. It is trite that before a conclusion can be arrived at, that an offence has been committed by an accused person, the court must look for the ingredients of the offence and ascertain critically that the acts of the accused person come within the confines of the particulars of the offence charged. See **Amadi V. State (1993)8 N.W.L.R (pt.314)646 at 664.**

Now before going to the merits, it may be necessary to at this point resolve the issue of the admissibility of the Certified True Copy of the memorandum and Articles of Association of WSHL sought to be tendered at the end of trial from the Bar by Learned Counsel to the 1st Accused. The counsel for the prosecution opposed the admissibility of the document and I indicated that I would consider the issue in my judgment.

The ground of objection is that the document was not properly certified in that no fees was paid and that there is no name of the certifying officer in compliance with **Section 111 of the Evidence Act.** The case of **Tabic Inv. Ltd V. GTB Plc (2011)17 N.W.L.R (pt.1276)240** was cited in support**.**

In response, Learned counsel to the 1st Accused submitted that the document was properly certified and the requirements of the law fully complied with. That they duly paid for the certification as clearly indicated and the name of the certifying officer is also indicated.

I have carefully considered the arguments on both sides and the issue to be resolved falls within a very narrow legal compass with clearly defined parameters. The issue simply has to do with the requirements of a properly certified public document. We take our bearing from the express provision of the **Section 104(1 and 2) of the Evidence Act** thus:

"

1. **Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees prescribed in that respect, together with a certificate written at the foot of such copy that it is a true copy of such document or part of it as the case may be.**

2. **Such certificate as is mentioned in subsection (1) of this section shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.**"

The above provision is clear on what a person seeking a certified copy of a public document should do and what is expected of a public officer releasing it should do. It is obvious that the word **shall** is used in respect of each act and performance to demonstrate the mandatory nature of the provision. A properly certified public document must therefore comply strictly with the above provision otherwise the document falls short of the clearly stated threshold and thus inadmissible. See **Tabik Investment V. G.T.B Plc (supra)240.**

In succinct terms before a public document can be tendered and accepted, the requirements of certification are:

(1) It was paid for

(2) There is an endorsement/certificate that it is a true copy of the document in question.

(3) The endorsement/certificate must be dated and signed by the officer responsible for his certification with his name and official title.

In this case, I have carefully looked at the certification here and as much as I have sought to be persuaded, I cannot accept that there is sufficient compliance with the mandatory requirements of the law here as stated above and which the Apex Court in **Tabik Inv. V. G.T.B Plc (supra)** have urged courts to uphold.

In the instant case, there is no clarity as to whether any fees was paid at all. While the certificate may have been signed on each page, the official responsible for the signature clearly did not state his name and official title.

In the absence of fulfillment of these requirements, it is difficult to ascribe necessary cognitive weight and credibility to the document. This is so because certified documents are deemed to be the originals and enjoy the presumption of regularity and so to enjoy that presumption, it must be properly certified. On the whole, in the absence of proper certification as countenanced by law, the said document is inadmissible and is to be marked tendered and rejected.

Now relating the earlier listed ingredients to the evidence led on record, it must at first be determined if the money(s) in question was entrusted to the Accused persons or that they had dominion over it.

I had at the beginning of this judgment given a deliberately comprehensive restatement of the evidence on both sides as it clearly provides the necessary factual and legal template in resolving the contending issues which remain to be resolved by court. It would appear that on the evidence there is no dispute as to the question of dominion over the moneys covered by the extant charge. The narrow issue is on the precise application of these funds.

Now on the evidence, it is not in dispute that the complainant, Wise Health Nigeria Ltd (hereinafter referred to as WSHL or the company) is a frontline Health Maintenance Organisation (H.M.O) incorporated on 27th July, 2004 and duly accredited with the National Health Insurance Scheme (NHIS) to provide health care for Nigerians at affordable prices or rates. The moneys subject of the extant charge belongs to WSHL.

The 1st and 2nd Accused Persons were indeed founding members of the said company. 1st Accused is a shareholder and pioneer Managing Director of WSHL. The 2nd Accused is a shareholder, Director and later the chairman of the Board of Directors. The 1st and 2nd Accused together with one Mr. Okala are the signatories of the account of the company at all times material.

There is therefore really no dispute that the moneys subject of the charge or various counts belongs to the company or W.S.H.L and both Accused Persons were principal officers of the company. It is therefore safe to say that by the respective positions of authority they hold in the company that the Accused Persons were indeed entrusted with and accountable to the company for any funds belonging to the company and over which they superintend in order that it was deployed judiciously in the interest of the company and its shareholders.

As such on the evidence, I should have no difficulty in holding and I hereby hold that the prosecution clearly established the first essential ingredient of criminal breach of trust against the 1st and 2nd Accused Persons.

Now I observe immediately that with respect to proof of the other ingredients, learned counsel to the 1st Accused Person has submitted that the other elements that constitutes the offence of criminal breach of trust must be established concurrently. He did not however precisely explain what he meant by concurrently. It would appear that learned counsel wants the prosecution to prove all the alternatives or elements at the same time. That appears to be raising the threshold beyond what the law prescribes. It is therefore important to note that the word **"or"** appears in the provision of **Section 311** stated above with respect to the succeeding ingredients to be established. In law, when the word **"or"** appears in an enactment, it is a disjunctive participle used to express an alternative or to give a choice among two or more things. See **Abia State University V. Anyaibe (1996)3 N.W.L.R (pt.439)646 at 661; Mangai V. State (1993)3 N.W.L.R (pt.279)108 at 117.** The effect of the use of the word **"or"** is simply that the succeeding ingredients required to prove the offence of criminal breach of trust as set out in the provision of **Section 311 of the Penal Code Act,** are couched disjunctively or in the alternative. In other words, the prosecution only requires to prove any but not all of these alternatives, namely: whether the Accused Persons dishonestly misappropriated the W.S.H.L fund; or whether they dishonestly used or disposed of the property in violation of any direction of law prescribing the mode in which that trust is to be discharge; or a legal contract express or implied, which they have made touching the discharge of the trust; or

whether the Accused Persons willfully suffers any other person to do any of the foregoing.

On the basis of the foregoing, I shall now proceed to evaluate the evidence on record and then determine which of the elements that the prosecution has established in the circumstances.

Now here, I have carefully related these critical ingredients to the evidence of the five prosecution witnesses in this case and without going into matters that may only have peripheral significance in the context of the substance of the charge, the evidence and general narrative of the prosecution witnesses is that certain amounts were dishonestly disbursed without the authority of the company. The evidence of PW1 and PW3 is clear to the effect that as shareholders and Board members of W.S.H.L, there was never a time that the board sat and authorised the payments made. PW1 who also is signatory to the accounts of the company never at any time signed any of the cheques for the disbursements made. Indeed from the evidence of the key witnesses for the prosecution, they only became aware of these disbursements after an audit report was made with respect to the accounts of the company which then prompted the petition, **Exhibit P3** to EFCC which led to investigations by the body and the filing of the extant charges against Accused Persons. It may be necessary to state at this juncture that the audit report was never produced at plenary hearing.

On the part of the 1st Accused and also 2nd Accused, the substance of their narrative is that all disbursements which they never denied, were done in good faith and with the approval of the board in furtherance of the core objectives of the company.

The crucial question to be resolved in determining the culpability of the Accused Persons for the offence of criminal breach of trust is whether the disbursement was undertaken with dishonest intent or not?

In resolving this poser, it is critical in my view to situate the essence of what the company stands for. As stated earlier and on the evidence, the company is a health maintenance provider (H.M.O) and acts as an

intermediary between care givers and care recipients. The H.M.O also oversee the quality assurance of health care delivery.

On the key question of the operations of the company and how it acquires **"lifes,"** the evidence of 1st Accused who was the founder and pioneer Managing Director of the company and PW5 who also served as Managing Director of WSHL appears insightful and interesting for its divergence. I will refer to their evidence *in-extenso*. Let me however at the outset streamline precisely what a **"life"** means as it is a term that appears severally in the narrative of parties. On the evidence and in the context of the business of WSHL, a life simply means a head or heads of health care recipients. Having stated what a life means, I return to the evidence of DW1 or 1st Accused.

He stated in evidence that the company sources for lifes by actually visiting and liaising with the principal officers of the universities and the unions especially ASUU. They also arrange for seminars to convince the lecturers who are their targets. He stated further that directors were encouraged to source for lifes and for incentive, they had to initiate a standard brokerage agreement which set the frame work for remunerating such efforts. The 1st Accused explained that to achieve this, three board meetings were held and that the people making the present accusations were not part of the board. Also that at the time, all their clients were federal civil servants and payments to the H.M.O's were done through the N.H.I.S. He further explained that payment of fees by the N.H.I.S is dependent on whether you were allocated or affiliated. That the first group of H.M.O's were allocated core ministries and payment was for covering whosoever is in their personal record. That in their case since they were only affiliated to universities, they had to do the entire registration of staff and they were paid based on the level of registration. That for example ABU had 7000 members of staff and that it took them nearly 2 years to even reach 65% of the staff.

On the part of PW5, his evidence on the sourcing of lifes is that what H.M.O's like Wisehealth do is to register people and in their case, these people are employees of Federal Government Parastatals. That the role of

H.M.O's is to pay the health care providers for looking after the lifes of those registered.

He stated that initially lifes were given to them by NHIS but later the onus fell on the H.M.O's to look for lifes. That throughout his tenure as Managing Director which is obviously after that of 1st Accused, no lifes were brought by anybody neither can he recollect from an examination of documents at his disposal that any lifes were brought in before his tenure beyond the initial ones given by NHIS.

Now with the above background, lets attempt to situate the factual or legal basis for the disbursements made allegedly to secure lifes.

The 1st Accused in evidence stated that the approval to operate brokerage transaction which supports the disbursement in counts 2 and 3 was given within the first four to five board meetings.

Now I have carefully read **Exhibits P8(1 -3),** which are board meetings of the company for 26th January, 2005, 19th April, 2005 and 15th June, 2005. In the minutes of meetings of 26th January, 2005, it is clear that brokerage considerations were discussed and the 1st Accused as MD/CEO explained the features and technicalities of brokerage of social Health Insurance and how W.S.H.L can exploit the vast and lucrative captive market nationwide. The board meeting of 19th April, 2005 similarly discussed the brokerage consideration and the Managing Director informed the board that a standard brokerage agreement has been prepared in readiness for execution with interested parties. Finally the board meeting of 15th June, 2005 is clear to the effect that the Managing Director explained that W.H.S.L has executed Standard Brokerage Agreement with various parties, some in the insurance industry, while others are in accounting firms or even banks and it was resolved that efforts be continued in following such avenues to their logical conclusion.

On the evidence, it is clear that as stated by 1st Accused, the issue of brokerage agreements was indeed discussed at the board meetings of W.S.H.L. It is also interesting to see that on the minutes apart from PW3, none of the key prosecution witnesses was then part of the board when

deliberations on the issue was discussed. Indeed by **Exhibit P8(3), PW3** was then a member of the board but he was not in attendance due to engagements elsewhere. He however in evidence agreed that he attended a board meeting where this issue was discussed and the 1st Accused was given the go ahead.

Having provided the above platform, the next key question is whether the payments or disbursements made were for purposes of brokerage as alleged. With regards to the specifics of the disbursement of ₦5Million and ₦7Million Naira, the 1st Accused stated that a company 2nd Accused was acquainted to was introduced by the 2nd Accused because of their activities in helping to secure lives. He stated that they received a letter for a loan to engage in securing lives. He stated that as Managing Director, he justified the loan. That it should be part of the remuneration that should come from brokerage and since the brokerage agreement had not been standardized at that time, that he requested for a post-dated cheque to be deposited for that amount. That after the standardization of the brokerage agreement and the company started receiving payments, they netted the amount due for brokerage fee minus the loan and that since the brokerage fee due to them was substantial they returned the post-dated cheque.

On the N7Million, he stated that since at the time the brokerage fee was substantial, the N7Million was not regarded as a loan but as part payment that was due to the company, Remisco. That 1% was due to Remisco on a monthly basis and as at that time over 25Million was due to them as they have procured 33, 217 families from 8 universities which is equivalent to 115,000 lives and that based on the lives secured by Remisco, they took an advanced payment bond or those lives before they could collect money from N.H.IS and that it was the same N.H.I.S that directed them to where they got the bond.

On his part, the 2nd Accused in evidence stated that they worked for the disbursements made by procuring lifes for W.S.H.L from the 8 universities. That companies like Remisco were utilized to get lives and they got 116,260 lifes and that Remisco was supposed to be paid 10% of administrative fee. That N836.5k is paid for each enrollee or life, and that if

this was multiplied by the number of lives, what was due to Remisco from July 2005 to end of October, 2007 was supposed to be about ₦25Million but only ₦12Million was paid and that this is the same amount said to be misappropriated.

That indeed at the time W.S.H.L was registered, they had to set up offices and buy equipments and because there was no money, he had to ask for a loan to enable them get lifes so that the company can survive.

Now as stated earlier, the witnesses for the prosecution and in particular PW1, PW3 and PW5 from the company debunked the entirety of the above narrative. That the company was never aware of such transactions, neither were they informed and there was no authorization by the Board. They also added that the lifes said to have been acquired was untrue and PW2, the I.P.O stated that their investigations did not reveal or prove that any such lives were acquired.

Now I have critically evaluated the evidence on record and as stated earlier, W.S.H.L was incorporated in 2004 and accredited in 2005. At least by **Exhibits P8(1-3),** the minutes of board meeting show that the company despite teething problems was fully operational. If as stated by 1st Accused that the company introduced by 2nd Accused applied for a loan by letter to help in securing lifes, no such letter was produced in evidence. Indeed even if such letter exist, the next question is whether any such template exist for the grant of such loans. The company WSHL is obviously not a bank or an institution created to function as a loan granting institution either to its directors or members or to anybody. I have carefully again read the relevant minutes, and while the issue of brokerage may have been discussed, no where was the issue of granting loans to secure lifes discussed and no where was such authorization given. Neither the 1st and 2nd Accused has provided any basis in evidence to support the exercise and as much as I have sought to be persuaded, I have not been so persuaded that the grant of loans by 1st Accused can be fixed or situated within a verifiable parameter.

Furthermore, even on the evidence, legitimate questions as to whether the said disbursement was a loan or for purposes of brokerage still arise in addition to the issue of security allegedly obtained for the loans. In respect of the N5Million as stated already, 1st accused stated that a company 2nd Accused was acquainted with applied for a loan to secure lifes and that he justified the loan because it will form part of the remuneration but that since the brokerage agreement was not then standardized, he requested for a post dated cheque to be issued.

Even if I accept that no standard brokerage agreement was ready at the time, I find it really strange that for moneys which neither belongs to the Accused persons, there is absolutely nothing on record to support this loan transaction or the brokerage relationship with 2nd Accused or the company Remisco. It would appear that the precise terms of this N5 Million loan transaction or relationship is only within the knowledge of 1st and 2nd Accused Persons and they similarly jointly signed the cheque which by the way the regulations of the company allow which enabled the said payment to be made. One would have expected that because of the obvious conflict of interest between 2nd Accused and Remisco, that 1st and 2nd Accused Persons would have allowed wise counsel to prevail by allowing the other signatory to sign the cheque and furthermore this relationship ought to have been disclosed to the board and a proper verifiable template to determine the basis for mutual reciprocity of legal relationship established. If the third disinterested party had perhaps appended his signature, the board would have certainly become aware even if constructively of the payments. All these steps were not taken.

This analysis equally applies to the ₦7Million. The 1st Accused stated that by the time of this transaction, the brokerage fee had become substantial and so the N7Million was not regarded as a loan but as part payment due to the company Remisco, because he said that by then, Remisco had procured 33,217 families from 8 universities which is equivalent to 115,000 lifes and that what was due to Remisco then was about N25Million.

Now for all this oral assertions and which were vehemently challenged there is absolutely nothing to provide a basis that this transactions

happened. The only semblance of reality to show that moneys belonging to WSHL were given out are the post-dated cheques, **Exhibits P5 and P6. Exhibit P5,** the cheque dated 19th January, 2007 issued by 2nd Accused with a value of N5,000,000 has no beneficiary. The second cheque of N7,000,000, **Exhibit P6** also signed by 2nd Accused has no beneficiary at all and is not even dated and this for me raises serious questions on the sincere intention or bonafide of the entire loan/brokerage business. How shareholders funds are secured in this manner suggested by 1st Accused really is difficult to understand.

Now its true that in evidence, the 1st Accused tendered the signed memorandum of understanding with respect to brokerage between WSHL and Remisco. Now I really don't see how this aids the case of the 1st and 2nd Accused Persons. The said agreement is dated 10th December, 2006 and predates the first cheque of N5Million issued by 2nd Accused dated 19th January, 2007 by nearly a month. This agreement detracts from the assertion of 1st Accused that as at the time he granted the loan and converted it to brokerage, there was no standard agreement which was why he asked for the post-dated cheque. The bottom line is that this agreement was already in place, and there was therefore no room for any grant of loan to secure lifes.

Now with respect to the second payment of N7Million, from the unchallenged evidence of PW4, this transaction occurred in November, 2007 when 2nd Accused applied for N7Million to secure social health insurance contract in Benue State and some other universities. It is clear here too that this loan was granted about a year after the M.O.U was signed with Remisco and it is difficult to understand the basis of this loan in the light of the express terms of the Agreement.

This agreement **Exhibit D1** as stated earlier is the document that necessarily regulates the relationship between parties. It is the basis of the mutual reciprocity of legal relation between WSHL and Remisco. It is therefore strange that loans are given out to a party to fulfill its own side of the bargain. This perhaps explains why these transactions were not made

known to the Board. Let me out of abundance of caution refer to the specifics of the agreement

“WHEREAS Messrs ‘Broking-Associate’ are engaged in the business of providing Resource Support Services particularly towards assuring an enabling environment suited for varied client-industries in Nigeria.

WHEREAS Messrs WHSL are engaged as a National “Health Maintenance Organisation (HMO)” in conformity with National Health Insurance Scheme (NHIS) as enabled by FGN Act 35, 1990;

WHEREAS WHSL have requested ‘Broking-Associate’ to solicit for the Affiliation of Contributors (Organizations, State Governments and Community Groups) with WHSL in effectuating the nation’s Social Health Insurance Scheme and ‘Broking-Associate’ have accepted the engagement, agreeing to render such services to secure such affiliations with WHSL as required based on Terms of Reference (T.O.R) outlined herein-below:

1. **That affiliations shall be packaged by ‘Broking-Associate’ into Formal or Informal Sector Groups, whereby Formal are for organisation with formal staff payment structures while Informal are for other entities coordinated by registered Faith-Based Organisation (FBO), Community-Based Organisation (CBO) or Non-Governmental Organisation(NGO).**

2. **That each packaged Formal Sector Group (FSG) shall comprise not less than 10(ten) contributor-members, while each packaged Informal Sector Group(ISG) shall have not less than 500 contributor-members.**

3. **That for each FSG, affiliation with WHSL will attract payment by WHSL to ‘Broking-Associate’ of a maximum Brokerage Fee of 10% (ten percent) of the Maximum Administrative Component of NHIS stipulated contributions.**

4. **That of each ISG, affiliation with WHSL will attract payment by WHSL to ‘Broking-Associate’ of a maximum Brokerage Fee of 5%**

(five percent) of the Maximum Administrative Component of contributions agreed with the Board of Trustees of the ISG

5. **That each ISG member shall pre-specify a choice of payment method as either fixed-period or flexible period payment; whichever the case, payments shall cover only the contributor and shall not be presumed to cover any spouse or dependent as in the case of the Formal Sector.**

6. **That the Fixed-Period Payment Contributors in any ISG, payments shall as agreed with the Board of Trustees Concerned, such payments being not less than N750(Seven Hundred and Fifty Naira Only), that is about US$6(Six US Dollars) per month; any individual default shall warrant immediate conversion to a flexible payment structure or total exclusion as may be agreed with the Board of Trustees.**

7. **That of Flexible-Period Payment Contributors in any ISG, payments shall be as indicated herein-below:**

   Every weekly contributor is to make a payment of minimum ₦300(Three Hundred Naira Only), that is less than US$3 (three US Dollars) not later than a waiting period of 6(six) weeks in advance of the week(s) concerned.

   Every monthly contributor is to make a payment of minimum N1,000(One Thousand Naira Only), that is, about US$8 (Eight US Dollars) not later than a waiting period of 6(six) weeks in advance for the month concerned.

8. **That in order to obviate duplication of efforts and/or circumvention problems, 'Broking-Associate' shall inform WHSL of each targeted prospective client and also the expected duration of the affiliation solicitation exercise involved.**

9. **That, on a case-by-case basis, all parties involved shall agree the modalities of engagement with due recognition given to every cost**

center and every financing centre without any premise construed to allow any form of Master-Servant modus operandi.

10 **That all payments due including any Imprest Account(s) amount shall be paid within an agreed specified period of confirming and clearing the payment instrument of each affiliation contract.**

11 **That the Modus Operandi of each affiliation assignment shall be necessarily discreet with due observance of standard non-circumvention code of ethics and project forum as minimized as possible without jeopardizing authenticity and integrity of any side.**

This M.O.U is valid from the moment of its execution as specified herein below on the day specified herein-above.

The M.O.U may be annulled by a notice of not less than 90(ninety) working days by either party.

This M.O.U is hereby executed by the appending of authorized signatures, dates and stamps/seals by both 'Broking-Associate' and WHSL as presented herein-below."

The agreement speaks out for itself. The modalities for brokerage payment were clearly streamlined on the basis of getting affiliations or carrying out the contract and no more. There is clearly even under the agreement no basis to support the kind of payments authorised by 1st Accused to be made to 2nd Accused or Remisco.

Critically if these moneys or disbursements were used to secure lifes, as alleged, beyond the viva voce testimony of 1st and 2nd Accused which was strenuously denied by PW1 to PW5, nothing was put forward by the Accused Persons to put the court in any position to accept their version of events that they secured lifes for the company. It is possible that lifes may have been secured by the 2nd Accused or Remisco, but beyond **Exhibit D1,** the brokerage agreement between W.S.H.L and Remisco, nothing has been put forward in real times to show the affiliations that were secured by this company for which these payments were allegedly made. What

Exhibit D1 shows is that a brokerage agreement exists. It does not however show and this is critical that the agreement was carried out or concretised. If it was executed, where was the execution done? What are the states, organisations or universities allegedly covered? The court obviously is got given to speculations, but if lifes were secured in various universities, there must be some basis, even if minimal, to provide a basis for the court to so hold.

I had earlier stated the burden of proof on the prosecution. I had similarly referred to the provision which states that if the prosecution proves the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt is shifted to the Accused Person(s). what this simply means is that where the prosecution establishes or crosses the threshold of proving its case beyond reasonable doubt, the onus then shifted to the defence to adduce evidence capable of creating some reasonable doubt in the mind of the trial judge.

The point must be emphasised to avoid any inclination or disposition to confusion that the primary onus of establishing the guilt of the Accused Persons was still or remains with the prosecution and this does not shift. What does shift is the secondary onus or the onus of adducing some evidence which may render the prosecutions' case impropable and therefore unlikely to be true and thereby create a reasonable doubt. See **Mufutau Bakare V. The State (supra)1 at 32, 33-34.**

In this case, in addition to the evidence of PW1, PW2 and PW3, the prosecution also produced **Exhibit P4** from the NHIS which shows the 8 universities affiliated to W.S.H.L and the fact that from June, 2006 to June, 2009, W.S.H.L was paid the sum of N1,623,924,376,27 (One Billion, Six Hundred and Twenty Three Million,. Nine Hundred and Twenty Four Thousand, Three Hundred and Seventy Six Naira, Twenty Seven Kobo) under the Public Sector Social Health Insurance Programme. Another N38,868,784.00 was also paid to the company under the N.H.I.S/MDG/MCH project in Gombe State for the months of January, 2009 to August, 2009.

The above evidence was not in any manner challenged or controverted. At the risk of prolixity, if as alleged, that the Accused Persons took steps to secure lifes in various other universities, then there must be credible evidence of this endeavour. None was supplied. I also note that the universities repeatedly referred to by 1st and 2nd Accused as institutions were **"lifes"** were solicited or secured similarly form part of the universities given to the company by the N.H.I.S vide **Exhibit P4.** The question that then arises is if these universities were already affiliated and enormous sums given by the Government, what then did the Accused Persons really do with these moneys subject of the charge belonging to W.S.H.L?

In addition if as alleged, that the loan was required because the company had no money and lifes were urgently required to sustain the company, the disclosure of payments by N.H.I.S completely discredits this assertion. Similarly if the loan was used to open offices in different geopolitical divisions of the country and to buy equipments, absolutely no evidence was produced by either 1st and 2nd Accused persons to give credibility to their narrative.

Also, if as alleged that the process of acquiring lifes involves travels and meetings with unions like ASUU in various universities across the nation, the pertinent point is that these schools and unions still exist. Is it that there is nobody or nothing tangible existing that gives some semblance of credibility to the narrative of Accused Persons? I just wonder.

I have alluded to the evidence of PW5 that contractors were contracted in Gombe State to acquire **"lifes."** This appears to confirm the fact that the company in addition to the affiliation of universities by Federal Government also took steps to acquire lifes. I really do not see any significant contradiction here. What this simply amounts to is that where the company goes ahead to acquire lifes beyond those affiliated or even acquires lifes from universities affiliated as contended by the Accused Persons, it is for this acquisition to be positively established as the issue of acquisition cannot be left to conjecture or speculation. The **Exhibit P4** from the N.H.I.S has made any further acquisition of lifes beyond those universities or even within them a matter of proof by anybody who makes such

allegation. For example, if anybody went to Gombe which is not within the eight universities in **Exhibit P4,** then there must be some basis for the court to hold that such activity was indeed carried out in Gombe.

There is here absolutely no record of these travels, meetings and lifes allegedly secured for the company by the Accused Persons. This really is strange. For example, the 1st and 2nd Accused Persons testified that Remisco procured 33,217 families from eight universities which is equivalent to 115,000 lifes and that what was due to Remisco from W.S.H.L at the relevant period was ₦25Million. The question that has agitated my mind really is what is the basis for this assertion. There is no scintilla of evidence in support of this transaction and the alleged indebtedness to Remisco.

Furthermore, the 1st Accused also stated that based on the **"lifes"** allegedly secured by Remisco, they had to get an advanced payment bond and that N.H.I.S directed them as to where to get the bond. He however did not provide any evidence to support the assertion of securing of any payment bond. One therefore really wonders as to how the business of such a serious company can be run in such cavalier manner bereft of records.

The court neither manufactures nor conjures evidence. The trial process despite its inherent imperfections is a search for truth and justice and it is completely evidence driven.

It is true that the prosecuting I.P.O did not extend their investigations to these universities where lifes were said to have been procured. That may have been fatal without **Exhibit P4** which shows clearly the eight universities affiliated to W.S.H.L and moneys paid by the Federal Government obviously for payment to health care providers, in addition to evidence of PW1, PW3 and PW5 which is unequivocal to the effect that beyond the affiliations by the Government, no further lifes were secured as alleged. The burden of proof as I have stated elsewhere in this judgment is not one beyond the shadow of any doubt. Absolute certainty in human affairs including administration of justice is impossible. With the tendering

of **Exhibit P4** from the office of the secretary N.H.I.S and the unchallenged evidence of PW1, PW3, and PW5 that lifes were not secured by anybody beyond that allocated by the Government, the burden shifted to 1st and 2nd Accused to establish or show what universities they covered and the "lifes" allegedly secured. If any payments are still due to Remisco, there must be a basis for same. As already alluded to, some of the universities said to have been acquired by 2nd Accused and Remisco clearly form part of those covered by **Exhibit P4.** In the absence of any credible counter evidence, it will be difficult to hold that "**lifes**" were acquired further to a brokerage relationship.

It may be appropriate at this point to refer to the extra judicial statements of 2nd Accused Person. In **Exhibit P12b** dated 12th June, 2008 he stated thus:

"…I went out of my way using prominent members of the political class and indeed employed the services of one of the employee of Remisco group. We finally succeeded in securing eight universities viz universities of Lagos, Ife, Ilorin, Jos, Ahmadu Bello, Kano, Calabar and Benin. In getting these lifes considerable cost was involved. Consequently, I requested for a loan which was refused by the M.D. To enable me recover my cost, Remisco Group took a brokerage service with Wise Health Services Ltd and the MD paid for services rendered partially claiming that Remisco had to do more. The payment for brokerage services is specified in clause 3 of the Terms of Reference. Although the payment of N5Million Naira was based in consideration of the procurement of lifes. What the Managing Director focused on soon after the procurement of lifes in respect of staff of the universities was students which is a daunting task. He requested Remisco Group to extend our dragnet to states and private orgainsations. Remisco since went for students of the eight universities listed above and some states i.e Benue, Lagos, Ekiti and others. Ekiti would have been secured by now but for the political situation and the fact that the board mandated that we should stop. Before this mandate, I had request for a payment of 50% i.e about ₦7Million for the work done. A cheque for N7Million was issued at

first and was returned due to lack of fund. Another cheque for N6Million was issued to Remisco International Agencies to cover part of the expenses incurred. The loan applied for was refused by the Managing Director but in its place he decided to pay part of the brokerage in securing along with other people eight universities. Since he refused giving me a loan he returned the cheque of N5Million which would have been the collateral if I was granted a loan."

In **Exhibit P12c,** he added as follows:

"… I requested Wise Health Services Ltd for a mandate to further secure lifes fro the company in the letter dated 18th October, 2007 for Lagos, Benue and students of eight universities in which we have earlier secured lifes of their staff. In the letter I put our professional fee at M15Million and requested for about N7Million as mobilization. The request also fell within the period when staffs of some of the universities did not grasp the concept of the new NHIS programme which indeed was novel. The need to go to these universities became imperative apart from the need for the procurement of students to be part of the programme. The MD gave approval for mobilization of N7Million Naira. A cheque was issued at first but returned to me by the bank. I then went to the Managing Director and requested for cash and cheque to cover the N7Million. A cheque for the sum of N6Million was issued while a cash of N1Million was given to me in the Account Department of Wise Health….A formal agreement was established between Remisco Group and Wise Health Services Ltd by signing a brokerage. The brokerage still subsists. At the time the universities were approved for Wise Health Services Ltd, Remisco Group was still out canvassing so no formal report would have been written. The evidence of our job is the affiliation of the eight universities. The request of 18th October, 2007 was signed on behalf of the company by Mr. G.A. Ayodele a staff of the company. The N5Million requested on 1st December, 2006 was expended on various contacts made between the accreditation of Wise Health and the affiliation. The N7Million request of 18th October was given as mobilization for securing the affiliation of the students of eight

universities mentioned before and possibly some states such as Lagos, Benue, Ekiti etc…."

The above statements also clearly speak out for themselves. The oral testimony that the moneys were given out as a loan to secure lifes clearly would have no validity. The argument that they were secured by the deposit of post-dated cheques appear also to lack credibility.

The whole story of the disbursements been loans or brokerage payments clearly is riddled with glaring inconsistencies and lack of clarity. Indeed even going by **Exhibit D1,** the brokerage agreement and I have already alluded to it, it presupposes that the broker is expected to first secure lifes or affiliations before payment. The idea that mobilization fees have to be paid is no where contained in the said agreement. Indeed by the evidence of both 1st and 2nd Accused Persons, there is a value attached to a life and the aggregate values of lifes secured will entitle the broker to a certain percentage of fees. Without lifes secured, there cannot be payments on brokerage. The condition precedent to the validity of any brokerage transaction is the securing of lifes and no more.

Now in addition to the absence of any precise identifiable basis to support the securing of lifes as alleged by the 1st and 2nd Accused Persons, there is similarly no evidence to show what really happened to these moneys. By the unchallenged evidence of the accountant, PW4, none of these moneys was at any time paid back.

On the whole, the dishonest intent with respect to counts 2 and 3, lie in the disposition of the funds of the company in a manner not countenanced by the laws or regulations governing the operations of the company and also violates the implied relationship of trust that exist between Accused Persons as directors of WSHL or the company. On the evidence, there is no verifiable template to support the granting of loans to anybody. On the evidence too the Federal Government had vide **Exhibit P4** affiliated 8 universities to the company and enormous payments made to the company. The allegation that at the material time that the company lacked money is therefore in the circumstances idle talk. If lifes were indeed

secured by 2nd Accused or indeed any company, no such evidence was supplied to court.

Furthermore, the dishonest intent can also be deduced from the fact that at no time did the 1st Accused who was aware of the interest of 2nd Accused in Remisco either inform the company of this clear conflict of interest or indeed inform the company of this transaction. The 2nd Accused himself aware of his position did not declare his interest in Remisco to the board or inform the board of this loan or brokerage transaction. It is clear here that the Accused Persons were not honest in their dealings with the company. The company has suffered loss while the 2nd Accused has undoubtedly benefited.

Both 1st and 2nd Accused Persons are prominent members of the company and clearly are intelligent and discerning enough to know better how to deal with company funds. The duty to secure the funds of shareholders is not one to be trifled with. Both 1st and 2nd Accused Persons were sitting Directors on the board of WHSL and the duty to act responsibly is my considered view paramount. Yes the 1st and 2nd Accused Persons may have found the company but that is no licence to use the funds of the company whimsically without recourse to either the Board or the internal rules or mechanisms put in place to ensure the smooth running of the company.

Let me at this point deal with the submission of learned counsel to the 2nd Accused that it is only the company or W.S.H.L, a corporate entity that can be liable for the offences allegedly committed by the company. The contention of learned counsel to the 2nd Accused is that the 1st Accused is the Promoter/Managing Director of W.S.H.L while the 2nd is a Director and co-promoter and that they are therefore owners of the purported complainant and that in law they are both one entity.

I really with respect do not seem to appreciate the arguments of learned counsel. I really do not see how a registered limited liability company becomes one entity with either its promoters or directors. This is new law to me and no authority was cited to support this proposition. Learned

counsel to the 3rd Accused made a similar submission in his address but in more clear terms. He stated that there is no iota of evidence of illegality against the 3rd Accused but only to Messrs intelligence Development Consulting Group Ltd where 3rd Accused is the Chief Executive Officer. That it was the company that applied to secure Social Health Insurance Scheme with Niger Delta States and that the company also received the payments. I need not go to any detailed analysis in this Judgment on the distinct corporate personality of a company. I would have thought that with the level of developments in criminal law jurisprudence, the subject of criminal liability for corporate conduct need not generate much debate. The position is therefore not as closed as both learned counsel want us to believe.

The much trumpeted corporate shield for criminal liability on the authorities by our superior courts is no longer impregnable. Apart from the fact that the individual director could be held personally liable for criminal infractions personally committed by him in office, where the conduct was attributed to the company he acted for, the corporate veil could be lifted and where he is identified as the directing mind of the corporate entity, he could face penal actions. I will only refer here to a few pronouncements by our Superior Courts. In **Oyebanji V. The state (2011)LPELR 3765,** the Court of Appeal affirmed the conviction of the Appellant, being Managing Director of a limited liability company, charged with the offence of stealing money paid to the company for the importation of certain goods which were not supplied and for which moneys paid were not returned to the customer. In its unanimous judgment, the court held, per *Fasanmi, JCA,* as follows:

"In my humble opinion, this is a case in which the law should disregard the corporate entity and pay regard to the entities behind the legal veil of incorporation. Allegation of crime lifts the veil of corporate or voluntary associations and opens up the body to prosecution upon good and substantial facts placed before a court of competent jurisdiction."

In **Vilbeko (Nigeria) Limited V. Nigerian Deposit Insurance Corporation (2006)12 N.W.L.R (pt.994)280 at 295,** Adekeye JCA (as he then was), elucidated on the doctrine of lifting the veil as follows:

"An incorporated limited liability company is always regarded as a separate and distinct entity from its shareholders and directors. The consequence of recognizing the separate personality of a company is to draw the veil of incorporation over the company. No one is entitled to go behind the veil. This Corporate Shell shall however be cracked in the interest of justice, particularly where the company is used as a mask or sham by the director to avoid recognition. In the eyes of equity, the court must be ready and willing to open the veil of incorporation to see the characters behind the company in the interest of justice. Since a statute will not be allowed to be used as an excuse to justify illegality or fraud, and once there is clear evidence of fraud or illegality, the veil will be lifted."

See also **Adeyemi V. Lan & Baker (Nigeria) Limited (2000)7 N.W.L.R (pt.663)33; Mezu V. Cooperative & Commerce Bank (Nigeria) Plc. (2013)3 N.W.L.R (pt.1340)188; Chinwo V. Owhonda(2008)3 N.W.L.R (pt.1074)347 at 362.**

Also apposite here is the dictum of Lord Denning, J (now late), in the English decision of **Bolton Engineering Company Limited V. Graham & Sons (1957)1 QB 159 at 172 to 173,** where the eminent jurist instructively stated as follows:

"A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of those managers is the state of mind of the company and is treated by law as such…"

In the instant case, the undisputed evidence on record is that the 1st Accused Person was at all times material to the instant charge, the Managing Director of W.S.H.L, a limited liability company shareholder and signatory to the account of the company. The 2nd Accused Person is similarly a shareholder, Director and also a signatory to the company's accounts by virtue of which they could be viewed in the eyes of the law as part of the directing minds of the company. On the evidence, the disbursement was made to a company that the 2nd Accused clearly has an interest.

On the evidence, it is clearly not in dispute that the authority for the disbursement and the infraction being complained about was solely that of the 1st Accused with clear knowledge of 2nd Accused. There is no evidence to the contrary to show any authorization by the board of W.S.H.L. The cheque payments were signed by only 1st and 2nd Accused Persons.

Most importantly, the evidence on record show that W.S.H.L in whose behalf and benefit the said disbursement was said to have been made did not in any cognisable manner benefit from same.

In the circumstances therefore, it will be in the interest of justice for the court to crack the corporate shell of W.S.H.L in order to determine the culpability of the two Accused Persons and Directors who were charged before this court with respect to the offence alleged against them in view of their crucial relationship with the W.S.H.L and the roles they played in the processing of the disbursements in issue.

The above position similar holds true for the 3rd Accused who clearly is the Principal Directing Mind of Intelligence Consulting Group. On the evidence, he dealt directly with 1st Accused and discussed with him in relation to the contract subject of the charge he is facing and he was the one that submitted the proposal to procure social health insurance contract for the Nine Niger Delta States. The payments made were to him and on the evidence the undertaking made to EFCC to pay back the disbursements made was given by him personally. The attempt to now hide under the guise of corporate personality cannot therefore be availing.

For the reasons expressed in the foregoing, borne by the evidence led on record, I hereby hold that the present charge is competently filed against the three Accused Persons, as the directing minds and wills of W.S.H.L and Intelligence Development Consulting Group.

On the basis of the foregoing therefore, I agree that the prosecution has proved beyond conjecture, that the Accused Persons misappropriated the funds covered by counts 2 and 3.

Count 5 similarly accuses 1st Accused of dishonesty allowing one Benjamin Eromosele (3rd Accused) to convert the sum of N6,250,000 to his own use by paying same as brokerage fees for Niger Delta State, a service he did not render and thereby committed as offence punishable under **Section 312 of the Penal Code.**

Count 6 charged the 3rd Accused with converting the said sum of N6,250,000 property of Wisehealth Nigeria Ltd by not rendering the service for which the sums was paid and thereby committed an offence contrary to **Section 308 of the Penal Code and Punishable Under Section 309 as of the Penal Code.**

I had earlier stated the ingredients of the offence related to count 5. I need to repeat same again. With respect to count 6, criminal misappropriation or conversion is defined in **Section 308 of the Penal Code thus:**

"Whoever dishonestly misappropriates or converts to his own use any moveable property, commits criminal misappropriation."

Here too in order to establish an offence of criminal misappropriation or conversion against an Accused Person, an essential element that the prosecution must prove is that set out in **Section 16 of the Penal Code.** I had earlier set out this section.

The **Black Law Dictionary (8th edition) at Page 1009** defines misappropriation as **"the application of another's property or money dishonestly to ones use."**

The key elements to prove the offence of criminal misappropriation or conversion are:

"1. **The Act of conversion or misappropriation of any moveable property.**
2. **The Act was carried out dishonestly with intention to cause wrongful gain to themselves or another or a wrongful loss to another. See Bakare & Ors V. The State (1968)1 All WLR 394."**

The burden here too is clearly on the prosecution to establish the above legal ingredients.

With the above as background, I proceed now to consider the evidence to determined whether counts 5 and 6 were established.

Here too on the evidence, there is no dispute that the moneys subject of counts 5 and 6 belongs to W.S.H.L and clearly under the control and dominion of 1st Accused as the Managing Director.

Now on this issue the 1st Accused in evidence stated that the said Benjamin Eromosele (3rd Accused) had a relationship with the company through his company which had done or carried out intelligence work for them. That the company of the 3rd Accused had carried out intelligence work for W.S.H.L especially in difficult terrains like the Niger Delta States where you require information and that is where intelligence comes in. That at the material point in time, he was trying to go beyond the Federal Civil Service to bring in the oil sector because of the volume of staff and communities in the Niger Delta with the aim of increasing the lifes procured for WSHL. That the company of the said Benjamin Eromosele produced an interim report and based on that report shell B.P approached them to cover the communities where they have built fortified primary care centers. That WSHL then became the foremost company handling the informal sector. That the consultancy was later stopped by the board of the company.

Under cross-examination, he confirmed that the 3rd Accused applied to secure social health insurance contract from 9 Niger Delta States and that the company earmarked ₦16Million but he was only paid N6,250,000 for

mobilization. That they could not pay for the contract because they did not have the money and the company later cancelled all informal sector contracts. He also stated that as Managing Director, he has the powers to engage consultants and to design conceptual frame work.

On his part, the 3rd Accused stated in evidence that further to a discussion with 1st Accused, he submitted a proposal to procure Social Health Insurance Programme contract for the communities in nine Niger Delta States and they quoted ₦36Million but that the cost of the consultancy was reviewed downwards to ₦16.25Million. That his company then developed and submitted a 22 page frame work document further to the payment of N6.25Million they received. That they facilitated several meetings, and interactions with offices of N.D.D.C, Shell BP, Bayelsa Partnership Initiative and the Bill Gates Foundation.

Now I have carefully evaluated the entirely of the evidence in respect of these two counts. The case of the prosecution basically is that the services said to have been rendered were not rendered. The Accused Persons argued otherwise.

Now I have in the course of this judgment referred to the fact that the Board of WSHL discussed the issue of brokerage and gave the go ahead to 1st Accused as confirmed by PW3. It is apparently on the basis of this go ahead that he engaged the services of 3rd Accused and his company to carry out intelligence work in the Niger Delta States. It is to be noted immediately that Niger Delta States do not form part of the states affiliated to the company. I will return to this point again.

I have not been referred to anything in the company that disallows the engagement of consultants to further the aims and objectives of the company.

In this case, while no agreement between W.S.H.L and the company of 3rd Accused was tendered, the unchallenged evidence of 3rd Accused is that he is the consultant engaged by the 1st Accused to carry out certain assignments in the Niger Delta States. The 1st Accused corroborated this engagement in all material particulars. The 3rd Accused said that further to

the assignment, he produced a 22 framework document which he submitted to the company and that he carried out various tasks in the Niger Delta States as earlier adumbrated. The 1st Accused in **Exhibit P10** in response to the Query by the company detailed in specific terms the activities undertaken by the 3rd Accused and his company.

On these allegations, the question that has agitated my mind bearing in mind the threshold of proof is what did the prosecution present in proof of these allegations. PW2, the I.P.O who investigated the matter clearly stated in evidence that he did not at any time investigate whether the consultancy service was executed. Now if no investigations was carried out to ascertain whether the assignment was executed, then what is the basis for the extant charge in counts 5 and 6 bearing in mind that these states do not form part of the universities or states affiliated to the company by the N.H.I.S vide **Exhibit P4**, particularly when it is recognised that the obligation of WSHL to acquires lifes is not limited to the universities covered by **Exhibit P4.**

I note that in response to why he did not investigate whether the consultancy service was carried out, PW2 stated that it was because 3rd Accused has stated in his statement that he would refund the money. Let me by the way also add that in the final address of the Prosecution, the refund is said to have already been made.

Now I have carefully read the said statements of 3rd Accused, **Exhibits P13a to c** and while it is correct that 3rd Accused said he would refund the money, it is equally clear from his statements that he said that his company executed or carried out the assignment.

Now even if there was such representation, and I don't see any, it clearly does not lessen the duty on the prosecution to prove these two counts on the threshold of proof beyond reasonable doubt as provided for by **Section 135 of the Evidence Act.** It may be argued here that neither the 1st and 3rd Accused Persons justified the disbursement or provided proof that the Niger Delta Services were carried out. While that may be so, they have however on the evidence giving elaborate unchallenged evidence of the

consultancy agreement, the inroads made in Niger Delta States and the facilitation works carried out through the works of 3rd Accused and his company and the fact that the ₦6.25Million represents only part payment for the assignment and that finally that the company put a stop to the agreement.

The dynamics here changes from the earlier counts treated with respect to the securing of lifes as alleged by 1st and 2nd Accused Persons. On counts 2 and 3 although the I.P.O there too, did not investigate whether lifes were secured, there was however direct, unchallenged evidence showing universities affiliated to W.S.H.L by the N.H.I.S and also the moneys paid to them via **Exhibit P4**.

In the present scenario, Niger Delta States were not affiliated to the company and being a profit making body, I cannot factually or legally fault the attempt to make inroads to those states. The prosecution who framed the charges that the services were not rendered did not in any manner lead evidence to establish the most critical and necessary ingredients of the offences. Without investigations, how do you establish criminal misappropriation or conversion with dishonest intent? By the I.P.O admitting that no investigations were carried out to determine, whether the 3rd Accused executed the consultancy agreement, the prosecution has left the issue with respect to counts 5 and 6 within the realm of speculations and conjectures. The inadequacy created here is palpable and cannot be ignored. I incline to the view that the lapse here must enure in favour of the Accused Persons.

Most importantly on the state of the law, to insist on the 1st and 3rd Accused Persons providing evidence to absolve them of the offences in counts 5 and 6 would amount to calling on them to prove their innocence. This clearly strikes at the inalienable constitutional provision of presumption of innocence which they enjoy and which remains constant.

The prosecution here clearly labouring on the wrong belief that because the 3rd Accused has agreed to refund the money clearly did not do the needful to properly investigate in the different states mentioned with a view to

finding out whether these assignments were carried out. Similarly the prosecution never met with the various organisations mentioned to determine the credibility of the narrative of 1st and 3rd Accused Persons. I cannot factually locate any dishonest intention causing wrongful gain or indeed causing loss to the company. In such patently unclear and inconclusive circumstances, it would be unfair and unjust to convict on counts 5 and 6.

At the risk of prolixity, I must repeat again that I agree with the prosecution that proof beyond reasonable doubt does not mean proof beyond the shadow of any doubt. That is correct and settled principle. See **Mufutau Bakare V. The State (1987)3 SC 1 at 32; Sule Ahmed (Alias Eza) V. The State 8 NSCR 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".

I need not add to the above eloquent admonition by the revered jurist. From the evidence adduced on record by the prosecution, I have not been put in a commanding height by the prosecution to comfortably hold that the case has been proved beyond all reasonable doubt with respect to counts 5 and 6. Here there is clearly reasonable doubt as to the culpability of the Accused Persons in relation to the offences charged therein. The implication therefore is simply that the prosecution has failed to discharge the onus of proof placed upon it by **Section 135 of the Evidence Act**. As I conclude on the counts, it is perhaps pertinent to observe that the totality of the case presented by the prosecution seeks to put forward a proposition which is the exact opposite of the requirement of the law. It appears to me by the way the case was presented that with respect to counts 5 and 6 that the prosecution discountenanced the basic constitutional presumption of innocence in favour of the accused, by tending to suppose that it is for the accused persons to prove their innocence, rather than for the prosecution to prove their guilt beyond reasonable doubt. This should not be so, as

much more, I am afraid could have been done by the prosecution with respect to these counts.

We now arrive at the last count 8.

Now count 8 states that the 1st Accused allowed one Zac Ade to convert the sum of ₦4,500.000 to his own use as brokerage fees for eight federal universities, a service he did not render.

On this count too, it is not in dispute that on the evidence, that the sums given to the said Zac Ade indeed are moneys held on trust by the 1st Accused for the company.

Now on the evidence, the 1st Accused by his statement vide **Exhibit P11b** dated 14th June, 2009 stated that the said Zac Ade applied for a brokerage exercise to secure staffers of four universities and their families and that he accordingly approved the sum of ₦4.5Million for the said Zac Ade.

Now here too no brokerage agreement was tendered and there is no evidence of **"lifes"** secured by Zac Ade and from what universities. Indeed on the evidence, **Exhibit P4** is clear that it was the N.H.I.S that affiliated 8 universities to W.S.H.L and paid moneys to it.

Furthermore on the evidence, contrary to the allegation that the moneys was for brokerage as alleged by 1st Accused, **Exhibit P7** the application by Zac Ade shows that the application in the sum of N4.5Million was for a soft loan to **"offset the outstanding for my housing project."** There is nothing in the said letter indicating that the said Zac Ade applied to engage in any brokerage exercise.

Crucially in all his statements before the court, vide **Exhibits P14a-b,** the said Zac Ade clearly contradicted the assertion of 1st Accused that he applied for any brokerage exercise. He stated in clear terms that he only applied for financial assistance to attend to his personal needs which he promised to refund in due course. Indeed in his statement of 17th June, 2009, he stated that while he requested for a loan, it was the 1st Accused who later advised him to change the application to that of brokerage and by his further statement of 26th October, 2009, he maintained in the strongest

terms that what he applied for was a loan and not to engage in any brokerage exercise and then he threw a challenge that anybody that has a contrary position should present the universities where he carried out the brokerage exercise.

Even if the court places no premium on the statements of Zac Ade bearing in mind that he was not called to testify and therefore provide the 1st Accused with the opportunity to cross-examine him, the court cannot ignore **Exhibit P4** and most especially **Exhibit P7** which is a clear **"application for grant/soft loan"** by the said Zac Ade which 1st Accused approved. No one can ignore the implication of this letter as it controverts the narrative of 1st Accused that the N4.5Million was given to Zac Ade as brokerage to secure lifes. **Exhibit P7** is direct evidence that it was a soft loan and is clearly inculpatory.

On the evidence, it is not in dispute that W.S.H.L is not a bank, a mortage institution or money lending agency. On the evidence, there is nothing showing what brokerage activity, if any undertaken by Zac Ade and till date, there is nothing to show whether the said moneys have been paid back to the company thereby clearly occasioning financial loss to the company. On the evidence, I am satisfied that the prosecution has proven dishonest misappropriation with respect to count 8. There is a clear deducible dishonest intention to cause wrongful gain to Zac Ade and wrongful loss to the company.

The final analysis, the judgment of this court is as follows:

1. **I find 1st Accused not guilty of count 5 and accordingly discharge and acquit him. I however find him guilty as charged on counts 2, 3 and 8 and I hereby convict him on each of the said counts.**

2. **I find the 2nd Accused guilty as charged on counts 2 and 3 and I hereby convict him on each of those counts.**

3. **I find the 3rd Accused not guilty on count 6 and I hereby discharge and acquit him of the said count.**

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Hon. Justice Abubakar Idris Kutigi

SENTENCE

I have carefully considered the plea for mitigated sentence as brilliantly articulated by learned counsel to the Accused Persons. In considering these submissions or plea for clemency, I am obviously to be guided by the clear provisions of the law which provides the punishment for the offences charge. The punishments under **Sections 132 and 97(2) of the Penal Code** range from imprisonment or with fine or with both. Whatever discretion that may be exercised 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. 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, unto 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 from 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 for me, it is, the punishment sections in the extant case has given the courts room to be flexible and liberal to achieve the set objective of the framers of the law. The utilitarian essence of punishment in my opinion is ultimately not aimed at destroying or ruining the offender, big or small.

The courts as necessary preventing tools in the criminal justice system must engage in some balancing act here between achieving the desired objective behind sentencing on one hand and on the other hand enforcing

the clear provisions of the law on sentencing and the courts must not be seen to encourage act(s) of criminality by giving very light sentences.

In this case, I have considered the fact that the Accused Persons are all elderly and first offenders. I also note that the 2nd Accused is seriously ill and presently on hospitalization and has to be even supported to stand on his feet in court. I have equally noted their sober conduct and commendable comportment all through the trial proceedings. I would also not discount the fact that they formed the company which by some strange twist of fate has led to this unfortunate incident. The stigma of conviction on its own without more can equally not be discountenanced.

For me however, underlying all these factors which I have duly considered is the basic, sound and unimpeachable philosophical point that there must be a cost or consequence(s) to be paid for inappropriate behaviour. No more, no less. So it is in this case.

Having weighed all of the above, I incline to the view that a light sentence appear to me desirable and appropriate in this case and would fully achieve the noble goal of deterrence and send out the appropriate and necessary signal to corporation managers to keep strict fidelity to corporate propriety or proper corporate conduct in all their actions. I leave it at that.

With respect to count 2, the provision of **Section 312 of the Penal Code,** under which 1st and 2nd Accused Persons were charged and convicted imposes a term not exceeding 7 years or with fine or with both.

Accordingly on count 2, I hereby sentence each of the convicts to a term of imprisonment of 6 months but with an option of fine in the sum of ₦500,000 only each.

On count 3 of the charge, **Section 312** under which they are charge makes similar penal provisions as in count 2.

Accordingly on count 3, I hereby sentence each of the convicts to a term of imprisonment of 6 months but with an option of fine also in the sum of ₦500,000 each.

With respect to count 8 of the charge, the provision of **Section 97(1)** under which the 1st Accused was charged and convicted imposes a term not exceeding six months or with fine or with both.

Accordingly on count 8, I hereby sentence the 1st Accused convict to a term of one month imprisonment, but with an option of fine in the sum of ₦100,000.

The sentences are to run consecutively.

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Hon. Justice Abubakar Idris Kutigi

Appearances

1. ***Joshua Saidi, Esq., for the Complainant***
2. ***Wahab Toye, Esq., for the 1st Accused Person***
3. ***Biodun Fasakin, Esq., for the 2nd Accused Person.***
4. ***Lekan Ogunleye, Esq., for the 3rd Accused Person.***