IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT ABUJA

BEFORE HIS LORDSHIP: THE HON. JUSTICE PETER O. AFFEN

MONDAY, NOVEMBER 28, 2016

CHARGE NO: FCT/HC/CR/60/2012

BETWEEN

FEDERAL REPUBLIC OF NIGERIA ... ... PROSECUTION

AND

MR. IKENNA OKORO ... ... DEFENDANT

J U D G M E N T

THIS CRIMINAL CHARGE, previously pending before *I. M. Bukar, CJ* [now retired] was transferred to this court by an Order dated 13/3/14 issued under the hand of the Honourable the Chief Judge of the Federal Capital Territory, whereupon trial commenced *de novo*.

The Defendant, *Ikenna Walter Okoro* is standing trial on a two-count charge of dishonest misappropriation/conversion of money to his personal use punishable under ***s. 315*** of the ***Penal Code, Cap. 532 Laws of the Federation of Nigeria (LFN) (Abuja) 1990****;* and issuance of a dud cheque contrary to ***s. 1 (1) (b)*** and punishable under *s. 1 (1) (i)* of the of the ***Dishonoured Cheques (Offences) Act, Cap. D11 LFN, 2004.*** The specifics of the charge are as follows:

"COUNT 1

That you Ikenna Okoro 'M' on or about April, 2009 in Abuja, within the Abuja Judicial Division being entrusted with the sum of ₦25,000,000.00 by one Dr (Mrs) Adah Okwuosa, as a broker/agent did dishonestly misappropriate and converted (sic) the said money to your own use and thereby committed an offence punishable under section 315 of the penal code, Cap. 532 Laws of the Federation of Nigeria (Abuja) 1990.

COUNT 2

That you Ikenna Okoro 'M' on or about the 4th of September 2009 in Abuja within the Abuja Judicial Division did issue an Oceanic Bank Plc cheque number 26009465 in the sum of ₦25,000,000.00 (Twenty Five Million Naira) to one Dr (Mrs) Ada Okwuosa which cheque was dishonoured upon presentation for reasons of insufficient fund and thereby committed an offence contrary to section 1 (1) (b) of the Dishonoured Cheques (Offences) Act, Cap. D11 Laws of the Federation of Nigeria 2004 and punishable under section 1 (1) (i) of the same Act."

The Defendant pleaded *'Not Guilty'* to all the counts of the charge, thereby setting the stage for the Prosecution to discharge the non-shifting burden of establishing his guilt beyond reasonable doubt. The Prosecution called two (2) witnesses and tendered Exhibits P1 – P9. The complainant, *Dr (Mrs) Ada Chibuzor Okwuosa* testified as PW1, whilst *Insp. Suleiman Usman* who is an investigating officer with the Economic and Financial Crimes Commission (EFCC), Abuja testified as PW2. The Defendant testified in his own defence as DW1, tendered Exhibits D10 – D16 and called three (3) other witnesses. *Mrs Halima Buba* and *Obaje Napoleon Adofu* who were former employees of EcoBank Nigeria Limited testified as DW2 and DW3 respectively, whilst one *Audu Israel* who stated that he is a Financial Consultant at *EazyTrade Concepts Ltd*

testified as DW4. Exhibit P1 is an Oceanic Bank Cheque dated 6/4/09 in the sum of ₦25m issued by Dr (Mrs) Ada Okwuosa in favour of Mr Ikenna Okoro; Exhibit P2 is the cheque dated 4/9/09 in the sum of ₦25m issued by Okoro Ikenna in favour of Dr (Mrs) Ada Okwuosa; Exhibit P3 is an extra-judicial statement made by Dr (Mrs) Ada Okwuosa to EFCC on 11/12/09; Exhibit P4 is another extra-judicial statement dated 30/4/10 made by Dr (Mrs) Ada Okwuosa to EFCC; Exhibit P5 is the statement of account of Dr Okwuosa, Ada Chibuzo (OON) – Acc. No. 0033270365; EXHIBIT P6 is the petition dated 25/11/09; Exhibit P7 is an extra-judicial statement made by the Defendant at EFCC on 15/2/09; Exhibit P8 is a petition dated 14/6/10 by *Uzomah Ibegbulem & Co;* Exhibit P9 is the Defendant's extra-judicial statement dated 18/8/10; Exhibit P10 is a petition dated 28/5/12 by *Greenfield Chambers* on behalf of the Defendant; Exhibits D10 and D11 are letters dated 31/3/10 and 14/6/10 respectively by *Uzomah Ibegbulem & Co* to EFCC; Exhibit D12 is a letter dated 20/6/13; Exhibits D13^{A} is a Receipt dated 20/4/09 whilst Exhibit D13^{B} is the Investment Agreement/Account Opening Form issued to the Defendant by EazyTrade Concepts Ltd; Exhibits D14 series and D15 series are the bundles of documents produced by the Bank through one *Sarah Edet;* whilst Exhibit D16 is a letter dated 20/6/12 by *Greenfields Legal Practitioners* to the Bank Manager of EcoBank, Area 8, Garki, Abuja.

At the close of plenary trial, the parties filed and exchanged final addresses as ordered by the court. The Defendant's final address is dated 10/6/16 whilst the Prosecution's final address is dated 27/6/16. The Defendant also filed a reply on points of law dated 4/7/16. When the matter came up in court on 15/9/16 for adoption of final addresses, *Emeka Obegolu, Esq.* of counsel for the Defendant adopted the Defendant's final address and reply on points of law and submitted that

the Prosecution failed to call Michael Asaolu and Mrs Halima Buba notwithstanding that both the complainant and the Defendant made copious reference to them; and that the Defendant's complaint that the complainant and Michael Asaolu took ₦26m from his account was not investigated even though that was the basis of the Defendant's claim of right of lien. He pointed out that the PW2 only produced the statement of account but conveniently left out the instruments used to deposit and withdraw the ₦26m, and that the ₦25m investment was also not investigated. *Obegolu, Esq.* argued that the Prosecution seeks to introduce evidence at pages 19 (paras. 3 and 4), 20 (para. 7(c)), 23 (para. 11 (d) and (e), 24 (para. 11(f)) of its final address, which is not permissible; and that the Defendant adduced evidence that the dishonoured cheque was issued on the understanding that it would be presented only if the termination of the investment was successful, and that he called Michael Asaolu to stop the cheque, but the Prosecution did not cross-examine him on these points by the Prosecution. He further contended that the dishonoured cheque was not used to obtain credit, which is the purpose of the Dishonoured Cheques (Offences) Act. The court was urged to discharge and acquit the Defendant.

In the same vein, *Adekunle Aderinto, Esq.* of counsel for the Prosecution adopted the Prosecution's final address. He argued that Defendant has not returned the ₦25m he received from the complainant even though the investment has since been terminated; and that the dishonoured cheque was first presented in September 2009 and again in November 2009 but returned unpaid on each occasion. The court was urged to hold that the Prosecution has established the charges preferred against the Defendant beyond reasonable doubt and convict him accordingly.

Now, it is merely restating the obvious that our adversary criminal justice system is accusatorial in nature and substance, and every person charged with a criminal offence is presumed innocent until proved guilty. See ***s. 36(5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).*** A necessary corollary of the presumption of innocence is that in a criminal trial such as the present, the burden is always on the prosecution to establish the guilt of the accused person beyond reasonable doubt. Quite unlike civil proceedings, this burden on the prosecution is static in a manner akin to the fabled constancy of the *'Northern Star'* and never shifts to the accused. It is if, and only if, the prosecution succeeds in proving the commission of a crime beyond reasonable doubt that the burden shifts to the accused to establish that reasonable doubt exists. See ***ss. 135 and 137 of the Evidence Act 2011.*** The Prosecution has the onus of proving all the material ingredients of the offence(s) charged beyond reasonable doubt. See ***STATE v SADU [2001] 33 WRN 21 at 40.*** Where the prosecution fails to do so, the charge is not made out and the court is bound to record a verdict discharging and acquitting the accused. See ***MAJEKODUNMI v THE NIGERIAN ARMY [2002] 31 WRN 138 at 147.*** Also, if on the totality of the evidence adduced the court were left in a state of doubt or uncertainty, the prosecution would have failed to discharge the onus of proof cast upon it by law and the accused would be entitled to an acquittal. See ***UKPE v STATE [2001] 18 WRN 84 at 105.*** However, in the words of the venerable *Lord Denning* in the case of ***MILLER v MINISTER OF PENSIONS (1947) 2 ALL E.R. 372:*** *"Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in*

the least probable', the case is [established] beyond reasonable doubt, but nothing short of that will suffice". See also ***AKALEZI v THE STATE [1993] 2 NWLR (PT. 273) 1*** and ***EBEINWE v STATE [2011] 1 MJSC 27.*** The three modes of evidential proof in a criminal trial such as the present are: (a) direct evidence of witnesses; (b) circumstantial evidence; and (c) the confessional statement voluntarily made by a criminal defendant. See ***OKUDO V THE STATE [2011] 3 NWLR (PT. 1234) 209 at 236, ADIO v THE STATE (1986) 5 S.C. 194 at 219-220, EMEKA v THE STATE [2002] 14 NWLR (PT. 734) 666*** and ***OLABODE ABIRIFON V THE STATE [2013] 13 NWLR (PT.1372) 587 at 596.*** Against the backdrop of the foregoing, the straightforward issue arising for determination is whether the prosecution has adduced sufficient, cogent, credible and compelling evidence to establish the charge against the accused person beyond reasonable doubt; and it is on this basis that we shall proceed presently to evaluate the evidence adduced.

Count One of the charge borders on criminal breach of trust, which is provided in s. 315 of the Penal Code Act as follows:

> *"Whoever, being in any manner entrusted with property or with 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 wilfully suffers any other person so to do, commits criminal breach of trust."*

The ingredients or elements that must be established by the prosecution in order to sustain a charge of criminal breach of trust pursuant to s. 315 of the Penal Code Act were highlighted by the

Supreme Court in the case of ***THEOPHILUS ONUOHA v THE STATE [1988] NWLR (PT. 83) 460*** as follows:

> *"a. That the accused was entrusted with property or with dominion over it;*
> *b. That he*
> *a. Misappropriated the property*
> *b. Converted such property; or*
> *c. Disposed of it*
> *c. That he did so in violation of;*
> *a. Any direction of law prescribing the mode in which such trust was to be discharged; or*
> *b. Any legal contract express or implied which he had made concerning the trust; or*
> *c. He intentionally allowed some other person to do or commit the above stated.*
> *d. That he acted dishonestly as in (b) above.*

See also the case of ***MICHAEL UZOAGBA & ANOR v C.O.P. [2013] ALL FWLR (PT. 685) 337, (2012) 11 MJSC 75, (2012) 9 MRSCJ 105.***

Now, the evidence adduced by the complainant, *Dr (Mrs) Ada Chibuzo Okwuosa* [PW1] is that the Defendant, *Ikenna Okoro* received ₦25m by cheque from her for purposes of investment with a group of bankers outside the normal banking system for a tenor of ninety (90) days, but he failed to return her money at the expiration of the said ninety (90) days, whereupon she suspected that he has converted the money to his own use. The Defendant conceded that he received the said ₦25 from the complainant but maintained that he invested the money with *EazyTrade Concepts Ltd* for a tenor of one (1) year with 6% interest payable every ninety (90) days; and that interest was paid to the PW1 at the expiration of 90 days and the investment was automatically rolled

over as agreed between them. The PW1 conceded that interest was paid to her at the expiration of ninety (90) days. There is therefore some controversy as to whether the ₦25m investment was for ninety (90) days as claimed by the PW1 or for one (1) year with interest payable every ninety (90) days as claimed by the Defendant.

The ingredients that must co-exist in order for a charge of criminal breach of trust or dishonest misappropriation/conversion of property capable of being stolen to be sustained are set out hereinbefore. In a scenario such as the present where the complainant (PW1) has conceded that the ₦25m she gave to the Defendant was meant to be invested with a group of bankers outside the normal banking system for a period of ninety (90) days and that she received interest from the Defendant at the expiration of the initial ninety (90) days, can it be said that the Defendant misappropriated the ₦25m given to him and/or converted the same to his own use? In other words, did the Prosecution succeed in establishing that the Defendant dealt with the PW1 at all material times with the intent to cheat, to deceive or to mislead her? It occurs to me that beyond merely stating that the ₦25m was given to the Defendant for purposes of investment with a group of bankers outside the normal banking system for a term of ninety (90) days, the Prosecution did not lead any evidence as to the details and/or modalities of the alleged understanding between the complainant [PW1] and the Defendant whilst conceding that interest was paid to her at the expiration of ninety (90) days. On his part, the Defendant testified that the ₦25m was invested with *EazyTrade Concepts Ltd* for a tenor of one (1) year with interest payable every ninety (90) days. Exhibits D13^{A} and D13^{B} are the receipt and the agreement form between *EazyTrade Concepts Ltd* and the Defendant. The Managing Director of *EazyTrade Concepts Ltd, Mr Israel Audu* who testified as

PW4 corroborated the Defendant's testimony. Since the Prosecution did not deem it necessary to cross-examine both the Defendant and the PW4, their testimony remains uncontradicted or uncontroverted. It has been held that failure to cross-examine a witness on an issue constitutes an acceptance of the truth of the evidence of that witness in respect of that issue. See ***ABADOM v THE STATE [1997] 1 NWLR (PT. 479) 1 at 20; R v HART (1932) 23 C. A. R. 202; NJIOKWUEMENI v OCHEI [2004] 15 NWLR (PT. 859) 196 at 226 – 227*** and ***NITEL LTD v IKPI [2007] 8 NWLR (PT. 1035) 109.***

I reckon therefore that it is difficult for court of law, which is also a court of equity, to find or hold that the Defendant misappropriated or converted the ₦25m to his own use in the light of the uncontroverted evidence adduced before me. Even if *arguendo* we accept the Prosecution's contention that the oral understanding or agreement between the Complainant and the Defendant was that the ₦25m would be invested for ninety (90) days but the Defendant proceeded to invest it for a one (1) year, it occurs to me that would, at best, constitute a breach of that oral understanding or agreement, but certainly not criminal misappropriation or conversion of the said ₦25m.

It is forcefully contended on behalf of the Prosecution that making the investment in his own name rather than in the name of the Complainant and not availing her even a photocopy of the investment constitutes conversion by the Defendant of the ₦25m he received from her. There is uncontroverted evidence before me that the Defendant exchanged the ₦25m into US $155,000 and made it up to US $200,000 with his own funds to enable him make the investment with *EazyTrade Concepts Nig. Ltd* at 6% interest rate every 90 days or 24% per annum – as against the 10% interest the complainant was given in the

investment she had to collapse in order to raise the ₦25m she gave to the Defendant; that the Defendant was paid ₦1.875m on the $200,000 investment after the first 90 days which was rolled over automatically as agreed; and that the entire interest of ₦1.875m was paid into the account of the Complainant who was outside the country, but she refused to give him his share of the interest which was about ₦400,000 upon her return. The above uncontroverted piece of evidence points to a joint investment between the Defendant and the Complainant who seemed content to allow the Defendant to use his discretion to invest her funds. In the absence of clear evidence adduced by the Prosecution that the parties specifically agreed that the investment must be made in the Complainant's name, I am unable to accept that merely making the investment in the Defendant's name and/or not availing the complainant a photocopy of the investment constitutes proof positive of dishonest intention on the part of the Defendant.

The Prosecution has equally harped on the fact that even though the investment was eventually terminated in October 2009, the Defendant has still not returned the ₦25m capital to the complainant, and that, that clearly demonstrates that the Defendant has misappropriated and/or converted the same to his own use. The point must be emphasised that it is for the Prosecution to prove its case beyond reasonable doubt and not for the Defendant to establish his innocence; and until that burden is discharged by the Prosecution, an accused person has no duty whatsoever to call any evidence in rebuttal because the law presumes him innocent until proven guilty. See ***AHMED v STATE [1998] 5 NWLR (PT. 550) 493 at 503***. Crucially, even though no burden is placed on the Defendant, the court is enjoined to consider every defence put up by him however spurious or stupid. The Prosecution is also enjoined in like manner to thoroughly investigate

every defence put up by the Defendant in order to render it false or unlikely; and it is only when this is done, that the trial court would be in a vantage position to reject any such defence. See ***ALFRED AIGBADION v THE STATE [2000] 7 NWLR (PT. 666) 686, (2000) 4 SC (PT. I) 1.*** The Supreme Court held in ***OPEYEMI v THE STATE [1985] 2 NSCC 921 at 926 - 927*** that failure on the part of the prosecution and the court to examine any defence put up by an accused person constitutes failure to perform a vital duty which is likely to occasion a miscarriage of justice. See also ***WILLIE JOHN & EDEM DAN v THE STATE (1966) 1 ALL NLR 211 at 212*** *–per Adetokunbo Ademola, CJN.*

In this connection, the Defendant adduced uncontroverted and uncontradicted evidence that he withheld the ₦25m because there were series of transactions between him and the complainant for which a reconciliation of account was required. The Defendant wrote in his very first extra-judicial statement dated 15/12/09 which was tendered by the Prosecution as Exhibit P7 that *"... the money became due in October, but I withheld it from her but paid her the interest of 6%. I withheld it until I settle some outstandings (sic) with her which she is owing me"*. The Defendant also wrote in his further extra-judicial statement of 14/4/10 which was equally tendered by the Prosecution as Exhibit P9 that "*Dr Mrs Adaoha Chibuzor Okwuosa connived with Michael Asaolu* to *illegally steal a total of ₦26,014.000 ... only from [his] company account in September 2009"*. The Defendant furnished details of the alleged withdrawals made by the Complainant and Michael Asaolu from his account and referred to *"commission being finder's fee that was due to [him] as the initiator/middleman that introduced Oceanic Bank to ECOWAS through Michael Asaolu and Dr Mrs Ada Okwuosa that brought about the injection of almost ₦750,000,000 ... to Oceanic Bank Area 8 Branch through Intercontinental Bank Gudu*

Branch…." In his oral testimony before me, the Defendant virtually rehashed the his extra-judicial statements, insisting that *Michael Asaolu* was able to make withdrawals from his accounts with the aid of pre-signed cheques and letterheads kept with him as account officer when he [Defendant] travelled out of the country. But quite strangely, the Prosecution did not cross-examine the Defendant on these issues, notwithstanding that the statement of account of *Power Acquisition & Property Ltd* [Exhibit D14], which is one of the Defendant's companies, shows that a cash deposit of ₦26,014,000 was made on 9/9/09 without the name and particulars of the depositor being disclosed. Indeed, *Obaje Napoleon Adofu* [DW3] who is a former Branch Manager with Oceanic Bank testified that Exhibit D14 shows a cash deposit of ₦26,014,000 into the account of *Power Acquisition & Property Ltd* on 9/9/09 and that although in his experience as a banker, it was not possible for money to be paid into a bank without any trace of the depositor or source of payment, he does not have any explanation as to why the name of the depositor was not stated in respect of the payment made on 9/9/09. The DW3 equally testified that *Michael Asaolu* informed him that he had a potential customer who was a Commissioner at ECOWAS and that himself, Mike Asaolu and Ikenna Okoro [Defendant] went to ECOWAS Secretariat to meet with *Mrs Ada Okwuosa* to discuss how to bring funds into the bank but they could not discuss because she was busy, and that he would not know if ECOWAS had previous banking relationship with the bank before then and could not confirm whether ECOWAS deposited funds with the bank through the Defendant's efforts.

It hardly bears mention that since the Prosecution did not cross-examine the Defendant and DW3, their evidence remains uncontroverted and lends some credence to the Defendant's assertion

that he withheld ₦25m to enable him *"settle some outstandings (sic) with her".* Even the Investigating Officer [PW2] merely stated in passing that the Defendant's assertions were 'thoroughly investigated but found to be spurious' without telling the court what he and his team of investigators did that amounted to 'thorough investigation' of the defences raised by the Defendant.

But more crucially, *Michael Asaolu* who was alleged to have connived or acted in concert with the Complainant to move the sum of ₦26,014,000 from the Defendant's *Power Acquisition & Property Ltd* account [on the basis of which the Defendant claimed *inter alia* to have withheld the ₦25m capital from the Complainant] was not called as a witness to dislodge or debunk the Defendant's testimony. It is submitted in the written address filed on behalf of the Prosecution that *Michael Asaolu* was not privy to the ₦25m investment between PW1 and Defendant; that it is not mandatory for the Prosecution to call all witnesses listed except where statutorily mandatory, citing ***KOR v STATE [2001] FWLR (PT. 76) 637 at 657***; and that Michael Asaolu was in court about four times when the matter was pending before the retired Chief Judge, *Hon. Justice I. M. Bukar*, but unfortunately by the time the matter was transferred to this court, he had disengaged from EcoBank PLC and every effort made by the Prosecution to locate him was unsuccessful hence his statement to the EFCC could not be tendered in his absence. I am afraid, the above submission merely begs the question as to whether Michael Asaolu was a vital witness in this case or not. Quite clearly the failure to call Michael Asaolu who featured prominently in the extra-judicial statements and oral testimonies of both the complainant and the Defendant to resolve the issues revolving around him one way or another is not helpful to the Prosecution's case; and the fact that he could not be traced makes no

difference whatsoever. The law is well settled that although the Prosecution is not bound to call a deluge of witnesses, it is nonetheless bound to call all known material witnesses irrespective of whether or not their evidence will support the case of the Prosecution. See the case of ***R v ESSIEN 4 WACA 112.***

What is more, the Defendant adduced uncontroverted evidence that at the expiration of the first ninety (90) days, he paid the entire interest of ₦1,875,000.00 on the US $200,000 investment [out of which the complainant's ₦25m amounted to US $155,000 whilst the balance of US $45,000 belongs to him] into the account of the Complainant who was outside the country at the time, but she refused to give him his share of the interest which was about ₦400,000.00 upon her return. This uncontroverted piece of evidence as well as the failure to call *Michael Asaolu* as aforesaid cannot be lightly wished away as it tends to lend further credence to the Defendant's claim that he held on to the ₦25m capital due to the complainant pending when accounts would be reconciled between them. In a scenario such as the present, reasonable doubt is doubtless implanted in the mind of the court as to whether or not the Defendant's action of not paying over the ₦25m to the complainant was borne out of dishonest motive or intent to defraud, cheat, misappropriate or convert the ₦25m as has been alleged by the Prosecution. It therefore does not seem to me that the Prosecution has succeeded in establishing the offence of criminal breach of trust against the Defendant. I so hold.

Let us shift attention presently to **Count 2**, which borders on issuance of a dud cheque. A dud cheque is, in law, an empty cheque; empty in the sense that it has no monetary value as no money can pass through it. See ***NATIONAL BANK v OPEOLA [1994] 1 NWLR (PT. 319) 126.***

The ***Dishonoured Cheques (Offences) Act*** ,***s.1(1) & (2)*** thereof, provides thus:

> *1. (1) Any person who:*
>
> *a. Obtains or induces the delivery of anything capable of being stolen either to himself or to any other person; or*
>
> *b. Obtains credit for himself or any other person, by means of a cheque that, when presented for payment not later than three months after the date of the cheque, is dishonoured on the ground that no funds or insufficient funds were standing to the credit of the drawer shall be guilty of an offence and on conviction shall:-*
>
> *i. In the case of an individual be sentenced to imprisonment for two years, without the option of a fine, and*
>
> *ii. In case of a body corporate be sentenced to a fine of not less than ₦5,000 (Five Thousand Naira).*
>
> *2. For the purposes of subsection (1) of this section:-*
>
> *a. The reference to anything capable of being stolen shall be deemed to include a reference to money and every other description of property, things in action and other intangible property.*
>
> *b. A person who draws a cheque which is dishonoured on the ground stated in the subsection and which was issued in settlement or purported settlement of any obligation under an enforceable contract entered into between the drawer of the cheque and the person to whom the cheque was issued, shall be deemed to have obtained credit for himself by means of the cheque notwithstanding that at the time when the contract was entered into, the manner in which the obligation would be settled was not specified."*

The Supreme Court grappled with the offence of the issuance of dishonoured cheque in the case of ***ABEKE v STATE [2007] NWLR (PT. 1040) 411.*** The gravamen of the offence of issuance of dud cheque 'is

obtaining or inducing the delivery of anything capable of being stolen (which includes money), or obtaining credit by means of a cheque that is dishonoured upon presentation within three months on the ground of no funds or insufficient funds standing to the credit of the drawer of the cheque.' It seems to me that the Act envisages that the issuance of the cheque must induce or mislead the person to whom it is issued to adversely alter his or her position. The Act does not envisage a situation where the person to whom the cheque is issued had already altered his or her position independent of or prior to the issuance of the cheque and the dishonoured cheque was merely issued *ex post facto,* save in a situation where the dishonoured cheque was issued in settlement or purported settlement of any obligation under an enforceable contract between the parties. It has been held that *"there must be evidence that it was by means of the dishonoured cheque that the accused obtained delivery of particular goods* [or anything capable of being stolen] *on a particular date* [as] *it is certainly not the law that in every case the drawer of a cheque which is eventually dishonoured commits an offence.* See ***THE STATE v BAKARE [1985] HCNLR 466*** – *per Odunsi, J.* (cited in 'Law of Banking: Texts, Cases, Comments' by Emeka Chianu [Lagos: New System Press, 1995], p. 64.

The evidence adduced by PW1 on behalf the Prosecution in the case at hand is that Defendant did the first deposit of ₦10m and repaid with interest; and then collected a cheque dated 6/4/09 for a larger sum [of ₦25m] with a convincing story of a much better interest rate; that the tenor was supposed to be for ninety (90) days for the ₦25m amount on the cheque; that the date of maturity was supposed to be 6/7/09; and that she became worried and started having sleepless nights until she eventually got the Defendant to issue her a [post-dated] cheque. The PW1 wrote in her petition to EFCC [Exhibit P8] that *"...at this point*

sometime in July I took the step of involving my family members and using pressure to obtain a cheque for 25 million Naira from Mr Okoro against the maturity date of July 27, 2009. The cheque was written for 4th September 2009. It has since been presented twice on 30th September 2009 and 17th November 2009 and has 'bounced' on both occasions. (Copy of the cheque is attached; original is available on demand)."

The obvious implication of the foregoing is that the Defendant did not obtain or induce the delivery of the ₦25m capital [for which the PW1 conceded that interest was paid to her at the expiration ninety (90) days] by means of the dishonoured cheque [Exhibit P2]. Rather, the PW1 *'used pressure'* to get the Defendant to issue her the cheque that was eventually dishonoured as a means of securing the return or refund of the ₦25m earlier given to him for investment purposes. I am not unmindful of ***s. 1 (2) (b)*** of the Act, which provides that:

> *"2. For the purposes of subsection (1) of this section:-*
>
> *a. .....*
>
> *b. A person who draws a cheque which is dishonoured on the ground stated in the subsection and which was issued in settlement or purported settlement of any obligation under an enforceable contract entered into between the drawer of the cheque and the person to whom the cheque was issued, shall be deemed to have obtained credit for himself by means of the cheque notwithstanding that at the time when the contract was entered into, the manner in which the obligation would be settled was not specified."*

This subsection clearly envisages the existence of an enforceable contract between the drawer and the drawee of the dishonoured cheque, which imposes a contractual obligation on the drawer who issued the dishonoured cheque in a bid to discharge or settle that obligation. It is hornbook law that offer, acceptance, consideration, intention to create legal relations and capacity to contract are the elements of a valid contract. These are autonomous units in the sense that a contract cannot be formed if any of them is absent. See ***ORIENT BANK (NIG) PLC v BILANTE INT. LIMITED [1997] 8 NWLR (PT. 515) 37 at 76*** (per *Niki Tobi, JCA* as he then was). A contract may be oral, written or inferred from the conduct of the parties in the course of the transaction between them. It could also be partly oral and partly in writing, in which case extrinsic evidence is admissible to prove the oral part of the agreement. See ***Chitty on Contracts, General Principles (29th Edition), pp. 752 - 753, paras. 12-096 – 12-097***. The law requires a party alleging the existence of an oral agreement, which is a unique method and procedure, to adduce credible evidence as to the modalities of such agreement: s/he must prove such an agreement to the hilt. See ***BROADLINE ENTERPRISES LTD v MONTEREY MARITIME CORPORATION [1995] 9 NWLR (PT. 417) 1, ACHIBONG v ITA [2004] 2 NWLR (PT. 858) 590*** and ***ODUTOLA v PAPERSACK (NIG.) LIMITED [2006] 18 NWLR (PT. 1012) 470 at 491.*** Was there any contractual obligation arising from a contract between the complainant and the Defendant in the case at hand? Let us find out presently.

The incontrovertible fact gleaned from the evidence adduced by both the complainant (PW1) and the Defendant (DW1) is that the Complainant gave the sum of ₦25m to the Defendant to enable him invest the same with a group of bankers outside of the normal banking system. The Complainant [PW1] testified that she *"trusted the*

Defendant in the belief that the son of someone mentored by her late father would not deal dishonestly with her". The Prosecution did not adduce any scintilla of evidence as to any *quid pro quo* or consideration furnished by the complainant or flowing from her to the Defendant on the basis of which the Defendant undertook to invest the ₦25m or any other sum on her behalf, and I find no evidence before me which points to any contract between them which is capable of being enforced. To that extent, this case is patently distinguishable from the facts of ***ABEKE v STATE supra*** where the appellant issued a cheque as evidence of the transaction between the parties instead of signing an agreement and obtained credit for herself but subsequently turned around to deny both the transaction and the issuance of the cheque; and the court entertained no reluctance in holding that *"she had issued a cheque in settlement of an obligation arising under an enforceable contract, which said cheque was dishonoured when presented..."*

But the scenario we are confronted with here is markedly different, and I take the considered view that notwithstanding that the ₦25m capital remains money the Defendant is bound to return to the Complainant, this is not premised on "any obligation under an enforceable contract" between them as envisaged by ***s. 1 (2) (b)*** of the ***Dishonoured Cheques (Offences) Act***. This being so, the arguments and counter-arguments strenuously canvassed in the written addresses filed and exchanged by the parties as to whether or not the Defendant acted as an agent or broker on behalf the Complainant are of no moment.

What is more, it would seem also from the evidence adduced before me that ***s. 1 (3)*** of the Act inures to the benefit of the Defendant. The subsection [which provides that '*a person shall not be guilty of an offence under this section if he proves to the satisfaction of the court*

that when he issued the cheque he had reasonable grounds for believing, and did believe in fact, that it would be honoured if presented for payment within the period specified in subsection (1) of this section] imposes on the drawer of a dishonoured cheque the burden of proving the existence of reasonable ground for believing that the cheque would be honoured and that he in fact did believe so. In this regard, it occurs to me that the Defendant adduced evidence which was neither controverted nor contradicted by the Prosecution that he issued the dishonoured cheque [Exh. P2] dated 4/9/09 in the belief that he would succeed in terminating the investment with *EazyTrade Concepts Limited* but it was presented before the investment was terminated. The Defendant's testimony is that he did not give the receipt of the investment to the complainant on demand because it was not in her name and the investment was not all her money, whereupon she insisted that he should terminate the investment and return her ₦25m capital but he told her it was not possible because the investment had been rolled over automatically as agreed and the company has a policy of being given at least 30 days notice of termination with penalties attached which she would not agree to bear; and that since the investment would become due in October, he will give them notice not to roll over again. The Defendant stated that the complainant insisted on immediate termination and he placed a call to *EazyTrade Concepts Ltd* in her presence, but they said to her hearing because his phone was on speakerphone that instant termination was not possible, at which point the complainant insisted that he should go and meet them face to face to perform his usual magic to ensure that the investment was terminated instantly with no penalties and her money and interest intact; and also that he should issue a post-dated cheque to cover her investment and interest, but he refused; that they argued back and forth and a lot of unprintable things were said; and

that he eventually issued a post-dated cheque on Michael Asaolu's intervention on the understanding that if he was able to terminate the investment, the complainant would present the cheque and accounts reconciled between them. He stated further that the complainant insisted that she needed the post-dated cheque because she would be travelling out of the country for a long period and wanted her daughter in Lagos to cash the cheque and make the money available to her son-in-law who was into oil and gas business. The Defendant maintained that the understanding was that the complainant was not to present the cheque until he informed her that he was able to terminate the investment before maturity, and he left her house on that note and has not returned there since then.

It is instructive that the Prosecution did not cross-examine the Defendant on the above crucial piece of evidence as to the circumstances in which the dishonoured cheque [Exhibit P2] was issued by the Defendant as well as the alleged preconditions that must occur before the cheque was to be presented for payment. Since the above evidence adduced by the Defendant remains unchallenged and uncontroverted, this court is obligated as a matter of law to act upon it without further assurance, and I cannot but find and hold that the Defendant had reasonable grounds for believing and did in fact believe that the cheque (Exhibit P2) would be honoured at the time it was issued. It only remains for me to add that there is no evidence that the preconditions set out in the uncontroverted evidence adduced by the Defendant were satisfied before the cheque was presented on 30/9/09, even as I find it curious that the dishonoured cheque (Exhibit P2) was presented again on 17/11/09 without any explanation offered by the Prosecution.

The Supreme Court held in ***ABEKE v THE STATE supra*** [upon which both the Prosecution and the Defendant have relied] that in order to convict an accused person under the Dishonoured Cheques (Offences) Act, the prosecution must prove beyond reasonable doubt that he had both *means rea* [guilty mind] and *actus reus* [guilty act]. Since the issuance of dud cheque is not a strict liability offence, these two elements must be shown to co-exist before any conviction can be sustained. In the case at hand, I find and hold that the Prosecution failed to establish that the Defendant had the requisite *means rea* [whether at the time he issued the cheque that was eventually dishonoured or subsequently], having regard to the peculiar facts and circumstances that have come to light in these proceedings. It therefore does not seem to me that the offence of issuance of dishonoured cheque has been made out against the Defendant. Count 2 must therefore fail without further assurance.

In drawing the curtains on this judgment, I will permit myself to observe in passing that both the investigation and the prosecution of this criminal charge leave much to be desired. The point has already been made hereinbefore that the Prosecution has a bounden duty to thoroughly investigate every defence put up by the Defendant in order to render it false or unlikely; and it is only when this is done, that the trial court would be in a vantage position to reject any such defence. See ***ALFRED AIGBADION v THE STATE supra***. In the instance case, the defences put up by the Defendant [that the sum of ₦26,014,000 paid to him by Oceanic Bank as finder's fee was moved from his account by the complainant acting in concert with *Michael Asaolu* who was the account officer of both himself and the complainant, and that he withheld the ₦25m from the complainant in exercise of a right of lien pending when accounts would be reconciled between them] were

not thoroughly investigated and shown to be spurious. The PW2 merely told the court that the Defendant's claim was investigated and shown to be false without demonstrating to the court what they did or did not do to arrive at that conclusion. To say the least, his evidence did not situate the court in any vantage position to reject the defences put forward by the Defendant. Especially is this so as the Prosecution did not call *Michael Asaolu* who featured prominently in the evidence of both the complainant and the Defendant to debunk and to put a lie to the defences raised by the Defendant. The Prosecution equally failed to cross-examine the Defendant and his witnesses, notably DW4 [Audu Israel] on the investment made on behalf of the complainant and himself, and left their evidence wholly uncontroverted and uncontradicted. It ought not to be so.

Be that as it may, I have already held that the Prosecution neither proved that the Defendant misappropriated and/or converted the ₦25m given to him by the complainant for purposes of investment with a group of bankers outside the normal banking system, nor that he obtained or induced the delivery of the said ₦25m or obtained credit for himself or some other person pursuant to any enforceable contract between them by means of the dishonoured cheque (Exhibit P2). This being so, notwithstanding that the ₦25m capital given to the Defendant by the complainant remains money had and received which he is bound to return to the complainant, the inescapable conclusion to which I have come is that the Prosecution has failed to discharge the onus of establishing the Defendant's guilt on the criminal threshold of proof beyond reasonable doubt. See ***WOOLMINTON v DPP (1935) AC 462.*** Accordingly, I will and do hereby record an order discharging and acquitting the Defendant, *Ikenna Walter Okoro* on the two (2) counts of the charge preferred against him.

The Registrar of this Court and/or the Economic and Financial Crimes Commission (EFCC) shall release forthwith the international passport of the Defendant and all other items deposited by or on his behalf in fulfilment of the bail conditions imposed by this court. IT IS SO ORDERED.

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PETER O. AFFEN

Honourable Judge

Counsel:

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