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

THIS TUESDAY, THE 8TH DAY OF DECEMBER, 2015

BEFORE: HON. JUSTICE A. I. KUTIGI – JUDGE
SUIT NO: FCT/HC/CR/79/09

BETWEEN:

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

AND

1. NICHOLAS AGOMUO } **...................ACCUSED PERSONS**
2. FELICIA CHIMEGWU OMANG }

JUDGMENT

The Accused Persons were arraigned before this court on 10th June, 2010 pursuant to leave granted to the prosecution to prefer a four(4) count criminal charge against them. The charge bordered variously on criminal conspiracy, obtaining by false pretense, criminal misappropriation and criminal breach of trust.

Upon being arraigned, the Accused person all pleaded not guilty to the charge. Thereafter the matter proceeded to trial on 19th July, 2010.

In all, the prosecution called three witnesses, two(2) of whom were staff of the Economic and Financial Crimes Commission involved in the investigations of the case and the nominal complainant. A total set of sixteen(16) documents were tendered as **Exhibits** through the prosecution witnesses. It is important to state even if briefly at the onset that though the nominal complainant gave evidence, she was not available for purposes of cross-examination. Indeed on the records, she at a point indicated that she was no longer interested in pressing her claims having settled the matter with the Accused Persons and stopped coming to court all together.

The prosecution in the light of this complete lack of interest by the nominal complainant in the complaint were compelled to close the case of the prosecution on 17th March, 2014 and indeed applied that the evidence of the nominal complainant who testified as PW3 be expunged from the records. I will return later on to this evidence and whether it has any evidential value in the circumstances.

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. In furtherance of this election, the court with the agreement and consent of all counsel in the matter, ordered for the filing of written addresses to encapsulate arguments in respect of the no-case submission.

On behalf of the 1st Accused Person, an address dated 16th April, 2014 was filed in the court's registry on 22nd April, 2014. No issue was precisely streamlined as arising for determination, but the address dealt comprehensively with the issue whether the prosecution has adduced sufficient evidence to warrant the 1st Accused to offer some explanation or enter his defence to the charge.

The address of 2nd Accused is dated 3rd October, 2014 and filed same date in the court's registry. No issue was also precisely formulated but the address too dealt with the question of whether sufficient or prima-facie evidence has been adduced by the prosecution to warrant 2nd Accused to enter a defence. The prosecution on its part did not file any address despite the more than ample time given for same.

On 27th October, 2015, learned counsel for the Accused Persons adopted the submissions contained in their written address and made further oral submissions in amplification of the points contained in their addresses. While counsel on behalf of the accused persons urged upon court to uphold the no-case submission made as legally availing, on the other side of the aisle, counsel who appeared for the prosecution submitted that she had nothing further to urge court on behalf of the prosecution.

I have carefully considered the evidence of the prosecution witnesses who have testified on record, the four count charge and exhibits along with the submissions made by the respective counsel for both the accused persons to which I may refer to in the course of this ruling where necessary. It appears to me that the sole issue to be resolved is whether the prosecution

has made out a *prima-facie* case against the accused persons sufficient for the court to call on them to enter their defence.

As rightly argued by the learned counsel to the 1st and 2nd Accused Persons, the provision of **Section 191(3) of the Criminal Procedure Code (C.P.C),** empowers the court, after hearing the evidence for the prosecution and where it considers that such evidence is not sufficient to justify the continuation of trial, record a finding of **"not guilty"** in respect of such accused person without calling him to enter upon his defence and such accused shall thereupon be discharged. This provision, combined with the provision of **Section 159(1) of the C.P.C,** is similar in material substance with the provision of **Section 286 of the Criminal Procedure Act (C.P.A),** applicable in the Southern States of Nigeria save to add that in either circumstance, the court *suo motu,* without application by the accused person, is entitled, at the end of the case of the prosecution, to undertake the exercise of considering whether the totality of the evidence adduced by the prosecution is sufficient or not, to warrant the accused person to enter into his defence.

In other words, the court is under a duty to discharge an accused person if it finds that no *prima facie* case has been established or made out against him at the close of the Prosecution's case. See **Ajidagba V. I.G.P. (1958)3frc 5 at 6.**

The intendment of the law maker, in enacting these statutory provisions, in my view, is so as to prevent protracted and futile trial of frivolous charges brought by complainants against accused persons and to further safeguard the accused person's fundamental right to personal liberty and the presumption of his innocence guaranteed by **Section 36(5) of the Constitution.** As such, the court is so empowered, nay mandated, after taking a proper look at the evidence led by the prosecution witnesses, to determine whether such evidence is cogent enough to cast some reasonable doubts on the innocence of the Accused Persons and thus to necessitate him to enter into his defence to disprove the reasonable doubts. See **Section 135(3) of the Evidence Act** (as amended).

The principles that guide the court in either upholding or dismissing a no case submission are now fairly well settled and this have been properly set out in the written addresses of respective learned counsel. The court in exercising its statutory powers must exercise utmost circumspection in this delicate judicial exercise. The court must necessarily play its part in ridding

the society of criminality and related vices but it must also ensure at the same time that accused persons are not made to face the rigors of a criminal trial without some justification or basis.

Now the meaning of a submission that there is no case for an accused person to answer is that there is no evidence on which even if the court believes it, it could convict. The question whether or not the court does believe the evidence does not arise, nor is the credibility of the witness in issue at this stage. See **R V. Coker & Ors 20 NLR 62.**

As rightly submitted by all counsel in this action a no case submission may properly be made and upheld when there has been no evidence to prove an essential element of the alleged offence or when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it. See **Ibeziako V. C.O.P (1963)1 SCNLR 99; Ekpo V. State (2001)FWLR (pt.55)454 and State V Emedo (2001)12 NWLR (pt.726)131.** All that the law requires a court to determine at this stage is whether the prosecution had made out a prima facie case, it is not to evaluate evidence or consider the credibility of witnesses. **See Daboh V. State (1977)11 NSCC 309 at 315 and State V. Emedo (supra).** In **Tongo V. C.O.P (2007)12 N.W.L.R (pt.1049)523;** the Supreme Court stated as follows:

"**Therefore, when a submission of no prima-facie case is made on behalf of an accused person, the trial court is not thereby called upon at that stage to express any opinion on the evidence before it. The court is only called upon to take note and to rule accordingly that there is before the court no legally admissible evidence linking the accused person with the commission of the offence with which he is charge. If the submission is based on discredited evidence, such discredit must be apparent on the face of the record. If such is not the case, then the submission is bound to fail.**"

For the sake of clarity, a *prima facie* case is not the same as proof, which comes later when the court is to make a finding of guilt of the accused, it is evidence which if believed and uncontradicted, will be sufficient to prove the guilt of the accused. See **Ajidagba V. I.G.P (1958) SCNLR 60 and Emedo V. State (supra) at 151-152.**

May I also say at this stage that in a no case submission, a defence counsel relying on the absence of evidence to prove an essential ingredient

of the alleged offence stands on a surer footing than one relying on the unreliability or lack of credibility of the prosecution's witnesses. This is mainly because at the stage of a no case submission only one side of the case has been heard and it would be premature and prejudicial to comment on the evidence or facts of the case at that stage. See **Criminal Procedure in Nigeria, Law and Practice by Oluwatoyin Dotherty (of blessed memory) at 272-273; R V Coker (supra).**

The above clarification becomes most important especially in view of the elaborate and extensive submissions of counsel for the Accused persons but especially that of 1st Accused Person on the testimonies of the prosecution witnesses and the wise counsel of The Supreme Court on situations such as this readily comes to mind. The court stated as follows:

"At the stage of no case submission, trial is not yet concluded and the court should not concern itself with the credibility of witnesses or the weight to be attached to their evidence even if they are accomplices. The court should also at this stage be brief in its ruling as too much might be said which at the end of the case might fetter the court's discretion. The court should at this stage make no observation on the facts."

Per Kutigi JSC (as he then was) in **Ajiboye V. State (1995)8 NWLR (pt.414)408 at 413 relying on Chief Odofin Bello V The State (1967)N.W.L.R 1 at 3** where Ademola CJN stated as follows:

"whilst it is not the aim of this court to discourage a judge from discussing matters of interest in his judgment, we would like to warn against any ruling of inordinate length in a submission of no case to answer, as too much might be said, as was done in this case, which at the end of the case might fetter the judge's discretion….it is wiser to be brief and make no observation on the facts."

It was even suggested by Oputa JSC that a ruling on a no case submission should be couched in a simple statement upholding or rejecting the submission. See **Atano V. A.G Bendel State (1988)2 N.W.L.R (pt.75)201.**

Bearing these in mind, to avoid prejudice at this interlocutory stage, I shall decline in this ruling from commenting on issues raised concerning supposed contradictions in the testimonies of the prosecution witnesses or

relating to the credibility of witnesses generally as that would involve evaluation of evidence adduced.

It is also important here before going into the merits of the no case submission to treat the question of the availability for use of the evidence of PW3 in the light of her failure to return for cross-examination.

I had earlier noted that learned counsel for the Prosecution had correctly in my view advanced the correct legal position that her evidence be expunged since a court cannot properly act on the evidence of a witness who has testified but refused to return for cross-examination. Learned counsel for the both Accused Persons at trial proffered a contrary albeit unavailing and faulty legal position that the evidence can still be utilised. Perhaps acting on this erroneous conception of the law, both counsel addressed the court on the no case submission using the evidence of PW3. In however what appears to me a contradiction in terms, learned counsel to the 1st Accused having utilised her evidence, then referred to the correct legal position backed up with judicial authorities of our superior courts which is binding that such evidence cannot be sued.

For me and as indicated earlier on, there appears to me no difficulty in stating clearly that a witness who having given evidence refused to appear in court to enable the adversary exercise his inalienable and indeed fundamental right to cross-examination is taking a dangerous course of action and making an expensive gamble. It is a different thing where the adversary chooses or elects not to cross-examine. Where however the adversary elects to cross-examine, the failure of the witness to present himself is fatal abinitio and undermines such evidence.

Cross-examination is a potent weapon in the hands of the adversary to enable him effect the demolition of the case of the other party. See **Oforlete V. State (2000)12 N.W.L.R (pt.681)415.** The purpose of cross examination is to contradict, destroy discredit, weaken or qualify the case of the opponent. See **Section 223 of the Evidence Act.** Succinctly stated, cross-examination is used as a means of establishing the party's case through the opponent's witnesses. See **Awopeju V. State (2000)6 N.W.L.R (pt.659)1 at 20.**

I incline to the view that the essence of any proper trial process must involve the procedure for cross-examination and to deny an Accused Person this important opportunity is to deny him or her his fundamental

right to fair hearing. A court cannot therefore legally act on the evidence of PW3 whom the Accused Persons wanted to cross examined but who disappeared or abandoned the trial after she gave her evidence. See the case of **Shofolahan V. State (2013)LPELR-20998(CA).**

Without much ado, the evidence of PW3 will accordingly be expunged and will have no bearing or value as I determine the extant no-case-to answer submissions. The effect of this in real terms to the case of the prosecution is that it effectively only had two(2) witnesses who gave evidence in proof of the extant charge.

Having set out the above guiding principles and template, the basic responsibility or focus of court now is to examine the available evidence led by the prosecution witnesses in the light of the critical elements required to sustain the offences for which the accused persons were charged and in doing so determine whether the evidence has failed to link the accused persons with the commission of the offences alleged against them so as not to require them to put in a defence.

In doing so, I shall proceed to examine the evidence as adduced by the prosecution to support or establish the four count charge as it relates to the accused persons.

Count 1 charged the Accused Persons with conspiracy to defraud one Ijeoma Onwughalu of the sum of ₦10,000,000. It is noted here that that the Accused persons were charged with this count under **Section 97(1) of the Penal Code Act (P.C.A)** which is the punishment section for criminal conspiracy. Now what does criminal conspiracy mean within the purview of the penal code law. **Section 96(1) and (2) of the Penal Code** provides the important definition of criminal conspiracy as follows:

1. **When two or more persons agree to do or cause to be done:**
   a. **An illegal act; or**
   b. **An act which is not illegal by illegal means, such an agreement is called a criminal conspiracy.**
2. **Notwithstanding the provisions of subsection (1), no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.**

The above statutory provisions appear to me clear in its import. In the present case, it is not a matter for dispute that obtaining by false pretence is an illegal act within the contemplation or purview of the Penal Code Act. That is however beside the point now under this count because it is settled principle of general application that conspiracy to commit an offence is a separate and distinct offence from the offence of the actual commission of the offence to which the conspiracy relates. Each is independent and must therefore be established. See **Atano V. A.G.Bendel State (supra)201** at 232. What the court is concerned with here which is apparent on the face of the above provision is whether there was an "agreement" amongst accused persons to commit an offence which is what criminal conspiracy entails. The Court of Appeal succinctly defined conspiracy in **Gabriel Okeke & Anor V. the State (1999)2 N.W.L.R (pt.590)246 at 265-266** to mean the meeting of two or more minds to carry out an unlawful purpose or to carry a lawful purpose in an unlawful way. In effect, the purpose of the meeting of the two more minds is to commit an offence. See also **Ishola V. The State (1972)10 S.C 63; Upahar V. State (2003)6 N.W.L.R (pt.816)230 at 262; Ikemson V. State (1989)3 N.W.L.R (pt.110)455 at 477.** On the authorities, the following are the salient ingredients that constitutes the offence of criminal conspiracy thus:

1. **That there must be an agreement of two or more persons to do an unlawful or a lawful act by unlawful means;**
2. **That the actual agreement alone constitutes the offence and it is not necessary to prove that the act has in fact been committed;**
3. **That the external or overt act of the crime of conspiracy is the concert by which mutual consent to a common purpose is exchanged; and**
4. **That the agreement is an advancement of an intention conceived secretly in the mind of each person. The overt act is the proof of the intention, mutual consultation and agreement.**

See Obiakor V. State (2002)1 NWLR (pt.776)612; Gbadamosi V. State (1991)6 N.W.L.R (pt.196)182; Kaza V. The State (2008)7 NWLR (pt.1085)125; Njovens V. The State (1973)NSCC 257.

I must also point out even if briefly that the offence of conspiracy is rarely or seldom proved by direct evidence but by circumstantial evidence and inferences drawn from certain proved acts or through inferences drawn from surrounding circumstances. See **Obiakor V. State (2002)36 WRN1;**

State V. Osoba (2004)21 WRN 131; Erim V. State (1994)5 NWLR (pt.340)522 at 534.

I have carefully related these ingredients to the evidence of the remaining two prosecution witness on record. I cannot but agree with the contention of the submissions of the learned counsel for the respective accused persons that there is no shred of evidence that establishes any of the ingredients stated above. There is nothing on the records to show or that suggested how, in what manner, by what means, under what circumstances whatsoever, where and when the alleged conspiracy or agreement to commit the said offence took place. There is also no portion of the evidence of any of the prosecution witnesses, by my calm examination, from where the court can make a clear inference as to where any plot, scheme, strategy or concerted calculations as between any of the accused persons to commit the alleged offence in the count was present or established. In my considered opinion, any narrative of evidence of conspiracy that on the surface does not show these key elements is flawed.

The evidence of the prosecution witnesses without unnecessarily going into any details is clear to the effect that the nominal complainant laid a complaint vide two petitions, **Exhibits P15a and P15b** with respect to:

1. A building project handled by 1st Accused Person, and

2. That the sum of N10Million was received by 1st Accused Person from her under false pretense to invest in a landed business.

The conspiracy charge relates to the N10Million allegedly received by 1st Accused under false pretence. Now on the evidence, this transaction or investment was primarily between the nominal complainant and 1st Accused Person. The 2nd Accused may be the owner of the plot offered to nominal complainant to invest in but no where did she appear in the trajectory or narrative of the relationship between nominal complainant and 1st Accused. PW1 conceded under cross-examination that no where was the name of 2nd Accused mentioned in the petitions and that she had no relationship whatsoever with the complainant and that it was only in the course of this matter or investigations that they even met.

Indeed PW1 even in his evidence in chief stated that the 2nd Accused told him clearly that she did not even know that 1st Accused collected any money from complainant. It is also to be noted that on the evidence, the

plot was earlier offered to one Ifeanyi and when there were problems with the plot, the 2nd Accused Person arranged to pay back the sums paid for the plot. PW1 stated that even in that case the said Ifeanyi confirmed that it was 1st Accused who offered and sold him the plot. There is therefore no dispute on the evidence that 1st Accused who also engages as an Agent to sell land and landed property was the one who called on nominal complainant to invest ₦10Million on the plot and that whenever the plot is sold, she would make a profit of ₦4Million in addition to the N10Million she invested. Indeed even by **Exhibit P14,** the cheque the nominal complainant issued, the name on it is **PHIU NIG LTD** said to belong to Ifeanyi, the original purchaser of the plot. Neither the name of 1st Accused nor even 2nd Accused is on it which goes to show that this was an investment and civil transaction and the interest that would accrue to the complainant of ₦4Million spelt out upon the sale to another purchaser. These narrative the PW1 confirmed in all material particulars and one then wonders how conspiracy can be inferred in the circumstances. Even if the transaction or business did not yield fruitful result as anticipated, how does this then suddenly metamorphorse to the offence of conspiracy? I just wonder.

As stated earlier, I cannot really locate or situate conspiracy between 1st and 2nd Accused Persons to defraud the nominal complainant under false pretence as alleged under count 1. I cannot see my way through any design, subtle or active to commit the alleged offence of conspiracy. My finding therefore , with respect to count one is that the prosecution has failed to establish a *prima-facie* case against the Accused persons with respect to the alleged offence of conspiracy to commit the offence of obtaining by false pretence. I accordingly hold that as far as this count is concerned, the Accused persons have not been shown to have any case to answer. Accordingly they are hereby discharged of this count.

Count two charge the 1st and 2nd Accused Persons with the offence of obtaining by false pretence.

Now **Section 1(1)(a) of the Advance Fee Fraud and Other fraud related Offences Act** under which the Accused Persons were charged provides as follows:

"Notwithstanding anything contained in any other enactment or law, any person who by any false pretence and with intent to defraud

(a) **obtains from any other person, in Nigeria or in any other country for himself or any other person… commits an offence under this Act.”**

Now the law is settled that the fundamental ingredients or elements that are required to be proved to establish the charge of obtaining money by false pretence are as follows:

1. That there was a pretence

2. That the pretence emanated from the Accused Persons

3. That the pretence was false

4. That the Accused Person knew of the falsity of the pretence; did not believe its truth

5. That there was an intention to defraud

6. That the property or thing is capable of being stolen

7. That the Accused Person induced the owner to transfer his whole interest in the property. See **Onwudiwe V. FRN (2006)All FWLR (pt.319)774 at 812-813G-F; Odiana V. FRN (2008)All FWLR (pt.439)436.**

The term false pretences denotes the offence (crime) of knowingly obtaining title to another persons property by misrepresenting a fact with the intent to defraud that person. Also termed obtaining property by false pretence; fraudulent pretences; larceny by trick; embezzlement, et al. See **Blacks Law Dictionary (6th ed) at 678.**

In the **Advance Fee Fraud and Fraud related Offences Act,** the crime of obtaining by false pretence was defined in **Section 20** thus:

“False pretence means a representation whether deliberate or reckless, made by word, in writing or by conduct, of a matter of fact or law, either past or present which representation is false in fact or law, and which the person making it knows to be false or does not behave to be true.”

It should be reiterated that the offence of obtaining property by false pretences could be committed in writing or even by mere oral communication. Therefore an honest belief in the truth of a statement on the part of the accused person, which turns out to be false, cannot found a conviction on false pretence. See the Court of Appeal decision in **CA/3/350C/2013**; **Chukwuemeka Aguba V. FRN** delivered on 25th June, 2014 at the Benin Judicial Division.

I have carefully related the above ingredients to the evidence of the prosecution witnesses on record and I cannot but agree with the contention of the submissions of learned counsel to the Accused Persons that there is no shred of evidence that establishes any of the above mentioned ingredients or elements of obtaining by false pretence.

On the evidence and I have already briefly alluded to it earlier on, it was only the 1st Accused who requested the complainant to invest the sum of ₦10Million in a land transaction with a return of investment of N4Million when the land is sold. It is also clear on the evidence that the land was earlier sold to one Ifeanyi and when problems arose over the land, the 2nd Accused paid back the consideration paid for the land. On the evidence, the money was not fully paid back and this explains the arrangement 1st Accused had with complainant wherein she issued the ₦10Million cheque vide **Exhibit P14** in favour of the said Ifeanyi's company so that the title documents could be retrieved from him with a view that the plot could be resold to a subsequent higher purchaser before the principal sum and the interest of N4Million will be paid back to the nominal complainant.

I cannot see on the evidence how 1st Accused made any pretences to the nominal complainant. The cheque payment by her to **PHIU NIG LTD**, **Exhibit P14,** the company said to belong to Ifeanyi undermines any allegation of false pretence. The complainant on the evidence clearly knew what she was getting into. There cannot be said to be a false representation here. What she may not have foreseen is that there might be a delay in the returns she fully expected to get but that cannot translate or aggregate to false misrepresentation with intention to defraud. In any event there is on the evidence no strict time frame or limit for the returns on the investment to materialize.

It is interesting to note that in all the above narrative or evidence on record, no where was the name of 2nd Accused mentioned or any causal link or nexus established to situate her within the purview of the ingredients of this

count of obtaining money by false pretence. The 2nd Accused absolutely had no business or relationship whatsoever with the complainant and one really questions the wisdom of even joining her to this charge.

On the evidence, the prosecution has not in any manner shown how it can be said that the Accused Persons inveigled and beguiled the complainant into parting with the sum of ₦10Million. In **Ijuaka V C.O.P(1976)LPELR 1466 or (1976)6 SC 99** the Supreme Court per Obaseki J.S.C quoted with approval the dictum of Humphrey J, in the old English case of **R.V. John James Sullivan 30 CR APPR 132 at 134** where he dealt with what had to be proved in order to establish the intent to defraud which is an essential element necessary to secure conviction on a charge of obtaining by false pretences as follows:

"In order that a person may convicted of that offence, it has been said hundreds of times that it is necessary for the prosecution to prove to the satisfaction of the jury (court) that there was some misstatement which in law amounts to a pretence, that is, a misstatement as to an existing fact made by the accused person; that it was false and false to his knowledge; that it acted upon the mind of the person who parted with the money; that the proceeding on the part of the accused was fraudulent. That is the only meaning to apply to the words with intent to defraud."

On the whole and with respect to count 2, the conclusion I must reach is that from the evidence on record, the prosecution has not made out any case against any of the Accused Persons which requires any of them to enter a defence upon. Accordingly I hereby discharge all the Accused Persons on count 2 of the charge.

The remaining counts 3 and 4 of the charges are against only the 1st Accused Person.

Count 3 charges him with the offence of dishonest conversion of the sum of ₦15,968, 560 out of the total sum of N32,000,000 being money entrusted to him and punishable under **Section 309 of the Penal Code.**

Here again, whereas the 1st Accused Person was charged with the punishment section of the offence of criminal misappropriation; the offence itself is defined in **Section 308 of the Penal Code Act** thus:

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

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 or 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 Person to cause wrongful gain to himself or another or a wrongful loss to any other person. See **Bakare & Ors V. The State (1968)1 All NLR 394.**

With respect to this count I have again appraised the evidence led on record and I am really at a complete loss as to what to make of the evidence to support this count which is abysmal at best.

The case of the prosecution and in particular the evidence of PW1 and PW2 is straightforward. By **Exhibit P15a** the first petition written by the complainant, the case made out was that the complainant's late husband was handling a contract in Anambra State before he unfortunately lost his life. The 1st Accused was called in to complete the contract and was paid ₦32Million even though what he projected for the completion of the contract was ₦47Million. PW1 stated that the nominal complainant complained that what was expended at the site was not up to the said amount. PW1 stated that when they called on 1st Accused, he informed them that he used all the money at the site. What we have here is the word of the complainant as against that of 1st Accused.

The question then is how was this issue of the conflicting assertions of the complainant and 1st Accused Person resolved? On the evidence, PW2 Reuben Hussaini, an operative of EFCC was sent to do the verification at the site. An expert was obtained from the Ministry of Works to do the valuation of the job 1st Accused Person said he carried out. On the day they all agreed to be at the site, the 1st Accused was not there and the

expert declined to do the valuation on the ground that it will be unethical to do so behind the back of 1st Accused Person.

PW2 then stated that he then on his own arranged for a Quantity Surveyor, one Mr Godwin Enemor to do the valuation which he did and prepared a report which allegedly showed that the sum of N16,31,440 was spent on the site out of the ₦32Million given to 1st Accused Person.

I note that in the final address of the 1st Accused, learned counsel referred to one Godwin Enemor, the Quantity Surveyor as having given evidence. I am afraid that cannot be correct. I have again carefully gone through the records of court and no where did the said Godwin Enemor appear as a witness for the prosecution. The reference to the evidence of a none existent Godwin Enemor will therefore be discountenanced without much ado.

The bottom line is that this key material witness that would have provided the missing link in the contested assertions with respect to the actual scope of work carried out was not produced in court.

It is indeed curious that this valuer was not presented in court and the report which formed the basis of the alleged shortfall was equally not presented in court. The best to me made of the alleged valuation said to be have been done is therefore at best hearsay and inadmissible. For a criminal matter, the court cannot be seen to be speculating. It is really difficult if not near impossible in this circumstance to prove misappropriation and that it was done with a dishonest intention for personal gain or the gain of other persons. It goes without saying that the perfunctory treatment of this count by the prosecution did not in any manner translate to the proof required to establish the essential ingredients of this count. As a logical corollary, since the prosecution have not even been able to prove misappropriation, the issue of whether the same was even carried out with or without a dishonest intention cannot even arise.

With respect to count 3, the conclusion, I must necessarily come to again is that from the evidence on the record, the prosecution has not made out any case by any means against the 1st Accused which requires him to enter a defence. Accordingly, I hereby discharge 1st Accused Person of count 3 of the charge.

The final count 4 charges the 1st Accused with the offence of fraudulent misappropriation as in count 3 of the sum of ₦15,968,560 out of ₦32Million entrusted to him as a private contractor and punishable order **Section 312 of the Penal Code** which is a punishment section for criminal breach of trust. In the light of count 3, this count will appear to be of some doubtful legal validity as they clearly have the same base with count 3. Since no objection was raised at any time to the count, I prefer to keep my peace.

Now here too, the 1st Accused was charged under the punishment section of the offence of criminal breach of trust, whereas the offence is defined in **Section 311 of the Penal Code Act** thus:

"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 rust 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 just like in count 3 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 person to cause wrongful gain to himself or another or a wrongful loss to any other person. See **Bakare & Ors V. The State (1968)1 All NLR 394.**

Here too as in count 3 and to avoid unnecessary repetition, I am in no doubt that on the evidence, that there is absolutely no credible proof of the misappropriation of the sum of ₦15,968,560 Million as alleged. The alleged valuer who carried out the valuation at the site and obtained the shortfall was not produced in court and the report said to have been

produced by him which formed the basis of counts 3 and 4 was equally not brought before the court. Even if the report had been produced, without the oral evidence of the said valuer to back it up, the report would in such circumstances lack any legal or evidential value. As in count 3 it follows here too that without proof of misappropriation, the issue of whether the same was carried out with or without dishonest intention for personal gain or the gain of others cannot even arise.

The 1st Accused Person was entrusted with some money to carry out an assignment. On the evidence he said he executed the assignment. The nominal complainant said he did not. Her evidence on the record was expunged. In real terms, that is all that is before the court. I cannot situate any dishonest misappropriation here.

It is also my conclusion here, going by the evidence as it is apparent on the record that the prosecution has failed to give any evidence with respect to count 4 that is worthy of a defence by 1st Accused Person. He is accordingly discharged of the said count.

As I conclude, I am compelled by the history of this case to make some observations. This is a matter in which as far back as 2012 precisely on 10th July, 2012 the learned prosecuting counsel informed the court that the complainant is no longer interested in the case. When I enquired from the complainant directly, she corroborated or confirmed what counsel said in court. This position remained the same all through the subsequent proceedings. Indeed the nominal complainant stopped coming to court and the proceedings were stalled as a result for about three years now and this to me is troubling and a matter of concern particularly with respect to the disposition or approach of the prosecution.

On the records, the case was set in motion by the petition of the complainant vide **Exhibits P15a and P15b.** It is obvious that a lot must have gone into the investigations both materially and financially before the matter was filed.

With hindsight, it is also patently obvious that what the complainant wanted was the moneys she gave out and not necessarily a criminal trial and therefore she chose to explore amicable ways to settle the matter despite the criminal action in court.

This therefore makes it imperative for the prosecutorial agencies to do alot of critical oversight before filing matters in court. Cases that have clearly foundational civil undertones have no place within the purview of a criminal action. Similarly complainant(s) should be encouraged to explore alternative resolution dispute mechanisms instead of resorting to actions such as this.

Most importantly where a vital witness critical to the success of a criminal action is unavailable and there is no successful way of proceeding with the case, common sense and prudence dictates that the prosecution takes immediate steps to abort such action rather that wasting tax payers money and engaging in an idle or fruitless exercise.

The way this case was conducted leaves me with the impression that because of certain unidentified and inhibiting challenges at their work place learned prosecution's counsel cannot take firm, necessary and independent action in a matter they are handling even if they know it is the right thing to do. This is unfortunate. Learned counsel for the prosecution therefore within the context of these challenges appear to misconceive the basic constitutional presumption of innocence in favour of the Accused Persons 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 doubts. The totality of the evidence offered by the prosecution in attempting to prove their case by my respectful estimation; and to say the least is not worth the time and resources expended in going through these proceedings for over five years. I incline to the view that immediately the nominal complainant refused to take any further part in the proceedings, the action became fatally compromised and prosecuting counsel ought to at that point have taken steps to discontinue the action instead of dissipating precious time and energy in proceeding further with this case particularly if the quality of the evidence on record is anything to go by. The court too in view of its tight schedule and volume of work should have been spared this merry-go-round bereft of any specific objective.

To allow these proceedings to continue having regard to the totality of the evidence laid bare on the record by the prosecution is to inflict undue hardship and injustice on the Accused Persons. They ought not have stood this trial in the first place if the evidence on record was all the prosecution had to offer. It is really a sad commentary on the process that this case was allowed to drag this long. I am minded to further add that if

the circumstances have been appropriate in view of this rather fruitless protracted prosecution and its undoubted mental and even physical effects on the Accused Persons, this is a matter deserving of heavy costs and damages in their favour. Nevertheless, I believe they will be assuaged by a discharge which amounts to an acquittal.

The legal consequence of a successful submission of no case to answer is that such a discharge is equivalent to an acquittal and a dismissal of the charge on the merits. See **Ibeziako V State (1989)1 CLRN 123; Nwali V. IGP (1956)1 ERMLR; Mohammed V. The State 29 NSCQR 634 at 640.**

In the final analysis and for the avoidance of doubts, my firm decision on the basis of the provisions of **Section 159(1) and Section 191(3) of the C.P.C** is that the evidence adduced by the Prosecution on record is not sufficient to justify the continuation of this trial. In other words, the prosecution has failed to make out a *prima facie* case against any of the Accused Persons in that they have failed to tender required minimum evidence to establish the essential elements of all the counts of offence that they have been charged with respectively. For this reason I hereby preclude the Accused Persons from entering upon their defence and accordingly, I hereby discharge the 1st and 2nd Accused Persons of the entirety of the charge preferred against them.

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Hon. Justice A.I. Kutigi

Appearances:

1. ***S.A. Ogwuegbulam, Esq., for the Prosecution***

2. ***Uche Uwazurounye, Esq., with Esther Ugoche (Mrs) for the 1st Defendant.***

3. ***O.D. Emole, Esq., for the 2nd Defendant.***