IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA

THIS MONDAY, THE 29TH DAY OF MARCH, 2021

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

CHARGE NO: CR/328/2018

BETWEEN:

FEDERAL REPUBLICOF NIGERIA .....COMPLAINANT

AND

1. OGBUKE EBUKA
2. CENTURY ROOFS LIMITED } **..... DEFENDNATS**

RULING

The Defendants were arraigned on a two (2) counts Amended charge dated 7th November, 2018 and filed on the 8th November, 2018 for offences bordering on criminal reach of Trust contrary to **Section 311 of the Penal Code Law** and Issuance of Dud Cheque contrary to **Section 1 (1) (b) of the Dishonoured Cheques (offences) Act Cap. D11 LFN 2004.**

The trial in this case commenced on the 28th May, 2019. The complainant called two witnesses and tendered **Exhibits P1-P6** in evidence and finally closed its case on the 20th February, 2020.

At the close of the Prosecution's case, Counsel to the defendants elected to file a no case to answer submission and in furtherance of the election of counsel on both side of the aisle, the Court ordered for the filing of written addresses.

The written address of the defendants is dated 6th October, 2020 and filed in Court's Registry on the 7th October, 2020. In the said address, the defendants raised four (4) issues for the determination of the court, to wit:

(a) Whether the prosecution on her own volition can amend the charge without the knowledge or leave of the Honourable court in view of Sections 216(1) and 218(2) of ACJA, 2015.

(b) Whether upon amendment of the charge, the defendant is not to take a fresh plea to the amended charge or further amended charge under the provisions of Sections 216 and 217 of ACJA, 2015.

(c) Whether a person who issues a post dated cheque in expectation of money into his account from a third party but whose account is not thereafter credited by the third party to make the cheque issued payable can be found guilty under Section 1 (3) of the Dishonoured Cheques (Offences) Act or any other Criminal Act.

(d) Whether the prosecution established that the money which the Nominal complainant gave the defendants was to be transferred to any Chinese partner of the Nominal Complainant, in view of no details of any Chinese partner or account disclosed or investigated whether the defendants herein are public or civil servants to be held criminally liable for the offence of criminal breach of trust.

The prosecution on the other hand filed its response to the defendants written submission on no case to answer dated 13th day of October, 2020 and filed in the Court's Registry on the 15th October, 2020. In the said written address, the Prosecution raised a lone issue for the determination of the court to wit:

Whether from the overwhelming oral and documentary evidence presented by the prosecution, the prosecution has been able to establish a prima facie case of obstruction (sic) against the defendant to warrant this Honourable court to call upon defendant to enter her Defence?

I have carefully considered the evidence of the prosecution witnesses, the 2 counts charge and all the Exhibits tendered along with the submissions made by the respective counsel to both the defendants and prosecution herein to which I may refer to in the course of this ruling where necessary. Learned counsel to the Defendants with respect appears to have misconceived the essence of what a no case to answer submission entails in the light of the numerous issues raised and particularly issues 3 and 4 and the extensive submissions made which goes to the substance of the case, creating the erroneous impression that the court is to deliver a final Judgment on the contested assertions or that the court is at this point determining the guilt or otherwise of the Defendants. Nothing could be further from the true legal position. It appears to me that the simple issue to be resolved is whether the prosecution has made out a prima-facie case against the defendants' sufficient for the court to call on them to enter a defence to the charge.

Let me also quickly address issues (1) and (2) on Amendments raised by the Defendants. I think these arguments are such that we should not waste unnecessary energy on. It has no bearing with a no-case to answer submission as same relates to the validity or otherwise of a charge. Let me however still make some brief comments. It is true that the initial charge filed in this case is dated 10th July, 2018 and filed on 19th September, 2018 but it was clearly against only the 1st Defendant - **Ogbuke Ebuka**. The court never mentioned or heard this case at any time on the basis of this charge. On the record and at all material times, the charge had not been mentioned and thus no plea of the defendant was taken by court predicated on this charge sheet. Indeed by the time the matter first came up in court, the prosecution had filed an Amended charge dated 7th November, 2018 and filed on 8th November, 2018 containing an additional Defendant - **Century Roofs Ltd** making the charge to now have two defendants. To the clear extent that the earlier charge had not been even mentioned, there was nothing under **Section 216(1) of ACJA 2015** preventing the filing of this Amended charge. No formal leave was required. Indeed on the Record, it was based on this **Amended charge** that the 1st Defendant took the plea for himself and on behalf of the 2nd Defendant. It was also on the basis of this Amended charge that the prosecution presented its evidence which the Defendants actively challenged leading to this point. One then wonders at the basis of this objection. Too much drama should therefore not be made on the granting of leave with respect to Amendment. The taking of a fresh or

new plea to any fresh amendment is the most important element in criminal jurisprudence or trials. Once the Defendant takes the plea, to any new or fresh Amendment, it means leave has been granted and no formal leave for amendments needs be recorded by court. In **Osarehen V. FRN (2018) LPELR 438939,** the Supreme Court per Rhodes Vivour J.S.C stated as follows:

"when it is the desire of a prosecutor to amend the charge or file a fresh charge, he files the process in the Registry and serves a copy of the process on the defence counsel. Leave means permission. An informal oral application is made to the trial judge in open Court to amend or file fresh charges and leave to amend is not formally granted by the judge. It is implied that leave has been granted when the accused person is called upon to plead to the amended charge or fresh charge. The fact that the accused person pleads to the amended charge is indicative of the fact that leave was obtained. Failure of the accused person to plead to the amended or fresh charge as provided by Section 164 of the Criminal Procedure Act renders the entire proceedings null and void. See R. V Eronini (1953)14 WACA P. 366, Adisa V. AG Western Nigeria (1965)1 ALL NLR p.412. There was strict compliance with Section 164 of the Criminal Procedure Act, when the charge was amended, in that the appellant pleaded to the amended charge. The amended charge was not an abuse of process and the trial is not a nullity."

The above instructive pronouncement is clear.

Finally, if the prosecution filed another Amended charge on 17th October, 2019 as contended, it has not presented it at any time on the Record as a charge on which it wants the Defendants to be prosecuted or for them to take a fresh plea. That **charge sheet** certainly cannot therefore determine or define the extant criminal proceedings and most accordingly be discountenanced. The fact that both sides added another **third party** on the face of the addresses filed, cannot change or alter the character of the charge before court. Counsel must therefore not unwittingly seek to create confusion, when it is clear that the case was never fought on the basis of that charge involving this third party **"Bukky Integrated Services Ltd."** I leave it at that.

Now back to the substance.

The principles that guide the court in either upholding or dismissing a no case to answer submission are now fairly well settled and this have been properly set out in the addresses of the 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 crimes and related vices, but it must also ensure at the same time that the defendants 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 the defendant 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 not believe the **evidence does not arise**, nor is the **credibility** of the witness is in issue at this stage. **R V. Coker & Ors 20 NLR 62.**

As rightly submitted by all the counsel in this matter, a no case to answer submission may properly be made and upheld when there has been no evidence to prove an essential element of the alleged offence(s) or when the evidence adduced by the prosecution has been so discredited under the force of cross-examination or is 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 NWLR (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 charged. 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 finding of guilt of the accused. It is evidence which if believed and un-contradicted, 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 to answer 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 no case to answer 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 Doherty (of blessed memory) at 272-273; R V. Coker (supra).**

The above clarification becomes most important especially in view of the elaborate submissions of counsel for the defendants 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 follow:

"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 and of blessed memory) in **Ajiboye V State (1995) 8 NWLR (pt.414) 408 at 413** relying on **Chief Odofin Bello V The State (1967) NWLR 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 (of blessed memory) 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 NWLR (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.

Having set out the above guiding principles, the basic responsibility or focus of court now is to examine the evidence led by the prosecution witnesses in the light of the critical elements required to sustain the offences for which the defendants were charged and in doing so determine whether the evidence has failed to link the defendants 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 two (2) Counts charge as it relates to the defendants.

Under count one, the defendants are charged under **Section 312 of the Penal Code Law** which is the punishment section for Criminal Breach of Trust. The offence is however defined under Section 311 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 trust is to be discharged or any legal contract express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits criminal breach of trust."

An important phrase in the above provision is **"dishonestly."** On this phrase, **Section 16 of the Penal Code Act** provides as follows:

"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."

The salient ingredients to establish Criminal Breach of Trust under **Section 311 of the Penal Code Act** are as follows:

(a) That the accused was entrusted with property or with dominion over it;

(b) That he:

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

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

(d) That he acted dishonestly.

Now on the evidence, the narrative or evidence of the Prosecution in substance through the Nominal complainant who testified as PW1 **(Tochukwu Metuh)** is that he knew the 1st Defendant as one who sells roofing sheets but that sometimes in 2016, he told him that he now operates a bureau exchange and that he can do business with him since he is an importer who imports goods from china. PW1 said he gave 1st Defendant the naira equivalent of 30,000 dollars to transfer for him which he did. That subsequently in March , he again gave or transferred to 1st Defendant the sum of N98,400,000 which is equivalent to 305,000 dollars to transfer to his business partner in china and that 1st Defendant stated that the transfer will be done in four days. That after a week, the 1st Defendant did not make the transfer but gave him a telex copy or transfer receipt indicating that a

transfer was made which turned out to be fake as his partners in china said they have not received the money.

PW1 stated that after about 3 weeks, his partners in china received 60,000 dollars and later another 100,000 dollars and despite the several failed promises made by 1st Defendant, he never made the complete transfer. That sometimes in May, the 1st Defendant told him that he won't be able to conclude the transfer and thus gave him a Diamond Bank cheque vide **Exhibit P1** in the sum of ₦45,950,000 representing the balance of his money and that he should go to the bank and collect same. He went to the Bank and there was no money in the account.

The 1st Defendant then gave him ₦4,000,000 in cash and a title document to his house as an assurance that he will pay all the moneys he collected. He never kept to his promises. PW1 said he kept calling 1st Defendant as his business was suffering and his partners in china were losing confidence in him. He was compelled to ask his lawyer to formerly write a petition to the EFCC. That the 1st Defendant has paid another ₦15,000,000 and ₦2,000,000 leaving a balance of ₦24,950,000.

The evidence of PW2, an officer of EFCC that investigated the complaint sought to accentuate the key elements of the case made out by the nominal complainant above vide **Exhibit P2(a and b), P3(a-e), P4a and b, P5a and b and P6.** The narrative of PW2 situates the transfer to 1st Defendant and she stated that the money was used for purely personal purposes.

I am in no doubt that on the basis of the evidence led by the prosecution, particularly the narrative of PW1, the nominal complainant and the findings of the investigation team through PW2 vis-à-vis the elements situating the offence that the prosecution has made out a prima facie case on count 1 requiring the Defendants to put up an answer or explanation with respect to the funds they received and how they disbursed same or indeed the circumstances surrounding the disbursement or transfer to china; whether it was infact made or not.

Now with respect to count 2, the defendants are charged with issuing the nominal complainant a Dud cheque in the sum of ₦45, 950, 000 (Forty Five Million, Nine Hundred and Fifty Thousand Naira) only on the company's Diamond Bank Cheque

Account No: 0020090870 contrary to **Section 1 (1) (b) of the Dishonoured Cheques Offences Act Cap. D11 LFN 2004** and punishable under **Section 1 (1)(b)(1)** of the same Act.

Section 1(1) and (2) of the Act provides thus:

"(1) Any person who-

(a) obtains or induces the delivery of anything capable or 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 of the cheque in the bank on which the cheque was drawn, 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 the case of a body corporate, be sentenced to a fine of not less than N5,000.

(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 above provisions appear to me clear. The critical ingredients for sustaining the offence under the extant charge is apparent and not difficult to decipher. Learned counsel to the prosecution in her address relying on the above provision and decided cases has succinctly set out the key elements or ingredients that the prosecution need establish in proof of the charge as follows:

a. **That the accused obtained credit for himself.**

b. **That the accused person issued a cheque to the complainant.**

c. **That the cheque was presented within three months of issuance thereon; and**

d. **That on presentation, the cheque was dishonoured on the ground that there was no sufficient fund standing to the credit of the drawer of the cheque in the bank on which the cheque was drawn. See Abeke V. The State (2007)Vol. 151 LRCN, Ojukwu V. FRN (2019) LPELR 46.**

Again, the evidence of the prosecution through PW1 and PW2 earlier highlighted, shows the issuance of a Diamond Bank cheque by Defendants vide **Exhibit P1** to offset or pay for the moneys he collected from PW1 which bounced on presentation due to insufficiency of funds.

The issues relating to whether Defendants were duped vide **Exhibit P6** or that they were expecting money from certain sources when the cheque was issued cannot be devoid of comments on facts and cannot be looked into and determined at this stage. The bottom line here is that on the basis of the evidence led vis-à-vis the elements of this count, there is no doubt that issues have been raised on this count providing basis for further inquiry and requiring a response from Defendants.

The point to reiterate as ably canvassed by learned counsel to the prosecution is that at this point, the issue is not whether the evidence is sufficient to ground a conviction. This can only properly come about at the end of substantive hearing

when the court has had the invaluable opportunity of hearing and testing their own version of the incident. All that is necessary is whether the evidence discloses a *prima-facie* case, even if weak, requiring some explanation. *Prima-facie* and conclusive evidence were instructively defined by the *Supreme Court in* **Ikomi V. State (1986)3 N.W.L.R (pt.28)340 at 385 -386** *per the respected and noble Kawu JSC (of blessed memory) as follows:*

"That which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favour that it must prevail if believed by the jury unless rebutted or the contrary proved; conclusive evidence, on the other hand, is that which excludes or at least tends to exclude the possibility of the truth of any other hypothesis than the one attempted to be established."

In summation and for avoidance of doubt, I hold that from the evidence so far adduced, the prosecution has made out a prima facie case against the defendants in respect of the two counts charge. The no case submission is accordingly overruled. In the circumstances and in accordance with the provision of **Section 303 of ACJA 2015,** the defendants are called upon to enter their defence with respect to the two counts.

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Hon. Justice. A.I. Kutigi

Appearances:

1. **Yetunde Alabi Esq. for the Prosecution.**

2. **R.I.O Oloyede Esq. for the Defendants.**