

**IN THE HIGH COURT OF THE FEDERAL
CAPITAL TERRITORY, ABUJA
HOLDEN AT APO, ABUJA**

ON THURSDAY, 24TH DAY OF JUNE, 2021


BEFORE HON. JUSTICE SYLVANUS C. ORIJI

CHARGE NO. FCT/HC/CR/274/2016

BETWEEN

COMMISSIONER OF POLICE --- COMPLAINANT

AND

<p>1. JOHNSON DIKKO [alia Stigma] 2. PIUS GABRIEL 3. MOSES EKAINU 4. EX. CPL. ABDULLAHI ISHAKU</p>		<p>DEFENDANTS</p>
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RULING

On 21/2/2017, the prosecution filed a 6-count amended charge against the 4 defendants.

In count 1, it is alleged that the 4 defendants *“on or about the 8/11/2015 at about 0100 hours at Sahara Super Cell Estate, Apo District Abuja ... conspired amongst yourselves to commit an offence to wit: armed robbery. ...”* In counts 2 and 3, it is alleged that the 1st& 2nd defendants and other members of their gang now at large committed the offence of armed robbery.

In count 4, it is alleged that the 1st& 2nd defendants were *“arrested by the Police while in possession of two fabricated locally made pistol, one AK 47 rifle, one pump action rifle, one SMG rifle loaded with 10 rounds of live ammunition without any license or legal authority to carry same.”*

The 1st& 2nd defendants are charged in count 5 with the offence of culpable homicide punishable with death in that *“while armed with dangerous weapons such as AK 47, ... forcefully broke in to the house of one Mr. Tony Ndubisimale adult of Plot C3 super cell estate Apo, FCT, Abuja for the purpose of carrying out an armed robbery operation and in that process shot and killed one miss UzorjiOfor female adult ...”*

In count 6, the 1st& 2nd defendants are charged with the offence of culpable homicide punishable with death in that *“while armed with dangerous weapons such as AK 47, ... forcefully broke in to the house of one Mr. Solomon Opaluwa male adult of B92 super cell estate Apo, FCT, Abuja for the purpose of carrying out armed robbery and in that process shot and killed his wife, named Mrs. OpaluwaOjoma, female, adult ...”*

The defendants were arraigned before the Court on 20/2/2019 and they respectively pleaded not guilty.

In proof of the counts, the prosecution called 5 witnesses: Daniel Opaluwa [PW1], Solomon Opaluwa [PW2], Tony Ndubisi [PW3], DSP Suleiman Ewida [PW4] and ASP Felix Onuoha[PW5].

The prosecution closed its case on 12/2/2020. Learned counsel for the 3rd defendant, Andrew Eche Esq., filed a written address on no case submission on 28/2/2020. Learned counsel for the 4th defendant, Titus TerfaAgundu Esq., filed a no case submission on 2/3/2020.

On 26/3/2020, the prosecution filed a motion on notice *No. M/7107/2020* for leave of the Court *“to re-open its case and call two more vital witnesses that would assist in the just determination of this case.”* The Court granted the application on 13/7/2020. The prosecution was unable to call any other witness until 26/3/2021 when learned counsel for the prosecution, D. F. Abah Esq., applied to close the case of the prosecution.

With respect to the no case submissions made by the 3rd& 4th defendants, D. F. Abah Esq. said: *“The 3rd& 4th defendants filed their written addresses on no case submissions. We do not intend to file any written address on the no case made by the 3rd& 4th defendants. We leave the issue to the Court.”* Learned counsel for the 3rd& 4th defendants then adopted their respective written addresses on no case submission.

The law is well established that a submission that there is no case to answer may properly be made and upheld: [a] when there has been no evidence to prove an essential element of the alleged offence; and [b] when the evidence adduced by the prosecution has been so discredited as a result of cross examination or is manifestly unreliable that no reasonable tribunal could

safely convict on it. See section 303[3] of the Administration of Criminal Justice Act, 2015; and the cases of Ibeziako v. C.O.P. [1963] 1 ALL NLR 61 and Ekpo v. The State [2001] 7 NWLR [Pt. 712] 292.

In considering a no case submission, the credibility of witnesses and the weight to be attached to their testimonies do not arise. In the case of Fidelis Ubanatu v. C.O.P. [2000] LPELR-3280 [SC], it was held that *prima facie* case means that there is a ground for proceeding. *Prima facie* case is not the same as proof, which comes later when the court has to find whether the accused person is guilty or not. The evidence of the prosecution is said to disclose a *prima facie* case when it is such that if uncontradicted and if believed, it will be sufficient to prove the case against the accused person. See also the case of Usman&Ors. v. FRN [2017] LPELR-43016 [CA].

At this juncture, let me refer to the testimonies of the prosecution witness. **Daniel Opaluwa [PW1]** stated that on 8/11/2015, he got a distress call from his younger brother [Solomon Opaluwa] that he and his wife [late Mrs.OjomaOpaluwa] were shot by armed robbers at their residence located at Super Cell Estate, Apo, Abuja at about 2 a.m. On arrival at the scene, he met 2 of them in the pool of their blood. He took them to Federal Medical Centre, Jabi where the doctors confirmed Mrs.OjomaOpaluwa dead.

In his evidence, **Solomon Opaluwa [PW2]** said he can recognise the 1st& 2nd defendants. He narrated how armed robbers attacked his residence at Flat 92,

Super Cell Estate, Apo, Abuja at about 2 a.m. on 8/11/2015; and how the 1st defendant shot his wife and shot him on his right knee and on his left thigh. When the 1st defendant saw that he was helpless on the floor, he told the rest members that they should leave. He [PW2] later called his brother [Daniel Opaluwa] on phone. His brother took them to Federal Medical Centre, Jabi where the doctors confirmed his wife dead. He was rushed to the theatre and later discharged from the Hospital. He said he is not sure of the faces of the 3rd& 4th defendants in the robbery. The robbers were 7 in number.

Tony Ndubisi [PW3] stated that at about 2 a.m. on 8/11/2015, he heard gun shots that lasted for about 1 minute. He then saw men jumping into the compound from the fence after they had cut off the barb wires. The 1st& 2nd defendants were the ones he saw clearly but the people who jumped into the compound were up to 6. Before they brought down the entrance door to his sitting room, he made for the rear door through the kitchen and “*scaled*” or jumped into the adjacent plot, which is a school. His lady friend [TochukwuOzojiofor] who was in his house could not “*scale*” or jump the wall and she was killed.

The evidence of **ASP Felix Onuoha [the PW5]**, attached to IGP Intelligence Response Team, is that he and his team members arrested the 1st& 2nd defendants. SARS operatives had arrested some of their gang members. The case was later harmonized and they handed over the 1st& 2nd defendants to SARS operatives for further investigation and prosecution.

DSP Suleiman Ewida[PW4], of FCT Police Command attached to SARS, testified that on 8/11/2015, between 1.30 a.m. and some minutes to 2 a.m., there was a distress call from FCT Command Control room that there was a robbery going on in Super Cell Estate, Apo, Abuja. He narrated how he and his team members went there. Eventually, they were able to arrest one of the suspects called Ogbonna, who confessed immediately that he is part of the robbery. Ogbonna gave them the name and phone number of Avangwa, their leader. They were able to arrest Avangwa at NnamdiAzikiwe International Airport when he was trying to fly out. With respect to 3rd& 4th defendants, DW4 further stated:

“While investigation was going on, Avangwa now led us to Lafia, Nasarawa State to make more arrests. He led us to Police Command Headquarters, Lafia to arrest IshiakuAbdullahi [4th defendant] who he said used to give them AK 47 ammunition which they use for their operations. The 4th defendant is a Police officer working at Police Mobile Force, Lafia. When we arrested Ishiaku [4th defendant], he led me to arrest the Police Mobile Force Armourer who he claimed used to supply him AK 47 ammunition. We went back to State CID Lafia where I interrogated Avangwa on how he knew the 4th defendant. Avangwa told me that there was a time he had a problem in Lafia - a criminal case - and he was taken to Lafia prison yard. That was when he knew Moses Ekainu [the 3rd defendant], a staff of Lafia prison, who then introduced him to the 4th defendant.”

DSP Suleiman Ewidanarrated how the 3rd defendant was brought before the ACP [Assistant Commissioner of Police] in charge of CID Lafia, Nasarawa State and continued:

“3 of them - i.e. Avangwa, 4th defendant and 3rd defendant were confronted by ACP in charge of CID, Lafia. It was there that the 3rd defendant said it was only 2 times that he collected AK 47 ammunition from 4th defendant and sold to Avangwa. The 3rd defendant said when he introduced the 4th defendant to Avangwa, they exchanged phone numbers. Avangwa confessed that after the ammunition he collected from the 3rd defendant, he had also collected AK 47 ammunition from the 4th defendant.”

During cross examination of PW4 by 3rd defendant’s counsel,he agreed that on the basis of the information that Avangwa gave him regarding the 3rd defendant, he was satisfied and built a strong case against the 3rd defendant. He added that he got to know the involvement of the 3rd defendant through his investigation; not through Avangwa alone.

When PW4 was further cross examined by the 4th defendant’s counsel, he maintained that the 3rd defendant, Avangwa and the armourer of PMF [Police Mobile Force],Lafia said they knew the 4th defendant.

The issue for determination is whether the evidence adduced by prosecution has disclosed a *prima facie* case against the 3rd& 4th defendants to make it worthwhile to continue with the proceeding against them.

In his submission, learned counsel for the 3rd defendant stated that the PW1, PW2, PW3 & PW5 did not say anything about the 3rd defendant. The evidence of PW4 about whatone Avangwa told him aboutthe 3rd defendant is hearsay. He referred to sections 37 & 38 of the Evidence Act, 2011 to support the principle that hearsay evidence is inadmissible in law. Counsel submitted that Avangwa was not called as a witness.He relied on **Njoku v. State [2013] 2 NWLR [Pt. 1339] 548** to support the principle that if the evidence of a witness to the court is based on what he was told by another person, then it is clearly hearsay evidence which is inadmissible in law and cannot be relied upon to convict for an offence. Mr.Andrew Eche concluded that *aprima facie* case has not been made out against the 3rd defendant to justify calling him to make a defence.

Similarly, learned counsel for the4th defendant posited that there is no evidence to link the 4th defendant to the commission of the offence alleged. Prosecution has built its case against the 4th defendant on hearsay evidence. PW4 testified that the 3rd defendant and one Avangwa mentioned the name of the 4th defendant. He submitted that failure of the prosecution to call Avangwa, the 3rd defendant or any other witness or evidence to corroborate the evidence of PW4is fatal to its case. Prosecution also failed to call armoury personnel as witness to state the missing arms and ammunitions as at the time of arrest of the 4th defendant.Also, the prosecution failed to link the exhibits before the Court to the 4th defendant.

Titus TerfaAgunduEsq. further submitted that where the prosecution has not made out a *prima facie* case against a defendant, to ask the defendant to answer the charge by calling evidence would amount to a reversal of the presumption of innocence under section 36[5] of the 1999 Constitution [as amended]. He referred to the cases of Suberu v. State [2010] 3 NMLR [Pt. II] 360, Ibeziakov. C.O.P. [supra] and Suleiman v. State [2009] 15 NWLR [Pt. 1164] 258.

Now, section 6[a], [b] & [c] of the Robbery and Firearms [Special Provisions] Act stated in count 1 read:

6. *Any person who –*

a) aids, counsels, abets, procures any person to commit an offence under section 1, 2, 3 or 4 of this Act; or

b) conspires with any person to commit an offence; or

c) supplies, procures or provides any person with firearms for use to commit an offence under section 1 or 2 of this Act, whether or not he is present when the offence is committed or attempted to be committed,

shall be deemed to be guilty of the offence as a principal offender and shall be liable to be proceeded against and punished accordingly under this Act.

The first important point to highlight is that even though it is stated in count 1 that the 4 defendants “committed an offence punishable under section 6[a], [b]

and [c] of the Robbery and Firearms Special Provisions Act, LFN 2004”quoted above, the 4 defendants are charged with the offence of conspiracy to commit armed robbery. For emphasis, in count 1, it is alleged that the defendants “*on or about the 8/11/2015 at about 0100 hours at Sahara Super Cell Estate, Apo District Abuja ... conspired amongst yourselves to commit an offence to wit: armed robbery.*”

The charge against the 3rd& 4th defendants is not that they did aid, counsel, abet or procure any person to commit an offence under section 1, 2, 3 or 4 of the Robbery and Firearms Special Provisions Act. Also, the charge against the 3rd& 4th defendants is not that they supplied, procured or provided any person with firearms for use to commit an offence under section 1 or 2 of the said Act. Put differently, the 3rd& 4th defendants are not charged under section 6 [a] & [c] of the Robbery and Firearms Special Provisions Act. The 3rd& 4th defendants are charged with the offence of conspiracy under section 6[b] of the said Act. The question then is whether the prosecution has established a *prima facie* case of conspiracy against the 3rd& 4th defendants.

The offence of conspiracy consists of the agreement to do an unlawful act or to do a lawful act by unlawful means. The law is trite that evidence of an agreement to commit an offence is a crucial element of the offence of criminal conspiracy. In **State v. Salawu [2011] LPELR-8285 [SC]**, it was held that a charge of conspiracy is proved either by leading direct evidence in proof of the common criminal design or it can be proved by inference derived from the commission of the substantive offence.

The pieces of evidence of PW4 against the 3rd& 4th defendants are that: [i] Avangwa informed him that the 4th defendant “used to give them AK 47 ammunition which they use for their operations”; [ii] Avangwa confessed that after the ammunition he collected from 3rd defendant, he had also collected AK 47 ammunition from the 4th defendant; and [iii] the 3rd defendant said it was only 2 times that he collected AK 47 ammunition from 4th defendant and sold to Avangwa.

Mr.Eche and Mr.Agundu did submit that the evidence of PW4 about what Avangwa told him is hearsay evidence and inadmissible. In the case of **Friday v. Nigerian Army [2016] LPELR-41604 [CA]**, the law was restated that where a third party relates a story to another as proof of the contents of a statement, such story is hearsay. Such evidence offends section 38 of the Evidence Act, 2011 and is therefore inadmissible. See also **Okoro v. State [1998] LPELR-2493 [SC]** and **State v. Egede [2017] LPELR-43438 CA]**.

The Court holds that the evidence of PW4 of what Avangwa told him about the 3rd& 4th defendants is inadmissible and cannot constitute *prima facie* evidence of the charge of conspiracy against them in count 1. The evidence of PW4 that the 3rd defendant told him that he collected AK 47 rifle from the 4th defendant twice- though not hearsay evidence against the 3rd defendant- is not *prima facie* evidence of the charge of conspiracy to commit armed robbery at Sahara Super Cell Estate, Apo, Abuja on 8/11/2015 against the 3rd& 4th defendants.

CONCLUSION

From all that I have said, the decision of the Court is that the prosecution failed to establish a *prima case* against the 3rd& 4th defendants in respect of the offence of conspiracy to commit armed robbery. Therefore, the Court upholds the no case submissions of the 3rd& 4th defendants. The 3rd defendant [Moses Ekainu] and 4th defendant[Ex-Cpl.AbdullahiIshiaku] are hereby discharged.

HON. JUSTICE S. C. ORIJI
(JUDGE)

Appearance of Counsel:

1. MayowaAdesioye for the prosecution; holding the brief of D. F. AbahEsq.
2. C. E. OkaforEsq. for the 1st& 2nd defendants; holding the brief of KelechiNwaiwuEsq.
3. Andrew Eche for the 3rd defendant.
4. T. T. Agundu for the 4th defendant.