IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

(APPELLATE DIVISION)

HOLDEN AT HIGH COURT NO. 8 MAITAMA,

ABUJA ON FRIDAY 28TH DAY OF JANUARY, 2022

BEFORE THEIR LORDSHIPS

HON. JUSTICE O. A ADENIYI: PRESIDING JUDGE

HON, JUSTICE B. MOHAMMED: HON, JUDGE

APPEAL NO.CRA/9/2019,

BETWEEN:

SAMSON JOHN SANI..... .... DEFENDANT/APPELLANT

AND

STATE SECURITY SERVICE .... COMPLAINANT/RESPONDENT

JUDGMENT

By an Amended Notice of Appeal, dated 22nd day of November, 2020 and filed on the 30 day of November, 2020 the Appellant being dissatisfied with the judgment delivered by his worship **CHRISTOPER OPEYEMI OBA ESQ of Magistrate Court of the Federal Capital Territory of Abuja sitting at Dutse in Abuja** on the 20th day of February, 2019 in CASE NO: CR/11/14 Appealed to this Honourable Court upon the grounds set out in paragraph 3 of the Amended Notice of Appeal. The

Appellant complained of the whole judgment delivered by the Court below and sought for the following reliefs to wit:

1. **An order allowing the Appeal**
2. **An order setting aside the judgment delivered by his worship, Hon Christopher Opeyemi Oba Esq, of the Magistrate Court of the Federal Capital Territory, Abuja on the 20th day of February, 2019 in Case No: CR/11/14; STATE SECURITY SERVICE V. SAMSON JOHN SANI.**
3. **An order discharging and acquitting the Appellant of the offences alleged against him in Case no: CR/11/14: STATE SECURITY SERVICE V. SAMSON JOHN SANI for want of evidence.**
4. **An order discharging and acquitting the Appellant of the offences alleged against him in in Case No: CR/11/14; STATE SECURITY SERVICE V. SAMSON JOHN SANI.**

The brief facts of the case that led to this Appeal is summarized as follows:

At the lower Court, the Respondent instituted this action vide a First Information Report alleging against the Appellant the offences of impersonation of a public servant, cheating and cheating by impersonation contrary to section 132, 322 and 324 of the Penal Code Act. However at the conclusion of evidence by the Prosecution, the Appellant made a no case submission which was overruled by the Court below. That the no case submission having been overruled, the Court below proceeded to amend and reframe the charge to remove the

offence of cheating and include the offence of criminal trespass to the charge. The Appellant pleaded not guilty and applied for the recall of the Prosecution witness for further cross examination. The Prosecution having explained their inability to bring forward the aforementioned witnesses, the Appellant applied for a leave to open his Defence.

The Appellant formulated eight issues for determination as follows:

Whether the Learned Trial Magistrate was right when in spite of his finding that it was due to the failure of the Prosecution to produce her other witnesses for further cross examination that appellant applied to open the case of the defence, he held that appellant waived his right to further cross examine PW2, PW3 and PW5 not insisting on recalling them.

And whether the Appellant was denied fair hearing when in spite of the fact that PW2, PW3 and PW5 were not produced for further cross examination, the Learned Trial Magistrate accepted and acted on their evidence to convict and sentence the Appellant.

On issues one and two raised for determination, Learned Counsel for the Appellant stated that the Court below upon delivery of the ruling on the no case submission, altered and reframed the charge.

Learned Counsel submitted that pursuant to section 219 of the Administration of Criminal Justice, Act, 2015, the Appellant applied to recall the Prosecution witnesses for further cross-examination to which only one witness was produced for that purpose.

Counsel further contended that the failure to produce the witnesses was against the Prosecution and that the Court ought to be guided throughout the course of the case that the Prosecution was unable to produce its witness for further cross-examination and it was based on the Prosecution inability to produce it's witnesses that the Defendant opened his case. Counsel submitted that he didn't inform the Court that he has waived his right to further cross examination as he made himself clear that his application was on the ground of the Prosecution's inability to produce PW2, PW3 and PW5

Learned Counsel posited that the issue of waiver is not applicable in the circumstances of this case as the issue of waiver can only be invoked, against a person who voluntarily or intentionally gives up his right or some of his rights. He cited the case of **AUTO IMPORT V. J.A. ADEBAYO (2005) 24 NSCQR 618** and stated that the decision of the lower Court is misconceived and a complete departure from applicable laws and statutory requirement. He added that the Appellant need not insist that the Prosecution produce its witnesses as it is the duty of the Prosecution to do so and It is sufficient that the Appellant applied for the recall of PW2, PW3, and PWS and was ready to further cross examine them had they been produced. He contended that it will be a different case had the Prosecution produced PW2, PW3, and PWS for further cross examination but the Appellant failed to cross examine them but decides to proceed to open the case of the defence. Learned Counsel posited that the right to further, cross -examination was not in his control and neither can it be waived, same been a fundamental right which cannot be waived. He cited **ZIIDEH V**.

RSCSC 29 NSCQR 701 AT 716, PARAS B-E and also the provision of section 36(6) d CFRN 1999 (AS AMENDED).

Counsel submitted that the right to fair hearing was breached and it occasioned a miscarriage of justice when the Court below relied on the evidence of PW2, PW3, and PW5 despite the fact that they were not produced for further cross examination. Counsel contended that the Court below would not have convicted or sentenced the Appellant had it not relied on the evidence of PW2, PW3 and PW5 as the Court had earlier rejected and discountenanced the evidence of PW1 and PW4 in Case No: CR/11/14; STATE SECURITY SERVICE V. SAMSON JOHN SANI.

Learned Counsel pointed out that a Court of law must be consistent and must not be seen to approbate and reprobate, he submitted that the Court below was seen to be inconsistent when it held that: "the defence Counsel applied to open the case of the defence due to the inability of the Prosecution to produce the other witnesses and then later held that the Appellant waived his right when he applied to be allowed to open his defense. Counsel cited the case of **BABA V APC (2019) LPELR-48159 (CA) P.28 PARAS D-E** and also the case of **NERC V ADEBIYI (2017) LPELR-42902(CA) P.31 PARAS A-C**

Issues 3 and 4 were argued simultaneously and for the sake of clarity I will produce them hereunder:

a. **Whether the Learned Trial Magistrate was right when without properly evaluating the evidence of the parties before him he found that the Appellant has been linked to the commission of the offence of criminal trespass and that Appellant was guilty of the offences charged against him**

b. **Whether the Learned Trial judge was right when in spite of the fact that the elements or ingredients of the offences for which the Appellant was charged were not proved beyond reasonable doubt, he held that the offence have been proved beyond reasonable doubt and that the Appellant was guilty of the offences and also convicted the appellant on count 1, 2 and 3.**

Learned Counsel submitted that there is a fundamental requirement of the law that where the commission of crime by a party to any proceeding is directly in issue in any proceeding, civil or criminal it must be proved beyond reasonable doubt against that party. That in law the burden to prove is always on the person who asserts that the offence was committed. He cited **AKPAN V. STATE (1990) 7 NWLR (PT.160) 101**. He added that section 36(5) CFRN 1999 provides that a person charged with a criminal offence shall be presumed innocent until he is proved guilty. And that it is the duty of the Court below to properly evaluate the evidence of the parties before making decisions. He cited the case of ADEDARA V. THE STATE (2009) LPELR 8194(CA) PP109-110. Learned Counsel contended that the purpose of evaluating the evidence in both civil and criminal cases is to ensure that the findings are based only on credible and admissible evidence.

Learned Counsel contended that the Learned Magistrate made findings and decisions without proper evaluation of evidence of the defence as same was not supported by any credible and admissible evidence. He contended that the elements or ingredients of the offences charged against the Appellant were not proved beyond reasonable doubt, however the Learned Trial judge held that same has been proved beyond reasonable doubt and found the Appellant guilty.

In support of his argument, Learned Counsel cited the provisions of section 36(8) CFRN and stated that it is imperative for the Prosecution to lead credible evidence as to the date of the alleged commission of the offences charged against the Appellant. He submitted that the alleged date of the offence is inconsistent, not credible and inadmissible. He contended that the oral evidence of the Prosecution witness in the open Court as to the date of the alleged commission of the offences was grossly inconsistent with the dates given by the witnesses in their extra judicial statements. He gave an instance that in Exhibit E, PW2 stated that the Appellant entered into premises of the Managing Director on the 12/12/2013 whilst in his oral evidence he told the Court that it was in 2014 that the Appellant entered into the Managing Director's property. Also in Exhibit 1, PW5 stated that it was on 13/12/2013 that PW2 informed him that a certain man named Sani came to the residential quarters of the Managing Director. However in his oral evidence he told the Court that it was on the 13/12/2014 and was so informed by PW2. Counsel contended that at the Court below, the trial judge faced conflicting and inconsistent dates as to the date of the

alleged commission of the offences. He contended that had the trial judge properly evaluated the evidence before him, he would have revealed the inconsistency and also found whether or not by the evidence put forward before him such inconsistencies has been explained or not, He stated that the dates of the alleged crime were said to be either 12/12/13, 13/12/13, 13/12/14. On the position of the law applicable where there is inconsistency between the oral evidence of a witness and the extra judicial statement made by that witness during investigation, Counsel referred the Court to the case of **SMART V STATE (2016) LPELR-40827(SC) PP 39-45 PARAS F-D.** From the above, Counsel submitted that the trial Court ought to have found that there is no reliable and credible evidence as to the date of commission of the crime and the entire evidence of the Prosecution cannot be the basis upon which to find the appellant guilty of any of the offences charged.

Learned Counsel posited that with the evidence of PW1, and PW4 expunged and rejected, the duty of the Court below was to discountenance and or expunge the evidence of PW2, PW3 and PW5 for being inadmissible and lacking in probative value.

Learned Counsel submitted that the evidence of PW1, PW2 and PW3 did not fall into the category of evidence required to prove the offences charged against the appellant and when each offence is considered side by side with the evidence put forward, none of the offences or the elements thereof was actually proved beyond reasonable doubt.

On the offence of personation, Learned Counsel referred the Court to section 132 of the Penal Code Act. He submitted that there are two

types of personation and that the Appellant is charged with the 2nd category of the offence particularly the offence of having personated a public servant.

Learned Counsel contended that to prove the offence of personation of a public servant, the person alleged to have been personated be shown by evidence to have been in existence at one time or the other. Counsel cited the case of **APC V. PDP (2015) 62 (PT1) NSCQR at 81-82**. Learned Counsel contended that in the extant case no person was described who is a public servant who was personated by the Appellant. There was no any evidence that he introduced himself by a name belonging to another person who held a particular public office. Counsel stated that the Prosecution's evidence was that the Appellant introduced himself as a person sent by Director General SSS and that the evidence of PW2, PW3 and PW4 would convince the Court that the case of personating public servant was never proved beyond reasonable doubt against the Appellant.

Learned Counsel analyzed the evidence of PW2 as follows:

That PW2 never told the Court that the Appellant pretended to be somebody else or that he introduced himself as somebody else holding a public office.

That the Appellant had a DSS tag on him and under cross examination, he added that he did not read any name on the tag.

That the tag tendered by PW1 does not bear the name of anybody and it was an access/visitors card belonging to SSS and same meant to be worn by SSS visitors in the premises to identify themselves as visitors.

That mere possession of a visitor's tag of the SSS does not in law amount to personating any public servant.

Evidence of PW3

Counsel contended that evidence of PW3 was inadmissible hearsay evidence and that he never told the Court that the Appellant introduced himself as someone holding a particular public office.

Evidence of PW5

Learned Counsel contended that the fact that PWS said he heard him saying he was sent by Director General SSS does not imply that the Appellant personated a public servant as such statement can only mean that he was there on an errand for Director General SSS and that the Prosecution could not name anybody in existence that was personated

Learned Counsel contended that the offence of cheating by personation was also not proved beyond reasonable doubt as the Prosecution was required to produce evidence to the effect that the Appellant cheated by pretending to be someone, knowingly substituted one person for another or that he represented that he or any other person is a person other than him or such other person. He reiterated that there was no evidence that the Appellant pretended to be someone else other than himself and that it was not even in evidence that he substituted himself

for another person. and that no other person was mentioned in evidence as the person personated by the Appellant. Counsel contended that in the absence of evidence establishing the offence of cheating by personation as defined by section 321 Penal Code, he urged this honorable Court to hold that the Appellant ought not to have been found guilty of the offences as charged..

On the offence of cheating, the Appellant submitted that there was no evidence that any one was cheated at all by the Appellant, Counsel stated that to prove the offence of cheating there must be evidence that someone has been fraudulently deceived into certain belief upon which he acted or omitted to act in a certain way. That there must be an evidence of deception; Counsel submitted that none of the Prosecution witnesses testified that he or any other person were deceived by the Appellant. He stated that although PW2 did not testify that Appellant gave him money, PW3 & PWS testified and claimed to have witnessed the sum of N200,000.00 being given to the Appellant by PW2; and that according to PW3 and PW5, the said money was given to the Appellant by PW2 on the instruction of the Managing Director.

Learned Counsel urged the Court to hold that PW2 having not testified in his oral testimony to the Court that he ever gave money to the Appellant, the evidence of PW3 and PWS be discountenanced for lacking in probative value

Counsel added that there was no proof to show that the appellant received such money, no receipt, document tendered to show money was received by the Appellant, he further argued that even if there was

receipt of that amount same was not obtained by cheating rather it was obtained based on the directives of the Managing Director. Counsel submitted that at the lower Court, the Managing Director was not brought as a witness and in the absence of evidence by PW2 and the Managing Director, counsel urged the Court to hold that the elements of cheating were never established against the Appellant.

On the offence of criminal trespass that the Appellant was also found guilty, Counsel submitted that same was not proved beyond reasonable doubt due to the failure of the Prosecution to present its witness for further cross examination which denied the Appellant the opportunity to cross examine the Prosecution witnesses in defence of this offence and new charge to which he pleaded not guilty. Learned Counsel cited the provision of section 342 of the Penal Code Act and the case of **SPIESS V ONI (2016) LPELR 40502 (SC) P.14 PARAS A-B.**

Counsel argued that there was no credible evidence that Appellant's entry into the premises was unlawful and that it was the gate man that allowed the Appellant entry into the premises. And that the gate man was never called in as witness to testify that the Appellant made an unlawful entry into the premises. He added that there is no evidence that the Appellant remained in the premises unlawfully or that he committed any offence while in the premises. Counsel contended that the ingredients of the offence of criminal trespass were not proved beyond reasonable doubt.

Learned Counsel submitted that by the provision of section 342, it is the person in lawful possession of a property entered into that must be

shown to have been intimidated, insulted or annoyed. He stated that the offence of criminal trespass is intended to protect the person in possession of the property & no other person. Counsel submitted that it is quite surprising that there is no evidence from the Managing Director that he was insulted, intimidated, or annoyed by the Appellant. Learned Counsel urged the Court ito so hold. Counsel further submitted that it is alleged that the Appellant said some intimidating words. However, the evidence of PW3, and PWS are conflicting and that the Learned Trial Judge ought not to act on inconsistent piece of evidence. Learned Counsel referred the Court to the case of **NWAKORO V NKUMA (1999) 9 SC 59 @ 64** amongst other cases cited. He reiterated further that it was wrong of the Appellant to convict the appellant on the offence of criminal trespass when he was not allowed to cross examine PW2, PW3 and PWS.

Learned Counsel urged the Court to hold that none of the offences charged against the appellant nor the elements thereof were actually proved beyond reasonable doubt by the Prosecution and that the Trial Magistrate was in error when he held that they have been proof beyond reasonable doubt.

Learned Counsel contended that the Exhibits tendered by the Prosecution was not useful to link the Appellant to any of the offences charged as there has to be credible and admissible oral evidence for same to be substantiated with documentary evidence: Counsel argued that in the extant case, there was no credible and admissible oral evidence to prove the offences and it is based on this submission that he urged the Court to disregard the evidence brought forward.

Counsel argued that EXHIBIT A is an access card for visitors and that the Learned Magistrate failed to take into consideration the fact that there is a great world of difference between an access card & an identity card. He contended that a person who wears visitor's card of an organization cannot be said to have personated any officer but can only be said to have presented himself as a visitor of the organization. Counsel submitted that moreover by the evidence of PW5 under cross examination at page 160 of the records, the Appellant was not wearing the tag i.e. Exhibit A when he visited the premises.

Learned Counsel submitted that Exhibit B is a search warrant which contained a list of items purportedly recovered from the premises of the Appellant; however Counsel contended that the search was carried out not in compliance with section 149(4) of the Administration of Criminal Justice Act, 2015 as only one witness was present during the search and that same was not signed by the Appellant against whom it was sought to be used. Counsel cited the Supreme Court decision of ADESANOYE V. ADEWALE (2006) LPELR 143(SC) and further contended that out of the 6 items recovered from the search only one item was tendered as Exhibit i.e. Exhibit c and even that was undated and unsigned, he therefore urged the Court to consider same as a worthless document. Counsel submitted that the failure to comply with the said provisions of the Act was fatal and renders the alleged search and Exhibit B a nullity and inadmissible.

Counsel further argued that Exhibit D is a bag which contained an Hp Laptop, a Techo Phone, Police belt, Hard drive and a letter headed paper

of ministry of aviation. Counsel contended that nothing in Exhibit D linked the Appellant with the commission of the offence.

Learned Counsel urged the Court to hold that none of the Exhibits tendered by pw1 linked the Appellant with the offence for which he was charged and that none of them established any of the offences against the Appellant.

Learned Counsel further submitted that Exhibit 3 and 31-33 were also inadmissible for noncompliance with section 84 of the evidence act and that a party seeking to tender a computer generated document needs to do more than just tendering same. He added that evidence as to the use of the computer must be called to establish the conditions set out under section 84 (2) of the Evidence Act 2011. Counsel referred the Court to the case of **KUBOR & ANOR V. DICKSON & ORS (2012) LPELR-9817 (SC)** at Pp 48-50, PARA F-E. Counsel contended that by section 84 (1), it is mandatory for the Prosecution to establish all the conditions in subsection 2 (a-d) however, the Prosecution failed to establish the condition as stated in subsection (2) (d). Counsel added that in law, partial compliance is tantamount to non-compliance. Counsel referred the Court to the case of **SYED QAMAR AHMED V. AHMADU BELLO UNIVERSITY (ABU) & ANOR (2016) LPELR** Learned Counsel posited that the effect of inadmissibility of the Exhibit J and J1-3 is that the evidence of PW3 and PW5 were not proved beyond reasonable doubt.

Learned Counsel contended that Exhibit H is also inadmissible, he contended that Exhibit H is a petition addressed by PWS on January 6 to

the Director General, DSS, he however further contended that the year the petition was written was not disclosed thus the year could have been 1720, 1722 or any other year and that the implication of this is that the petition is undated. Learned Counsel submitted that an undated document has no probative value and urged the Court to discountenance same for having no evidential value in law.

To further support the case of the Appellant, Counsel submitted that Exhibits E F and I which are the extra judicial statements made by PW2, PW3 and PW5 to the investigating officers of the Respondent are also inadmissible. Counsel submitted that in the instant case the oral evidence given by the party in the open Court failed and it is wrong for the Court to resort to documentary evidence of the party not examined in open Court as the Court is an adjudicator not an investigator. He added that the Court ought not to go beyond the oral evidence led in the open Court in search of evidence from statements and cited the case of ACN V. LAMIDO & ORS SC 25/2012 in support of his submission, where the Supreme Court held as follows:

> **"It is not the duty of a Court or Tribunal to embark upon clustered justice by making enquiry into the case outside the open Court not even by examination of documents which were in evidence but not examined in the open Court. A judge is adjudicator; not an investigator" an**

Learned Counsel posited that once the Prosecution's oral evidence fell short of the expectation of the law, the Court below had no duty to

resort to: Exhibits E, F, and I in order to make a case for the Prosecution which the Prosecution itself did not make in the open Court. Learned Counsel urged the Court to hold that in the circumstances in which there was no credible and admissible oral evidence to link the Appellant to the commission of the offences alleged against him, Exhibits E, F, and I did not deserve any probative value

And on the whole Learned Counsel urged the Court to hold that none of

the Exhibits tendered in the case linked the Appellant with the commission of any of the offences charged against him. Learned Counsel posited that the case of the Prosecution was not proved beyond reasonable doubt and the Learned Magistrate ought to have accepted the case of the Appellant.

On the 5th issue raised for determination by the Appellant Le "whether the Learned Trial Magistrate was right when in spite of the fact that the issue as to why Exhibit A was not returned to the SSS by the Appellant was not placed before him and no evidence was adduced by the Prosecution in support of the issue, he proceeded to hold that the reason Appellant did not return Exhibit A to the SSS was that Appellant converted and kept Exhibit A for his own use, particularly to deceive unsuspecting members of the public.

Learned Counsel contended that the issue before the Court is whether the Appellant personated a public servant and not why Exhibit A is still in his custody. Counsel submitted that even if the Appellant kept the tag for his use, it did not establish the elements of the offence of

personating against the Appellant. Learned Counsel submitted that the law is trite that a Court of law must confine itself to issues submitted by parties for determination. Learned Counsel cited the case **DAUDA V BANKOLE (2008) 5 NWLR (PT 1079)26 AT 47-48 G-A** amongst others cited in his support of this

submission Learned Counsel submitted that the finding made by Learned Magistrate was not supported by any admissible evidence brought before it. Counsel contended that moreover, there was no evidence by the Prosecution as to why Exhibit A is still in custody of the Appellant, he added that the only evidence as to Exhibit A came from the Appellant and same was never challenged nor discredited under cross examination and the evidence did not suggest the inference drawn by the Learned Thal Magistrate. Learned Counsel urged this honorable Court to disregard the inference of the Trial Magistrate.

On issues no. 6 and 7 ie..

The evidence of the appellant as to what brought him to the premises and what transpired in the premises during his stay in the premises having not been challenged and having not been discredited during cross examination, whether the Learned Trial Magistrate was right when it failed to accept and act on it but held that the failure to call Precious Edache to corroborate it created doubt in the mind of the Court in respect of the case of the Appellant.

Counsel added that ssuming but not conceding that the evidence of the Appellant created doubt in the mind of the Court whether the Learned

trial Magistrate was right when he failed or refused to give the appellant the benefit of the doubt.

Learned Counsel submitted that by the provision of section 36(5) a Defendant against whom no offence is proved beyond reasonable doubt cannot be found guilty of any offence, and the Defendant may choose to keep silent throughout the proceedings and that this does not derogate n nocence if the offence is not proved beyond reasonable doot res counsel contended that in the extant case, the case of the Prosecution vos not proved beyond reasonable doubt and the right thing the Court Slow ooght to have done was to dismiss the charge against the Appellant, acquit the Appellant for want of credibile evidence. Loamed Counsel submitted that the learned trial Magistrate erred when be found the Appellant guilty for not corroborating his evidence and despite the fact that the case has not been proved beyond reasonable doubt. Counsel urged this Honorable Court to hold that the Learned Trial judge erred in law when he failed to accept the credible and admissible evidence of the Appellant which stood unchallenged. Learned Counsel submitted that the nonproduction of Precious Edache is immaterial to the case for the fact that the Prosecution could prove the case beyond reasonable doubt against the Appellant. Counsel added that creating doubt in the mind of the Court is not sufficient to find him guilty of offences that need to be proved beyond reasonable doubt. He added that the law is trite that benefit of the doubt in criminal cases should always be given to the Defendant.

On the eighth issue raised le. assuming but not conceding that the Appellant was quilty of the offences for which he was charged, whether

the Learned Trial Magistrate was right when in passing sentence on the Appellant, he failed to take into consideration the fact that the Appellant was accused of series of acts one or more of which constitute more than one offence and in consequence passed a sentence on the appellant which was the most severe punishment the Court could award for any of the offences.

Learned Counsel cited the provisions of section 76 of the Penal Code and contended that the Appellant was charged with three offences, particularly the offence of personating a public servant, cheating by personation and criminal trespass. He argued that the provisions of section 76 was not put into consideration which led to the Appellant being convicted with the most severe punishment instead of the least severe punishment the Court could award in any of the offences.

In its brief of argument dated 3 November, 2021, Counsel for the Respondent adopted Appellant's issues no. I to 4 and then formulated one additional issue to wit

> **"Whether the Learned Trial Magistrate was right when he found the Appellant guilty and sentenced him to imprisonment, for offences charged in the light of section 132, 322 and 347 of the Penal Code Act.**

On issues 1 and 2 as adopted by the Respondent, Learned Counsel for the Respondent submitted that the Appellant, indeed reserves the right to recall the Prosecution witness for further cross-examination, however, there is no statutory provision mandating either the Prosecution or the

Court to produce such witness at the instance of the Defence Counsel placed reliance on section 251 and 252 of the Administration of Criminal Justice Act, 2015 which provides that:

> **"Where a person attends Court as a State witness, the witness shall be entiled to payment of such reasonable expenses as may be prescribed, where a person attends Court as a witness to give evidence for the Defence, the Court may in its discretion on application, order payment by the Registrar to such witness of Court such sums of money, as it may deem reasonable and sufficient to compensate the witness for the expenses he reasonable incurred in attending the Court."**

Counsel argued that the implication of these two sections is that, neither the Court nor the Respondent is responsible for recalling any witness at the instance of the Appellant Counsel added if the Appellant had found it necessary to recall any witness for further cross-examination, he should have done the needful by bearing the expenses. Counsel placed reliance on the decision of the Appellate Court in **KAAINJO V. FRN (2018) LPELR 44745 (CA).**

Counsel further submitted that the alteration made in the First Information Report was framed by the Trial Magistrate and the charge was framed after the Prosecution had led evidence and closed its case, in which case the Defence should have bored the financial burden of recalling witnesses for his defence.

On issues 3 and 4 as formulated by the Appellant and adopted by the Respondent., Counsel for the Respondent submitted that the Trial Magistrate was right to have found the Appellant guilty of the offences as charged, having regards to the quality and the nature of evidence led by the Prosecution at the trial. Counsel refer the Court to **EMEKA V. STATE (2001) 14 NWLR (PT**. 736) 666 at 683 where the Court held that there are three (3) ways of proving the guilt of an accused person in Court and these include:

1. Reliance on the confessional statement of the accused person voluntarily made; or
2. Circumstantial evidence; or
3. By the evidence of eye witness

Counsel submitted that, applying these principles to the facts of the instant appeal, PW1 testified before the trial Court that when the Appellant got to the company, he informed them that he was an operative from the office of Director-General state Service and he was, there to arrest them because the Managing Director of the Company was involved in sponsoring terrorist activities.

Counsel further submitted that, in proving the offence of personating a public officer, PW2 and PW1 testified that the Appellant had a DSS tag on him which he flashed at PW2 and he demanded the sum of three (3) million Naira of which he was given N200, 000, 00.

On issue no 5 formulated by the Respondent, Counsel argued that the Respondent was able to prove the offence of impersonating a public officer through PW2 when he stated that Exhibit A which is a visitor's access card belonging to the SSS, Benue Command was flashed by the Appellant when he presented himself as a personnel of the SSS at the scene of the offence.

Counsel submitted that the Prosecution was able to establishe at the trial Court that the Appellant gained access into the quarters of the Managing Director, Parsons Science and Engineering Company Limited, impersonated an officer of the SSS and collected the sum of N200, 000.00 from PW2 and this was witnessed by PW2, PW3 and PWS. That this piece of evidence was not contravened or challenged by the Appellant during cross-examination. Counsel placed reliance on the decision in **ZAMFARA STATE V. GYANLAGE & ORS (2012) 8 SCM 217.**

Counsel urged the Court to dismiss the instant appeal and uphold the Judgment of the trial Court.

For the record, the Appellant filed a reply brief to the Respondent's brief of argument dated 10 November, 2021 wherein the Appellant's Counsel argued and made submissions on seven (7) points which are reproduced as follows:

1. That the Respondent in derailing in his argument and in not arguing in support of issues 1, 2 and 3 and for which it adopted hook line and sinker abandoned her issue A, B C and D, thereby rendering the entire arguments made thereunder incompetent.

2. That in failing to reply to issues 1, 2, 3, 4, 5, 6, 7 and 8 formulated by the Appellant, the Respondent conceded to all the issues formulated by the Appellant

3. That the contention by the Respondent that it was due to the alleged inability of the Appellant to foot the necessary expenses in bringing witnesses to the Court that PW2, PW3 and PWS were not further cross-examined is an afterthought which in law is not credible.

4. That the formulation of issues D and E on only one ground (ground 4) rendered issues D and E incompetent.

5. That the argument of the incompetent issue D together with issue C rendered incompetent the entire arguments under issues C and D.

6. That the Respondent has not shown that the offence for which the Appellant was convicted and sentenced or any of them was proved beyond reasonable doubt.

7. That the Respondent has also not shown that there was proper evaluation of evidence and that the findings of the Court below were based on credible and admissible evidence.

We have carefully and thoughtfully examined the issues formulated by Counsel on both sides, and we are of the view that only four (4) out of the nine (9) issues are relevant for the determination of this appeal in view of the fact that the ultimate aim of an Appellate Court is to adopt

or formulate and consider issues that would determine the real grievance in an appeal for a judicious determination of the controversy between the parties.

It is a settled law the appellate Court is not bound or under a duty to take all issues formulated by a party or parties for the determination of an appeal, in order to give decision. In other words, an appellate Court can prefer an issue or issues formulated by any of the parties and can itself or on its own, formulate issues which it considers to be germane to and pertinent in the judicious determination of the matter in controversy. See Agbareh Anor Vs. Dr. Anthony Mima & Others (2008) 2 5CN 55 At 71 See **OLAOSEBIKAN V. INEC & ORS (2009)-8513 (CA).**

Thus the following issues calls for the determination of this appeal to wit:

Appellant's issue no. 1:

> **"Whether the Learned trial Magistrate was right when in spite of his finding that it was due to the failure of the Prosecution to produce her other witnesses for further cross examination that appellant applied to open the case of the defence, he held that appellant waived his right to further cross examine PW2, PW3 and PW5 not insisting on recalling them.**

Appellant's issue no. 2

> **"Whether the Appellant was denied fair hearing when in spite of the fact that PW2, PW3 and PWS were not produced for further**

cross examination, the Learned Trial Magistrate accepted and acted on their evidence to convict and sentence the Appellant".

Appellant's issues no. 3 and 4:

Issue 3

"Whether the Learned Trial Magistrate was right when without properly evaluating the evidence of the parties. before him he found that the Appellant has been linked to the commission of the offence of criminal trespass and that Appellant was guilty of the offences charged against him.

Issue 4

"Whether the Learned trial judge was right when in spite of the fact that the elements or ingredients of the offences for which the appellant was charged were not proved beyond reasonable doubt, he held that the offences have been proved beyond reasonable doubt and that the appellant was guilty of the offences and also convicted the appellant on count 1, 2 and 3

Issues 1 and 2 will be determined simultaneously due to their similarities. The fundamental contention of the Appellant on this issues is that, while section 219 of the Administration of Criminal Justice Act established the statutory right of the Appellant to further cross-examine the witnesses of the Prosecution, there was an implied statutory duty on the

Prosecution to produce the witnesses applied for by the Appellant for further cross examination, the duty which the Prosecution has failed to carry out. The Respondent on the other hand contended that by virtue of the provisions of sections 251 and 252 of the Administration of Criminal Justice Act, the Prosecution does not bear any statutory duty to make a witness available for the defence for further cross-examination.

We have considered the submissions of Counsel on both issues and the first thing that cross our mind on this two issues particularly issue no. 1 is, whether both the Appellant and the Respondent have done what the law requires them to do in the circumstance of the recall. In order to carefully resolve these two issues, we think there is need to employ the aid of the record of this appeal especially pages 164-166 which contain the position of both parties and the ruling of the trial Court. At page 164 the Prosecution was recorded to have made the following submission:

> **"The Court had granted the application of the Defendant for a recall of four of our witnesses. On the 7th March, 2018, I put a call across to the Counsel for the Defendant informing him of the location of the witnesses. Paul Adebayo is in Lagos. I pleaded with him to avail us their transportation expenses and accommodation to enable us discuss with their Director of operation to release them for today. When we brought them to testify for the Prosecution, we paid for their expenses. The provision of the Administration of Criminal Justice Act, section 251 and 252 that empowers Registrar to pay expenses is not yet operational. He told me that they are still my witnesses and I told him that it is a settled law that he that takes benefits takes**

the liability. This has remained a bone of contention. He is at liberty to recall them but he must do the needful".

The Defence Counsel made the following submission on record at pages 164-165 of the record of this appeal:

"I confirmed that the Prosecution called me and asked that we foot the bills for the recalled witnesses to be in Court. I find it very strange. My take is that any party can call any witness desired. That witness is for the party who calls the witness to testify. Even when the witness has always been part of our law. It is our argument that the witness remained state witnesses. Section 251 of the Administration of Criminal Justice Act provides for payment of expenses but that we apply for the recall does not make them our witnesses. Assuming they are personel of the SSS that we deserve to testify on our behalf, the burden would be on us to take care of the expenses. But in this case, they remain state witnesses".

From the submissions of both Counsel at the trial Court on this issue, it is clear that the Prosecution has done all that the law required it to do in the circumstance to make the witnesses available for further cross-examination But the Defence was not forthcoming in this regard. In view of the obvious fact that the provisions of section 251 and 252 of the Administration of Criminal Justice Act is not yet operational, the fact which is very known to the Defence Counsel, we have no reason to disagree with the Counsel for the Prosecution that he who takes the benefits should equally take the liability. There is absolutely nothing on

the record to show that either the trial Court or the Prosecution over denied the Defence the right to recall any witness. In fact the defence Counsel expressly stated on the record that:

"The Prosecution called me and asked that we foot the bills for the recalled witnesses to be in Court"

And to further display an act of good faith and its willingness to aid the defence in further cross-examining the Prosecution witnesses, the Prosecution made available PW1, who is the only witness within the jurisdiction of the trial Court and within the powers of the Prosecution for further cross-examination. The Defence is being indolent in this regard and wants to unjustifiably put the blame on the Prosecution. This Court will certainly not entertain that. Therefore, we agree with the decision of the trial Chief Magistrate on this issue when he held that:

> **"I believe firmly that it is the Defendant that is attempting to disprove the case for the Prosecution by applying for the recall of these witnesses. The implication of that is that these witnesses are expected to be in Court to assist the Defendant in his case as the further cross-examination is expected to aid the Defendant."**

There is absolutely no statutory duty on the Prosecution to foot the bill of Court's attendance of any witness that is recalled by the Defendant for further cross-examination. The submissions of the Defence Counsel that the Prosecution had an implied statutory duty to make available its witness and bear the cost of attending the Court's proceedings by this

witnesses for the Defendant to cross-examine them is most misconceived. We will not hesitate to discountenance this line of submissions as it is totally unfounded. A party who has been given every opportunity to recall witnesses and has woefully failed in doing so cannot be heard complaining of breach of his right to fair hearing or miscarriage of justice. Fair hearing is a constitutionally guaranteed night given in deserving circumstances. It is not meant for an indolent party, who has calculatedly failed in doing what he ought to have done or who has simply failed in carrying out his duty. The Defence has been availed all the time and support for the recall of the witnesses but has chosen to dwell on an argument that will not help his case. Issues no. 1 and 2 are hereby resolved in favour of the Respondent and against the Appellant.

Now, to issue no. 3 and 4 as formulated by the Appellant which is the last issue for the determination of this appeal that is:

> **"Whether the Learned Trial Magistrate was right when without properly evaluating the evidence of the parties before him he found that the Appellant has been linked to the commission of the offence of criminal trespass and that Appellant was guilty of the offences charged against him.**
>
> **"Whether the Learned trial judge was right when in spite of the fact that the elements or ingredients of the offences for which the appellant was charged were not proved beyond reasonable doubt, he held that the offences have been proved beyond**

reasonable doubt and that the appellant was guilty of the offences and also convicted the appellant on count 1, 2 and 3.

It is a cardinal requirement of our criminal justice system that the Prosecution must prove its case beyond all reasonable doubt. The implication of this statement is that every ingredient of an offence must be established to that standard of proof so as to leave no reasonable doubt of the guilt of an accused. See **AIGUOREGHIAN & ANOR V. STATE (2004) LPELR-270(SC).**

In the instant appeal, the Learned Counsel for the appellant submitted that the Court below was wrong to hold when in spite of the fact that the elements or ingredients of the offences for which the appellant was charged were not proved beyond reasonable doubt, he held that the offences have been proved beyond reasonable doubt and that the appellant was guilty of the offences and also convicted the appellant on count 1, 2 and 3 Unfortunately, the Learned Counsel for the Appellant did not mention even one of the ingredients of the offence not proved. It is not enough to make an allegation or assertion, the person making an assertion must prove. Appellant's Counsel's argument on this issue was best at large. There are no specifics. He failed to link his arguments to those specific elements that were not proved. That notwithstanding, the testimonies of PW2, PW3 AND PWS who were eye witnesses were credible and were never impeached through cross-examination by the Appellant The Prosecution witnesses especially PW2, PW3 and PWS graphically narrated how the Appellant gained access into the premises of the Managing Director, Parson Science Engineering Co. Ltd, presented himself as an operative of the State Security Service and demanded

some money of which he was given the sum of N200, 000.00. These pieces of evidence were never impeached by the Defendant at the trial Court. Thus, the trial: Chief Magistrate was right when he held that: "I am of the firm view that from the evidence before the Court, it will be safe to convict the Defendant on the offence of impersonating a public officer punishable under section 132 of the Penal Code Act, Cheating by impersonation punishable under section 322 of the Penal Code Act and Criminal trespass punishable under section 348 of the Penal Code Act".

We have no doubt in our mind that the Prosecution proved its cuse against the Appellant beyond reasonable doubt as affirmed by the Court below. Issues 3 and 4 are also resolved in favour of the Respondent and against the Appellant.

Having resolved all the issues against the Appellant we find and hold that this appeal lacks ment and is hereby dismissed. The judgment of the lower Court convicting the Appellant of the offences of impersonating a public officer, cheating by impersonation and Criminal trespass is hereby affirmed.

HON JUSTICE OLA. ADENIYI
(Presiding Judge)
28/1/2022

HON. JUSTICE B. MOHAMMED
(Hon. Judge)
28/1/2022