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

SUIT NO: CV/109/2019

BEFORE HIS LORDSHIP: HON. JUSTICE BABANGIDA HASSAN

BETWEEN:

MICHAEL ACHIMUGU……..CLAIMANT

AND

1. **SLOT SYSTEMS LIMITED**
2. **EJIKEME EZEIGBO** } **……..DEFENDANTS**
3. **VICTORIA OKAFOR**

JUDGMENT

By the endorsement on the writ of summons filed by the claimant and whereof sought for the following reliefs:

1. A declaration that the sale of an iPhone XS MAX by the defendants to the claimant, a phone which the defendants knew was defective, malfunctioning and non-transferable is unconscionable, vexatious, wicked, wrongful, and a breach of contract.
2. A declaration that the failure, refusal or neglect of the defendants to replace the said phone or refund the cost price of the phone, weeks after collecting the phone from the claimant with the promise to do so, is unconscionable, vexatious, wicked, wrongful, and a breach of contract.
3. An order of this Honourable court directing the defendants, jointly and severally to replace the defective iPhone XS MAX sold to the claimant with a brand new iPhone XS MAX that has no defects, functioning properly and transferrable or refund the sum of N443,000 (Four Hundred and Forty Three Thousand Naira only) being the

cost price of the said phone, 48 hours after delivery of judgment.

4. General damages of N50,000,000.00 (Fifty Million Naira) only against the defendants, jointly and severally, for the inconvenience, hardship, trauma and damages suffered by the claimant as a result of the actions of the defendants.
5. Cost of this action at N1,500,000.00 (One Million, Five Hundred Thousand Naira) only.

The claimant in his statement of claim averred that he went to the 1st defendant's shop in Garki II, Abuja to buy an iPhone XS MAX on the 6th of April, 2019, but the said phone was not found in Garki II shop, however, one Sophia, a staff of the 1st defendant took the claimant to the Banex Shop where he got the said phone for the cost price of N443,000.00 (Four Hundred and Forty-Three Thousand Naira) only and came back to Garki II shop for the 2nd defendant to examine the phone, and it was examined by the 2nd defendant and found that it was defective and the claimant was told so.

It is averred that on the same day, the 2nd defendant took the claimant to the 1st defendant's shop in Banex Plaza, Abuja where the 2nd defendant explained to the 3rd defendant that the iPhone XS MAX was bad, in which the 3rd defendant admitted that it was bad and the claimant was given another iPhone XS MAX for the same price.

It is averred that the 2nd defendant examined the iPhone XS MAX which the claimant was given at the Banex plaza shop and the 2nd defendant then was in a hurry to go home, and the 2nd defendant declared the phone fit and the claimant paid the cost price of N443,000.00 (Four Hundred and Fifty-Three Thousand Naira) only in full. And

because the 2nd defendant was in a hurry, he did not finish transferring the claimant's files from the claimant's old phone to the 2nd defendant's laptop for onward transfer to the claimant's new phone XS MAX, and till the time of preparing this statement those files are still on the laptop of the 2nd defendant without being transferred to the claimant's phone, and the claimant also averred that he bought this phone as an investment which he can easily sell back at any time when he is in need of money.

It is averred that on or about 17th September, 2019, the claimant called one Blessing Samuel, a staff of the 1st defendant, and asked her if she can get someone to buy his phone, the iPhone XS MAX which he bought from them, so that he can raise some money for school fees for his daughter to go back to school, and in which she promised she would call him immediately she gets a buyer, and on the 20th September, 2019 Blessing Samuel called the claimant that he should bring the phone for the 2nd defendant is willing to buy it and resell to someone else, and in which he took the phone to Gark II shop of the 1st defendant where he met the 2nd defendant, and the later immediately recognised the claimant and asked the claimant to delete important data from the phone to enable the 2nd defendant do a factory reset, even though the claimant insisted that the 2nd defendant should check the phone first to determine if it meets the standard of the buyer the 2nd defendant will sell to, and the 2nd defendant told the claimant not to worry as he recognised the claimant and knew the phone and thus, the phone was good.

It is averred that the claimant deleted all text messages and vital applications on the phone, and on the

recommendation of the defendants, he brought a flash drive from the 1st defendant, where the 2nd defendant promised to save all the pictures and videos from the phone, and the 2nd defendant also promised to do a back up of the claimant's whatsapp data and other apps on the phone. The flash is still with the 2nd defendant and the backup has not been done. That the 2nd defendant proposed to pay for the phone within an hour and the claimant's bank account would be credited with the sum of N300,000.00 (Three Hundred Thousand Naira) being the agreed price for reselling of the phone, and the claimant left the phone with the defendants and left. Two hours after, the claimant did not receive the alert, and so he called the 2nd defendant, and the later did not pick the call but rather asked one of his colleagues, the said Blessing Samuel, to speak to the claimant. Blessing Samuel told the claimant that the moment the claimant walked into the shop and the 2nd defendant said that it was the claimant that was the seller, and the 2nd defendant recognised him and knew that the phone would not sell, this was because the 2nd defendant knew from the day the phone was sold to the claimant in their Banex Plaza shop that it was part of the bad batch phones that had been blacklisted and blocked, which it meant that the claimant could never sell the phone or gift it to anybody else.

It is averred that when the claimant asked the 2nd defendant as to why he was not told about this initially and even when he came to resell the phone, and the 2nd defendant claimed that he did not want the 1st defendant to know he was the one who revealed the truth to the claimant, in order to save his job, but he advised the claimant to return the phone to the 3rd defendant in Banex and he would get a replacement for it. That on the 27th of

September, 2019, the claimant reached out to the 3rd defendant on phone and she instructed the claimant to take it to her branch in Banex as she had ordered a replacement immediately, and when the claimant got to Banex that same day, they demanded that he pay an extra sum of N36,000.00 (Thirty-Six Thousand Naira) only before they would replace the phone, and the claimant declined because the fault was from their end and it is the responsibility of the company to replace the defective phone, and the 3rd defendant promised that she would get a new phone for the claimant from their Lagos Head Office within two days, and she pleaded with the claimant to be patient, and on that the claimant would not need to pay an extra sum for the replacement, and on the 30th September, 2019, the 3rd defendant called the claimant to inform him that the new phone replacement has arrived from Lagos and so he would come and get it, and while the claimant was driving to Banex to pick up the phone, the 3rd defendant called again to say that there was a mix up and that the phone she bought was a different one and asked the claimant to give her few more days to solve the matter, and the claimant still went to the office of the 3rd defendant, and he was shocked when the 3rd defendant told him in the presence of everybody that she lied to him on phone, and the truth was that she had not gotten approval from Lagos to replace the bad phone they sold to him, and the claimant demanded for his phone, and the 3rd defendant told him that she has sent the phone to Lagos.

It is averred that three days after, the claimant called the 3rd defendant, and that was on or about 2nd October, 2019 and the 3rd defendant told him that there was nothing she could do and that he could take any action he wanted; and the defendants are still with the iPhone XS

MAX as they have refused to replace the phone or to refund the cost of the phone to the claimant.

It is averred that the claimant got a phone call from one Franklin Okoye, the procurement officer of the defendant from Lagos Office requesting for the password of the claimant to access the claimant's phone, and the claimant told him to speak to the claimant's lawyers. That it is averred that the claimant has suffered damages, trauma, indignation, discomfort, distress and hardship due to the defendants' actions.

The defendants filed their joint statement of defence dated the 7th day of November, 2019, and that is with the leave of this court.

The defendants admit paragraphs 2, 3 and 4 of the statement of claim, and also admit paragraph 5 to the extent that on the 6th April, 2019, the claimant was at the defendant's shop at Garki II, Abuja to purchase iPhone XS MAX but because the said phone was out of stock at that particular shop, the claimant was taken to the 1st defendant's shop at Banex Plaza, Wuse II, Abuja where he purchased the said phone for N443,000.000, and also returned to the 1st defendant's shop at Garki II to have the phone examined, however, they deny the rest of the averments in that paragraph. They also admit paragraph 6 of the statement of claim only to the extent that the claimant's iPhone XS MAX was replaced upon return to the 1st defendant's shop at Banex plaza shop, and they deny every other facts in the said paragraph.

Further to paragraph 4 of the statement of claim, the defendants states that the first phone to the claimant was not defective but highly codified by the manufacturer against theft, and as a result of some mix up in the

activation number of that particular phone, the claimant was given another phone of the same brand on the same amount which was easier to activate in order to avoid the waste of the time of the claimant, and they also state that they are not in a position to admit or deny whether the claimant's car was bashed as they did not see the car or witness the bashing.

The defendants also admit paragraph 7 of the statement of claim and also state that the 1st defendant, who has over 65 branches of phone and electronic shop nationwide and equally a household name on mobile phones, computers and other electronic devices, deals on fit and good brand new phones, and the 1st defendant does not compromise quality.

The 2nd defendant admits paragraph 8 of the statement of claim only to the extent that the claimant was in a hurry to leave the 1st defendant's shop on the said 6th April, 2019, and the 2nd defendant denied the rest of the averment, and further state that the duty of the 2nd defendant is to examine mobile phones bought by customers and activate same and the claimant never approached him to transfer files from phone and he does not have the claimant's files neither does he have a laptop.

The defendants are not in a position to admit or deny paragraph 9 of the statement of claim as same are facts within the exclusive knowledge of the claimant, and they are not in a position to admit or deny paragraph 11 of the statement of claim as they were not aware of any private and unofficial discussion between the claimant and Blessing Samuel, member of the 1st defendant's staff.

The 2nd defendant also admits paragraphs 12, 13 and 14 of the statement of claim only to the extent that the

claimant came to the 1st defendant's shop at Garki II, Abuja on or about 20th September, 2019, (That is five months after he purchased the phone) with the phone he purchased from the 1st defendant's shop at Banex shop and stated that he wanted to swap it for a brand new iPhone of the same brand, and the 2nd defendant denies all other averments in those paragraphs.

Further to paragraph 10, the 2nd defendant averred that contrary to the claimant's averment in paragraphs 12, 13 and 14 of the statement of claim, the entire claimant's personal information in the said phone were already deleted by the claimant before giving him the phone and further states that there was never a time he promised selling the phone for the claimant at all even in his own individual capacity, and he denies selling phone for its customers, and it only swaps phones based on agreed terms and conditions.

The 2nd defendant further averred that upon his advice, the claimant took his phone back to the 1st defendant's office at Banex plaza, Wuse , Abuja so that it could be sent to our Head office at Lagos State for the 1st defendant's management to evaluate the phone as the usual practice is, before approving any mobile phone swap, especially when it involves a high-end-user mobile phone like the one purchased by the claimant.

The 2nd defendant denies paragraphs 15 and 16 of the statement of claim and states that there was no time he or any of the defendants promised selling phone for the claimant, and the transaction between the claimant and the 1st defendant on whose account the 2nd defendant was acting, was a swap transaction and if the phone sold to the claimant was bad, the claimant would have brought a

complain within 5 months he used the phone before returning for swap or upgrade.

The 1st defendant denies paragraphs 15 and 16 of the statement of claim and state that it does not trade stolen, blocked and blacklisted phones as alleged by the claimant, as what the 1st defendant deals on are genuine and authentic mobile phones and device.

The defendants admit paragraph 17 of the statement of claim to the extent that the claimant was told to bring the said phone to the 1st defendant's shop at Banex plaza, and they deny the averments, and state that the claimant came for phone swap/upgrade and not replacement, and further state that the reason the claimant was told to bring the phone to the 1st defendant's shop at Banex plaza shop was to enable the 1st defendant's staff send the phone to the head office in Lagos State through one of the logistics companies at the Banex plaza.

The defendants deny paragraph 8 of the statement of claim and averred that neither the defendants nor any of the 1st defendant's employee demanded the sum of N36,000.00 or any amount of money at all from the claimant, and further state that the phone was sent down to Lagos for evaluation and swap approval of the 1st defendant's expense, and there was never a time the defendants promised a phone replacement to the claimant but a phone swap transaction since the claimant's phone is not faulty.

The 3rd defendant denied paragraphs 19 and 20 of the statement of claim and state that the only conversation she had with the claimant was on the mode of the swap/upgrade deal, and how much the claimant would pay additionally to the 1st defendant to have a new phone on the swap/upgrade deal and nothing more.

Further to paragraph 17, the 3rd defendant states that neither she nor the 1st defendant promised to replace the claimant's phone with a new phone as nothing wrong with the claimant's phone, as the claimant came for a swap transaction and not replacement.

The defendants averred that the claimant's phone was sent to the 1st defendant's head office in Lagos wherein it was noticed by the 1st defendant's procurement officer, Mr. Frank Okoye that the claimant has not disabled his icloud account on the phone nor removed his password in order for them to have access to the features on the phone and to confirm if the phone still meets up with the standard required for the swap, and immediately it was noticed that the phone could not be accessed because of the icloud account and password, Mr. Frank Okoye, the 1st defendant's procurement officer in Lagos contacted the claimant requesting for the phone password so they can access and assess it, but the claimant failed to release the password, and the phone was immediately returned to Abuja and the defendants contacted the claimant severally requesting him to come over and off the icloud account and release the password so they can access and assess it, and conclude the swap arrangement but the claimant failed to show up. They further averred that since the claimant could not come to take off his icloud account on the phone, and since the claimant is interested in swapping the phone, they called the claimant on phone to send his password so that they can unlock by themselves but the claimant, for reason best known to him, failed to show up and has since abandoned his phone.

The 3rd defendant denies paragraphs 21 and 22 of the statement of claim and state that she did not have any reason to plead with the claimant through text message or

any source since it was the claimant that delayed the swap transaction by failing to show up to take off his icloud account from the phone to enable the perfection of the swap deal.

The defendants deny paragraph 23 of the statement of claim and state that contrary to the claimant's allegation therein, it is the claimant that abandoned his phone with the defendants, and they are not under any obligation to replace the claimant's phone as he never complained of any fault. They stated that assuming without conceding that the claimant lodged a complaint with the defendants that his phone is defective or faulty, the defendants will not readily replace the phone or refund the purchase money to the claimant if he does not take off or disable his icloud and password from the phone.

The defendants admit paragraph 24 of the statement of claim and state that it is confusing and difficult to understand that instead of providing his password for his phone to be accessed, in order to evaluate the phone for the purpose of the swap transaction, the claimant chosed to engage a lawyer, and the defendants further state that they were shocked and surprised that the claimant who came for a phone swap, and who never complained that the phone he purchased from the 1st defendant since April, 2019 up to 20th September, 2019 that he came for phone swap transaction is faulty, suddenly turned around to claim that the phone sold to him by the 1st defendant is defective, and the claimant has not stated the defects and faults of the phone, and he never lodged a single complaint since he purchased the phone from the 1st defendant.

The defendants averred that when the claimant became troublesome for no reason, the claimant's disturbance was brought to the Chief Executive Officer of

the 1st defendant who personally placed a call across to the claimant and promised to swap the claimant's phone with the latest version of iphone 11, which is far more expensive than the claimant's phone for the sake of peace, and on condition that the claimant unlocks his phone and take off the icloud account but the claimant who thought he could make money by pursuing a frivolous and concocted claim, demanded the sum of N5,000,000.00 from the 1st defendant's Chief Executive.

They averred that the claimant's phone will be useless to them if they go ahead with the swap deal without having the claimant unlock the phone and take off the icloud account on his phone, and the phone sold to the claimant is a warranty phone, and if the claimant had in any form brought a complaint of defect since April, 2019 that he purchased the phone to September, 2019 that he came to swap same, the 1st defendant would definitely replace the phone if defect noticed on the phone is a factory fault and if the complaint is brought within the warranty period.

The defendants averred that since the claimant is their customer, they are willing to go ahead with the swap transaction with him while they still have that particular brand of phone in their stock; they will jettison the swap transaction if that particular brand of phone is exhausted from their stock.

In his reply to the defendants' statement of defence, the claimant averred that in response to paragraph 9 of the statement of defence, there are whatsapp chats between the said Blessing Samuel and the claimant, audio recordings, recorded phone calls where the said Blessing Samuel told the claimant that the defendant sold him a blocked and blacklisted phone and where she also told the

claimant that the new phone has arrived from Lagos, which turned out to be a lie.

In response to paragraphs 10, 11, 12, 13, 14 and 15 of the defendants' statement of defence, the claimant averred that the defendants have admitted that they ought to replace the phone because it was defective, and that it was a phone swap they offered but a phone replacement when they found out that they had sold the claimant a defective phone. That they even called the claimant to say that the new phone has arrived and that he should come and pick it up, and this turned out to be a lie.

In response to paragraph 16 of the statement of defence, the claimant averred that he even complained bitterly on phone to the defendants when he was asked to pay the said N36,000.00, and so they cannot turn round and deny it now.

In response to paragraphs 17 and 18 of the statement of defence, the claimant averred that there are phone conversation recordings where the 3rd defendant promised the claimant a phone replacement on realising that they sold him a defective phone, where they called to inform the claimant that the said phone had arrived from Lagos and where the 3rd defendant also admitted that she lied to the claimant when she said the new phone had arrived from Lagos.

In response to paragraph 19, 20, 21 and 22 of the statement of defence, the claimant averred that he indeed spoke on phone with one Mr. Frank Okoye and Mr. Frank Okoye admitted that "in cases like this, they ought to do a replacement", and that they started to request for his password after the claimant has already instructed his lawyers to file a case in court after the claimant had

endured several acts of deceit, betrayal and disappointment from the defendants.

In response to paragraph 23 of the statement of defence, the claimant averred that there are recordings of phone conversation where the 3rd defendant pleaded with the claimant to exercise more patience and forgive their deceits and disappointments.

In response to paragraphs 24, 25, 26 and 27 of the statement of defence, the claimant averred that he did not know that the phone had any fault or defective, because by the nature of the defect, as revealed by the 1st defendant's staff, the claimant can use the phone but cannot transfer or sell it to someone else, until he wanted to sell it to the 2nd defendant, who sold him the phone in the first place, and who recognised the phone as defective one. The 3rd defendant admitted this defect when she called the claimant to say they will do "a permanent unlock" on the phone instead of swapping it.

In response to paragraph 28 of the statement of defence, the claimant averred that indeed the Chief Executive Officer of the 1st defendant called him and admitted that they made a huge mistake, apologised profusely and offered him a brand new iPhone 11 and the sum of N200,000.00 (Two Hundred Thousand Naira) which the claimant refused because he has spent so much money in prosecuting this case, which the defendants pushed him to do by their gross negligence and insincerity.

The claimant adopted his witness statement on oath as PW1 and so the PW2, and they were all cross-examined.

The defendants filed their statements of defence along with their witnesses statement on oath of Ejikeme Ezeigbo and Victoria Okafor, the 2nd and 3rd defendants respectively.

The DW1 adopted his witness statement on oath, while the DW2 adopted her amended witness statement on oath.

In the course of examination-in-chief, the PW1 tendered some documents tending to show a text message emanating from the 3rd defendant to the claimant, and a whatsapp conversation between one Blessing Samuel (the PW2) and the documents were admitted by the court marked as EXH. "A1" and "A2" respectively. Three audio disc containing the conversations between the claimant and one Blessing Samuel (PW2) were admitted and marked EXH. 'V1', 'V2' and 'V3' respectively. The audio disc containing the conversation between the claimant and the 3rd defendant was admitted and marked as EXH. 'V4'.

The audio disc containing full conversation where the 3rd defendant agreed to give to the claimant a new phone on realising that they sold to the claimant a defective phone and where the 3rd defendant lied to the claimant that the phone has arrived from Lagos and in which she admitted to have lied, and the PW1 was asked whether in that audio, it was his voice, and in which he answered in the affirmative, and the two audio disc were tendered and admitted and were marked as EXH. 'V5' and 'V6'.

The PW1 also tendered a recording conversation between the claimant and one Frank Okoye, and was admitted and marked as EXH. 'V7'.

The PW1 also tendered four audio disc of the conversation between the claimant and the 3rd defendant, where the 3rd defendant was pleading with the claimant to forgive the defendants for their disappointment and deceit, and they were admitted and marked as EXH. 'V8', 'V9', 'V10' and 'V11'.

The PW1 tendered a recording conversation between the claimant and the 3rd defendant, where the later

promised to do a permanent unlock of the phone, and the disc was admitted and marked as EXH. 'V12'.

The PW1 tendered an audio conversation between the claimant and the Chief Executive Officer of the 1st defendant, where the later admitted that he made a mistake, and the disc was admitted and marked as EXH. 'V13'.

In the course of cross-examination of the PW1, whether, in his counter affidavit in opposition to the notice of preliminary objection, he deposed to the fact that the reason why he did not bring any complain to the 1st defendant that the phone was bad was because the fault of the phone would only be discovered at the point that he could resale or give it out somebody, and he answered that he did bring a complain.

The PW1 was asked that it was this iPhone XS MAX in issue that the claimant bought from the defendants which it was on the 6th of April, 2019, and on 17th September, 2019. The claimant called the PW2 and told her that he wanted to sell, and whether this was the correct position, and the PW1 answered in the affirmative. He was also asked whether as at the time he called the PW2, he told her that the phone has a fault, and he answered in the negative. He was also asked whether the reason why he wanted to sell the phone was because it was good, and whether this was true or false, and he answered that it was false.

The PW1 was asked during cross examination as to why did he want to sell the phone, and he has not given any answer. He was also asked whether from the 6th of April, 2019 to 17th September, 2019, he has ever complained that the phone was faulty and he answered in the negative.

The PW1 was also asked whether for the period of five months he has used the phone, has ever brought to the

attention of the 1st defendant that every feature of the phone was malfunctioning, and he answered in the negative.

The PW1 was asked that when he called the PW2 and told her to look for a buyer, whether it was correct, and the PW1 answered in the affirmative, and was further asked whether it was on 17th September, 2019 that he called the PW2 and told her to look for a buyer, and he answered in the affirmative.

The PW1 was asked whether the PW2 told him that the 2nd defendant was willing to buy the phone, and he answered in the affirmative. He was asked as to who sold the phone to him, and he answered it was the defendants, and the receipt given to him is bearing the name of the 1st defendant.

The PW1 was asked whether he met with the 2nd defendant face to face, and he answered in the affirmative, and he was also asked when he met the 2nd defendant face to face and the 2nd defendant told him that he should not worry that the 2nd defendant knew the phone and that the phone is good, whether this is what happened between him and the 2nd defendant, and the PW1 answered in the affirmative, and that when the 2nd defendant said the phone is good and agreed to buy at the rate of N300,000.00, whether that is the correct position, and the PW1 answered in the affirmative.

The PW1 was asked that with who, either the PW2 or the 2nd defendant that he discussed repurchase transaction of the phone, and he answered he discussed with both of them. He was further asked whether during the discussion for the purchase he told the 2nd defendant that the phone has a fault, and he told the court that he made a complaint. He was also asked as to what fault the phone

has, and he answered that his daughter tried to using her sim card, and the phone did not work, and he did not understand what was the problem, and he took it to the 2nd defendant and the PW2 that they should check it, and the 2nd defendant said that the phone was good and that he should go and they would send the money into his account.

The PW1 was asked as to what problem or defect the phone has, and he answered that it was locked and blacklisted according to the staff and employee of the 1st defendant, and that was why the 3rd defendant called him to say that they would try to do the permanent unlock of the phone, which means it is locked and is not supposed to be. He was asked whether he operate the phone to confirm that the phone was locked or blacklisted after he was told, and he answered that he can't confirm that.

The PW1 was asked as to whether there is anything to show that the phone is blacklisted or it is permanently locked, and he told the court that the 3rd defendant confirmed to him that they wanted to do a permanent unlock, the procurement officer also called from Lagos claiming that Apple that made the phone has received as defective phone from them and that they were going to unlock the phone, and that the PW2 told him that the 2nd defendant has checked the phone and was locked and blacklisted, and the Chief Executive Officer of the 1st defendant called him and confirmed that they supposed to have replaced the phone immediately, and the Chief Executive officer of the 1st defendant offered him a bigger phone which he rejected.

The PW1 was referred to his reply statement, on oath where he stated that the defendants admitted in their statement of defence in paragraphs 10, 11, 12, 13, 14 and 15 that they ought to replace the phone as it was defective

and he was given the statement of defence to show and to point out where such admission was made, and having looked at the statement of defence, the PW1 answered that he has not seen. He also told the court that he did not supply the password as demanded by the procurement officer of the 1st defendant, and that he did not supply the password to Banex plaza shop where he bought the phone because he was not asked to do so. The PW1 told the court during cross-examination that he referred Frank Okoye to his lawyer, and that he did not give his lawyer the password for onward delivery to the procurement officer. He further told the court that nobody can access his phone without the password, and that if the phone has software fault, the phone cannot be looked in or fixed without the password.

The PW1 was asked whether he has anything before the court to show that he has a car which was bashed, or that the case was bashed and he answered in the negative. He was also asked whether he had anything before the court to show that he has spent N100,000.00 and he answered in the negative. When the PW1 was asked whether he expects the 1st defendant to swap his old phone for a new one without supplying the password of his old phone, and he answered that he did not know the answer to that question. He further told the court that the 2nd defendant did not check the phone in his presence, but the 2nd defendant told him that the phone was good.

When asked whether the 2nd defendant told him that the phone was bad, and the PW1 answered that the 2nd defendant did not take the phone anymore, and further told the court that it was the PW2 that told him that the phone was blacklisted; and that the PW2 do sell iPhone inside the shop of the 1st defendant and he did not know if the PW2 is a technician and it was one of the reasons he

acted upon what the PW2 told him. He was also asked whether it was the PW2 that sold the phone to him, and he answered in the negative.

The PW1 was asked to look at EXH. A2 and to tell the court whether a telephone is there to show that it was a text message between him and the 3rd defendant, and he answered in the negative. He also answered in the negative when he was asked whether there is anywhere his name appeared on the exhibit.

The PW1 was asked to have a look at EXH. 'A1' which is the chat between him and the PW2, and was also asked whether there is anywhere his number appeared on that exhibit to show that it was a direct conversation between him and the PW2, and he answered that when a message is sent, there is no way his phone number will appear on that message and there is no need to put his name in the message; and therefore his name and the phone number are not on the message. He was also asked to show in the exhibit "A1" any other thing that can be identified that he was chatting with the PW2, and he answered that the names of other defendants were mentioned in their chat with the PW2.

The PW1 was asked whether there is anything to show that it is a telephone conversation between him and the 3rd defendant in EXH. 'V11', and the PW1 said the court will determine that. He was also asked to show anything in EXH. "V6" that it was a telephone conversation between him and the 3rd defendant, and he said, that the court will determine that.

The PW1 was asked whether there is anything to show that EXH. 'V8' and 'V9' is a conversation between him and the 3rd defendant, and he said that the court will determine that. He was asked is there anything to show in EXH. 'V10'

that it is a conversation between him and the 3rd defendant, and he said the court will determine that.

The PW1 was asked whether there is anything to show in EXH. 'V13' that it is a conversation between him and the 1st defendant, and he said the court will determine that. He was asked whether there is anything in EXH. 'V7' to show that it was a conversation between him and the procurement manager, and he said the court will determine that.

The PW1 was asked whether there is anything in EXH. 'V1', 'V2' and 'V3' to show that it was a telephone conversation between him and the PW2, and he answered that the court will determine that. He was asked with whom he was having conversation in EXH. 'V4', and he said it was with the 3rd defendant. He was further asked whether there is anything to show that it was a telephone conversation between him and the 3rd defendant, and said the court will determine that. He was also asked whether there is anything to show in EXH. 'V5', 'V12' that it was a conversation between him and the 3rd defendant, and he answered that the court will determine that.

The PW1 said it is not true when it was put to him that exhibits V1 – V13 were concocted by him and that nor voices of the 1st, 2nd and 3rd defendants and the PW2 in the exhibits. Also he said it is not true when it was put to him that EXH. 'A1' and 'A2' were concocted by him.

The PW1 told the court during cross-examination that since his phone was left with the defendants; he has been making calls, he has been running his business; and his child has been going to school, and when asked if he is making calls, running his business and his daughter has been going to school, what damages has he suffered as a result of the phone in issue, and he answered that he is an adviser to the

former vice president and he could not transfer any document or data from the iPhone.

The PW2 during examination in chief told the court that she is a sales consultant attached to the 1st defendant, and she is to market iPhone, and that she met the claimant when he came to buy phone in April, 2019, and she saw the claimant at the 1st defendant's shop, and it is true that he has sent the sum of N50,000.00 into her account for helping him to sell his car. The PW2 told the court that the claimant met her that he wanted to swap his phone, and she directed him to the 1st defendant's engineer, and that she is not aware that he initially bought a phone and it was later detected to be defective and it was changed, and that he bought the phone at Banex plaza store and how she came to know that he bought the phone at Banex plaza shop was because he called her and said he has bought the phone. The PW2 told the court that she did not call the claimant to tell him that the new phone has arrived from Lagos.

The PW2 during examination-in-chief further told the court that it is not her talking to the claimant in EXH. 'V1' and it is not her talking to the claimant in EXH. 'V2' that she did not say that the phone has arrived from Lagos, and she also told the court that it is not her voice talking to the claimant in EXH. 'V3'. She further told the court during examination-in-chief that she was not lying, when the counsel to the claimant put it to her that she was lying.

The PW2 also told the court that the claimant came to the shop to swap his phone and not to sell. When she was asked that if a phone is swapped, do they give exact phone or higher phone, and the PW2 answered that it depends upon what a customer wants. The PW2 was also asked whether they will only give the customer a new phone or they will give phone and accessories if a customer

swapped, and she answered that she doesn't know as she only market phones to customers.

The counsel to the claimant then put it to the PW2 that she is lying as she told this court that the claimant came to swap his phone and her to sell his phone, and later she said she doesn't handle swapping but market phones, and the PW2 answered that she did not lie.

The counsel to the claimant tendered EXH. 'C1' and 'C2' in evidence through the PW2. She also tendered her appointment letter EXH. C3 to show that she is not a staff of the 1st defendant.

During cross-examination, the PW2 reiterated that the claimant came to the shop to swap his phone, and the claimant did not authorise her to swap the phone, and she also did not tell the claimant that his iPhone XS MAX is defective.

The PW2 was shown EXH. 'C1' and was asked whether it was a whatsapp chat between her and the claimant, and she answered in the negative.

On the part of the defendants, the DW1 adopted his witness statement on oath, and in the course of cross-examination, the DW1 told the court that he is not aware that the CEO/MD of the 1st defendant and the procurement officer, Mr. Frank called the claimant, and he further told the court, when he was asked whether he believe the claimant when he said the CEO of the 1st defendant and Mr. Frank Okoye called him, that he believed that they called him.

When it was put to the DW1 that he was inconsistent for the fact that in paragraph 3(f) of his witness statement on oath said that immediately the claimant's phone got to the Lagos that Frank Okoye called the claimant, and later the DW1 said that he is not aware that the CEO/MD and the

procurement manager has called, and he answered in the negative. He also told the court that he is the technician and IT manager at Ahmadu Bello Way shop, and that the manufacturers of the iPhone don't configure as they have it in phone, and when it is purchased, the defendants activate with the purchaser's password.

The DW1 was asked to look at paragraph 3(h) of his witness statement on oath where he said that the first phone the claimant bought at Banex and was brought to the DW1 for activation was highly coded and could not be activated, and the DW1 answered that in the affirmative, and went further to say that the claimant was given another brand new one and that was activated.

It was put to the DW1 that the first phone that was not activated was defective and that was why it could not be activated, and he answered in the negative.

It was also put to the DW1 that the 1st defendant sells some defective phones one of which is the first phone it was sold to the claimant which could not be activated, and that the DW1 knew that the second phone that was given to the claimant was also among the batch of defective phones which include the first phone, and the DW1 answered that in the negative. He also saw that the claimant came to the shop to swap and not to sell, and that the phone was taken to Lagos to assess and access it before it can be swapped, and the defendants do not have the equipment to activate and assess the phone.

The DW1 was asked during cross examination that is said in paragraph 3(g) of his statement on oath that when the phone was returned from Lagos the DW1 called the claimant to provide his password, and so if the activation could be done in Abuja why taken it to Lagos, and the DW1 answered that it was brought back to Banex Plaza and not

Garki shop. He was also asked whether what he was saying is that the shop in Banex plaza, where the claimant bought the phone, has someone with the qualification or has the equipment to access the phone, but yet it was sent to Lagos, whether the DW1 wants this court to believe him, and the DW1 said that the 1st defendant has partnership agreement with Matrix and the work of Matrix is to check phones, if someone wants to swap his phone and Matrix have their own staff, and that was the reason it was sent to Lagos to check the phone, and so the time they brought the phone to Banex plaza shop was when the staff of Matrix were around and that was why the claimant was called to supply the password and which he refused to supply the password.

It was put to the DW1 that he was telling this court a lie when he said in paragraph 3(e) of his witness on oath that the phone was sent to the defendant's head office in Lagos, and the DW1 told the court again that the phone was sent to Matrix, and the DW1 answered that he did not say that, but said that they have Matrix in slot.

The DW1 was asked whether he did transfer all the files or some files were left in his laptop, and he answered that no one is left in his laptop. He was also asked whether he is telling this court the truth that he doesn't keep customers' files in his laptop, and the DW1 answered in the affirmative.

The DW1 was referred to paragraph 3(d) of his witness statement on oath where he said he did not have a laptop, and he later told this court that he did all the transfer of files from his laptop to the claimant's phone, and it was put to him he is a doctored and was mentored to come and tell lies before the court, and the DW1 answered in the negative.

It was put to the DW1 that you sold to the claimant a defective phone, and the DW1 answered in the negative.

The DW1 was referred to paragraph 7 of his witness statement on oath where he said he did not know what the claimant and the CEO discussed, and nobody told what they have discussed, and in paragraph 7 the DW1 outlined the discussion between the claimant and the CEO, whether he wants the court to take the inconsistency he has shown, and the counsel to the defendants objected to the line of question, and the objection was sustained.

The DW2 adopted her amended witness statement on oath, and in the course of cross-examination, the DW2 said that she did not say that the first phone the claimant bought could not be activated. The counsel put it to the DW2 that she told the court a lie when she said in paragraph 3(b) of her witness statement on oath that the first phone could not be activated, and the DW2 answered that she did not lie.

The DW2 also told the court that she was aware that the CEO of the 1st defendant has called the claimant and offered the later a new phone, but did not apologise to the claimant. The DW2 was also asked whether she called the claimant to provide his password and she answered in the affirmative, and she was also asked whether she is responsible for activating the phone, and she answered in the negative, but that it is the engineer which they have in the two branches.

The DW2 was asked whether she was the one that told the claimant to take the phone to another branch, even though there was an engineer in her branch, and the DW2 answered that it was the claimant who insisted that he wanted to take the phone to the other branch for activation.

The DW2 was asked as to why they took the phone to Lagos, and the DW2 answered that it was because it was not in her place to assess the phone, and that was why she did not push, and that was why it was sent to Lagos and for the one who is in charge to speak to the claimant directly. So that he can access the phone. She was also asked that since she said it is not in their place to assess phone, and she asked the claimant for his password, and why did she ask for the claimant's password, and the DW2 answered that she casually asked the claimant.

The DW2 was also asked that since she confessed that she can be causal about her job, whether she wanted the court to believe that she did her job well in making sure that the phone given to the claimant is not defective, and the DW2 answered that the 1st defendant does not sell defective phones.

The counsel to the claimant asked the DW2 that she said the phone cannot be assessed in Abuja, and the phone was sent back to Abuja and she called the claimant to bring his password so that it can be assessed, and he then put it to the DW2 that either the phone was never sent to Lagos because of calling the claimant to come and supply his password in Abuja meaning that the phone can be assessed or that there is no company policy, and the DW2 answered that the 1st defendant has a partnership with Matrix and it is the one that can have access to the phone and to approve same for swap, and when the claimant was adamant to supply his password of the phone and by then one of the Matrix staff was sent to Abuja from Lagos on official duty and that was why when she contacted the claimant, but he refused to send saying that she added that the phone was sent back to Lagos after which Mr. Frank

Okoye contacted the claimant for the password and the icloud which the claimant refused to release.

The DW2 was asked whether the conversation in EXH. 'V6' was her and the claimant, and she answered in the negative. She was also asked whether the conversations in EXH. 'V9', 'V10' and 'V11' were her own and the claimant, and the DW2 answered in the negative.

In his final written address, the counsel to the defendant raised sole issue for determination in this case, to wit:

> **Whether the claimant is entitled to judgment as claimed in the writ having not proved that the defendants sold defective, malfunction and non-transferrable iPhone XS MAX to him thereby breaching a contract?**

The counsel submitted that the crux of the issue in this suit is whether the defendants sold defective, malfunctioning and non-transferrable mobile phone, iPhone XS MAX to the claimant, and to him, the law is settled that he who asserts must prove as is envisaged in section 131(1) of the Evidence Act, 2011, and he referred to section 132 of the Act to the effect that the burden of proof lies on the person who would fail if no evidence at all were given on either side, and submitted further that it is the duty of the claimant to prove that the defendants sold a defective, malfunctioning and non-transferrable mobile phone (iPhone XS MAX) to him. To the counsel, the facts in issue here are;

i. **Whether the phone is defective, malfunctioning and non-transferrable as claimed by the claimant, or**
ii. **Whether the claimant came to swap the phone or to sell same.**

The counsel submitted that the claimant in his evidence-in-chief stated that he bought the mobile phone (iphone xs max) from the 1st defendant on the 6th of April, 2019, and also the claimant stated that the 2nd defendant, who is a mobile technician in the 1st defendant's shop declared the said mobile phone fit. He submitted that the claimant also stated in his evidence-in-chief that he took the phone on the 20th September, 2019 to sell to the 2nd defendant, and to him therefore, from the 6th April, 2019 when the claimant purchased the phone from the defendants, to the 20th September, 2019 (after five months) he took the phone to sell to the 2nd defendant as he alleged, the claimant has been using the phone and has never brought a single complaint to the defendants that the said phone was defective, and nowhere in the evidence-in-chief of the claimant, he ever mentioned that between the period of 6th April, 2019 to 20th September, 2019 that he brought it to sell that he noticed the mobile phone was defective, and thus the claimant admitted during cross examination, and the claimant also admitted that he never brought a complaint that any of the features of the said phone was defective, and to him, evidence elicited during cross-examination, if it relates to a fact in issue, has probative value, and is valid, potent and authentic, and he referred to the case of **Gaji V. Paye (2003) 8 NWLR (pt 823) 583.**

The counsel submitted that in the course of giving evidence-in-chief, the claimant stated that when he brought the said phone on the 20th September, 2019 to sell to the 2nd defendant (as he alleged) who is equally a mobile technician, the 2nd defendant recognised the claimant and told him that the said phone was good, and this was also confirmed by the claimant during cross-

examination that the 2nd defendant confirmed that the said phone was good, and therefore submitted that this means that at no point did the 2nd defendant inform the claimant that the said phone was bad.

The counsel submitted that the claimant not only did he admit in his evidence-in-chief, but confirmed during cross-examination that from the 6th April, 2019 to 20th September, 2019 the phone was good, and to him the evidence garnered through cross-examination is more credible and dependable than that on the examination-in-chief, and he cited the case of **Adeosun V. Governor, Ekiti State (2012) 4 NWLR (pt 129),** and to him, the claimant failed to show that the defective iPhone XS MAX was sold to him by the defendants. It is surprising for the claimant, who admitted that he never lodged any complaint to the defendants of faulty or defective phone since he bought it on the 6th of April, 2019 to when he came to sell it on the 20th September, 2019, to turn around to state in the course of cross-examination that "I lodged the complaint". He further submitted that the claimant stated that he took the phone to lay complaint to the defendants two weeks before the 20th September, 2019, when he took the phone back to sell to the 2nd defendant, as he alleged, and two weeks before 20th September, 2019 ought to be 4th September, 2019, and this is contrary to the claimant's earlier evidence that from the 6th April, 2019 to 20th September, 2019 he came to sell the phone to the 2nd defendant, he never laid any form of complaint about the phone. To him, the contradiction in the claimant's evidence is very material and substantial, as it is whether he laid a complaint or not, and the question is very crucial and the answer too is crucial, and the law is that where the contradiction is so material, substantial and fundamental, the evidence of such a witness will be

regarded as unreliable, and the court is left with no option than to deem it as unreliable and to reject it as the court is not to pick and choose between the two versions of evidence, and he cited the cases of **Ige V. Akolu (1994) PLELR – 1451 SC; and Edosa V. Oglem Wanre (2018) LPELR-46341 (SC).**

The counsel submitted that the plaintiff failed to prove that the phone iPhone XS MAX sold to him by the defendants is defective, and intact, the claimant is not even sure whether it is defective or not. To him, the claimant has not transferred the phone to anybody at all for him to come to the conclusion that the phone is not transferrable.

The counsel to the defendants submitted that the claimant alleged that it was the PW2 (Blessing Samuel) that told him the phone was not good, that is to say, the claimant relied on an information given to him by the PW2, who is not a mobile phone technician and who was not the seller. The claimant in his evidence-in-chief that the PW2 told him that the phone was blacklisted and blocked, and during cross-examination when the claimant was asked if he operated the phone to confirm if the phone was blacklisted and blocked, and the claimant answered that he has not confirmed that, and to the counsel, this is to show that the claimant is not sure of the state of the said phone and could not prove defect.

The counsel also submitted that the claimant relied on EXH. 'A1', 'A2' and 'C2' which are documents to prove that it was the PW2 that told him that the phone was bad, and the claimant also relied on EXH. 'V1', 'V2' 'V3' and 'V13(a)' which are audio CDs which the claimant claimed were voice conversation between him and the PW2 wherein she informed him that the phone was blacklisted and blocked, however, in the course of her examination-in-chief, the PW2

stated contrary to what the claimant said, that the claimant came to the defendants to swap his phone XS MAX and not to sell it, while the claimant maintained in his evidence-in-chief and in cross-examination that he came to sell the phone in question.

The PW2 also during examination-in-chief and cross-examination said categorically that there was no time she told the claimant that the iPhone XS MAX in question was blacklisted and blocked, and that she never told the claimant that his iPhone XS MAX was defective. The counsel submitted that the PW2 denied the content of the whatsapp chat EXH. 'A1', 'A2' and 'C2', saying that they are not her whatsapp and that she had no chat with the claimant on whether the phone was bad or defective. According to him, the PW2 also denied EXH. 'V1', 'V2', 'V3' and 'V13A' which are audio CDs which the claimant claimed to be a telephone conversation between him and the PW2. The counsel submitted that the PW2 during cross-examination stated that she was not an employee of the 1st defendant rather an employee of one Flex Edge Ltd, and she proved that by tendering EXH. 'C3' which is an offer of employment as in the case of EXH. 'C3'.

The counsel submitted that the letter of employment EXH. 'C3' is a conclusive evidence of her employment with the aforementioned company, and he referred to the case of **Organ & Ors V. Nigeria Liquified Natural Gas Ltd & Anor. (2013) LPELR – 20942 (SC)** where the Supreme Court held that letter of appointment is the bedrock on which the holder can lay claim to being an employee of another and without it, no employment can be inferred.

With regards to the high level of material contradictions witnessed on the evidence of the PW1 and the PW2, the counsel submitted that the law is well known that where the

evidence of a witness called by a party conflicts with the evidence of another witness called by the same party on an evidence of a fact or material fact, the evidence of both witnesses are inconsistent and unreliable, and he cited the case of **Eboade & Anor. V. Afomesin & Anor. (1997) 5 NWLR (pt 506) 490.** To him, the contradictions are not minor which can be overlooked by this court, and he urged the court not to treat such contradictions as minor, and he cited the case of **Achonye V. Nwachukwu (2011) LPELR – 3677 (CA)** to the effect that two or more pieces of evidence would be contradictory where they affirm the contrary or opposite of what the others say or state, and pieces of evidence would be contradictory where they are in direct conflict, irreconcilable, inconsistent and totally against each other in their substance such that all of them cannot represent the truth of their content at the same time.

The counsel to the defendants submitted that the claimant tendered EXH. 'A1', 'A2' and 'C2' which are documents, EXH. 'V1', 'V2' 'V3' and 'V13A' which are audio compact discs: EXH. 'V4', 'V5', 'V6', 'V8', 'V9', 'V10, and 'V11' which are telephone conversations between the claimant and the 3rd defendant as alleged by the claimant; EXH. 'V7' and 'V13' which are audio CDs what the claimant alleged to be his telephone conversation with one Frank Okoye, the 1st defendant's procurement manager and the Chief Executive Officer of the 1st defendant respectively.

The counsel submitted that the PW2, Blessing Samuel and the 3rd defendant while giving evidence denied and disclaimed the voices on EXH. 'V1', 'V2', 'V3', 'V13', 'V4', 'V5', 'V6', 'V8', 'V9', 'V10' and 'V11' respectively stating they were not their voices. He submitted that the Chief Executive Officer of the 1st defendant and the Procurement Officer of the 1st defendant were not invited to the court by

the claimant for the purpose of identifying whether the alleged telephone conversation were their voices or not. Blessing Samuel also denied EXH. 'A1', 'A2', 'C2', 'V1', 'V2', 'V3' and 'V13A' contrary to the evidence of the claimant that she was the one involved in those exhibits.

The counsel submitted that the claimant abdicated the duty of proving whose voices they are to the Honourable Court as he was asked during cross-examination if he had anything to show that the voices contained in those exhibits were that of the individuals he mentioned as he said he is leaving it to the Honourable Court to determine, and this amounts to delegating the onus of proving his case to the court. He submitted that sentiment and empathy command no place in judicial deliberations and they cannot override the rules of evidence particularly as to the burden of proof as to who asserts must prove and he cited the case of **Ezeugo V. Ohanyere (1978) 6-7 SC 171;** and **Idrisu V. Modupe Obafemi (2004) 11 NWLR (pt 884) 396 at 409.** He further commend to the court the provisions of sections 131, 132 and 133 of the Evidence Act, 2011 that the burden of proving that the voices on EXH. 'V1', 'V13' and 'V13A' are that of those referred to by the claimant, is that of the claimant and not the Honourable Court.

The counsel submitted that EXH. 'V1' to 'V13' and 'V13A' and the contents therein are issues that have to do with science and also technology in determining whether the voices on those exhibits were those of the mentioned individuals and which is purely scientific and the determination of evidence of such scientific nature may not be within the common knowledge of the court, considering the facts that people's voices can be cloned digitally. To him, digital cloning is an emerging technology which involves leaving algorithms, which allows one to manipulate

currently existing audio. He submitted further that the solution could have been employed by the claimant in order to guide the court in determining, whether the voices on EXH. 'V1' – 'V13' and 'V13A' were those of the people mentioned has been provided in section 68(1) (2) of the Evidence Act 2011. EXH. 'V1' –'V13' and 'V13A' are as dumped on the Honourable Court without a guide as to how it ought to arrive at a conclusion on the evidence, that is to say, the claimant ought to have called an expert witness in determining whether or not the voices were real. He submitted that it is trite that an expert witness is necessary if by the nature of the evidence, scientific or other technical information, which is outside the experience and common knowledge of the trial judge is required, and he cited the case of **Egesimba V. Onuzurike (2002) LPELR-1043 (SC).** He went further to submit that the Supreme Court in the case of **Iduche V. Eseh (1996) 5 NWLR (pt 451) 750 at 758** held that the duty of expert witness is to furnish the judge with the necessary scientific criteria for testing the accuracy of his conclusion so as to enable the judge form his own independent judgment by the application of the criteria to the facts proved in evidence before him. To him, in the instant case, the claimant said he leave the issue of determining the real owners of the voice to the court when no guide was provided by him, since the PW2 and the 3rd defendant denied the voices.

The counsel also submitted that no evidence as to the time and date the calls were made to the individuals was mentioned in EXH. 'V1' to 'V13' and 'V13A' by the claimant. It is his submission that the claimant failed to supply evidence of phone numbers he called or that called him to prove that those calls and conversations took place; no evidence was called of the telecommunications network

providers by the claimant to tender call logs as appeared on their servers showing that those calls took place indeed, and these are the things the claimant leave to the Honourable Court to do or determine by itself, and he cited section 94(1) of the Evidence Act, 2011 to buttress this point, and therefore urged the court not to attach probative value to the exhibits but discard them accordingly, and also rely on section 94(2) of the Act, and further cited the case of **Orogun V. Fidelity Bank (2018) LPELR – 46601 (CA)** and submitted that the claimant having not taken the necessary steps in making the identity of the persons whose voices were contained in EXH. A1 to 'V13' and 'V13A' known or taking steps to prove the identity of the person in relation with EXH. 'A1, 'A2' and 'C2', the court is urged not to attach any probative value to those exhibits, and they ought to be declared unreliable for not conforming with sections 94, 125 and 126 of the Evidence Act, 2011, and therefore, there is no way the court will determine whether those exhibits are spurious or not.

The counsel to the defendants submitted that the DW1 maintained in his evidence-in-chief and during cross-examination that the claimant came to swap his phone and not to sell it; that the claimant refused to supply his password so that the said phone could be accessed and assessed; and stated that the mobile phone, iPhone XS MAX sold to the claimant was not defective, and to this, the DW1 has maintained consistency on the material and fundamental facts. He however, submitted that though there were number of inconsistencies in the evidence of the DW1 during cross-examination, those inconsistencies and contradictions in his evidence-in-chief and oral testimonies during cross-examination are minor, and they cannot be

fatal to the case of the defendants. The counsel highlighted the contradictions in the evidence of the DW1 which are:

1. **during evidence-in-chief the DW1 stated that Frank Okoye and the Chief Executive Officer called the claimant but during cross-examination he stated that he was not aware whether they called the claimant;**
2. **he stated in evidence-in-chief that he had no laptop computer but admitted he had one during cross-examination;**
3. **he stated in evidence-in-chief that the CEO of the 1st defendant called the claimant and promised to give him a phone in swap of his own on condition that the password of the iPhone XS MAX be supplied first, but during cross-examination, the DW1 stated in evidence that he was not aware what the claimant and the 1st defendant's CEO discussed.**

The counsel then submitted that those contradictions and inconsistencies in the evidence of the DW1 as listed above are minor inconsistencies that do not go to the root of the case. The relevant facts in this suit, he submitted, is whether the claimant laid a complaint of defective phone was sold to him before the 20th September, 2019; whether defective phone was sold to the claimant; whether the claimant came to sell or swap his iPhone XS MAX; and whether he was told to supply his password or not. To him, other facts are minor, and further submitted that the law is that minor inconsistencies between previous written statement and subsequent oral testimony does not necessarily destroy the credibility of a witness, and he referred to the case of **Basil V. Fajebe (2001) 4 SCNJ 257 at 269,** and he submitted that the evidence of the DW1

cannot be regarded as unreliable because of the minor discrepancies in his evidence, or also that of the DW2. The evidence of the DW1 and DW2, he submitted, are consistent on the material facts.

The counsel further submitted that another potent reason the Honourable Court ought to believe the evidence of the defendants over that of the claimant is for the fact that Blessing Samuel (PW2), who is the claimant's witness gave evidence that supported the case of the defendants against the claimant, and he cited the case of **Meju V. C & C. B (Nig.) Plc (2003) 3 NWLR (pt 1340) 188 SC** to the effect that a party who gives his adversary facts favourable to his adversary has thereby weakened and demolished his own case. To him, every piece of evidence given by the PW2, if it could be relied on by the court, formed and supported the case of the defendants, and what the claimant is alleging is that the PW2 told him that the iPhone XS MAX sold to him by the defendants was defective, and the PW2 denied the said allegation in her evidence. He then submitted that the claimant failed to prove his case and he urged the court to dismiss this suit in its entirety with substantial cost.

The claimant's counsel in his final written address formulated lone issue for determination, to wit:

> **Whether by the facts pleaded, testimonies given and evidence adduces, the claimant has made out a case to be entitled to the reliefs sought?**

The counsel to the claimant submitted that the defendants have admitted selling a defective phone, and he cited the case of **Nwankwo V. Nwankwo (1995) LPELR – 2110 (SC)** to the effect that admissions are usually contained in a pleading as facts admitted in a pleading need not be proved any longer but are taken as

established. He submitted that in paragraph 5 of the statement of defence and paragraph 3(b) of both the 2nd and 3rd defendants' statement on oath, they admitted that the first phone they sold to the claimant did not work or function properly because it was "highly codified against theft", however, they failed to prove that it was only this one phone that was codified and they also failed to show the court how the phone XS MAX that did not work because it was codified was different from the second iPhone XS MAX. They finally gave to the claimant, same phone, same model and same brand. One was highly codified while the other was not.

To him, it is therefore reasonable to conclude that highly codified against theft is a euphemism, if not a lie for a defective phone, the main point is that it was not working properly so they had to change it. So, the balance of probability that the second phone or any other phone they sold to the claimant was also defective is very high.

On whether the claimant know that the phone he was sold was defective, the counsel submitted that the claimant never knew that he was sold a defective phone due to the nature of the said defect as was again admitted by the defendants. He submitted that during cross-examination, the claimant revealed that whenever anyone else other than himself tried to use the phone by taking ownership of it, like using their own sim cards or login details, the phone will refuse to work, and to him this happened with the daughter and at the time he did not think much of it.

The counsel submitted that the purported inconsistency pointed out by the defendants' counsel is an explanation that when he went to sell the phone to the 2nd defendant, he first requested that the 2nd defendant, who is the 1st defendant's technician, should check the phone

thoroughly (because he noticed that his daughter's sim was not working with the phone), and that since the claimant bought the phone only his sim works in the phone, and so he was concerned that the phone was not transferrable and might not work with the sim of the prospective buyer. To him, this explanation elicited during cross-examination is consistent with the claimant's deposition in paragraph 12 of his statement on oath.

On how the claimant find out the phone was defective. The counsel submitted that the claimant found out when he called Blessing Samuel, a sales girl of the 1st defendant, asking if she can get someone to buy his phone, and Blessing Samuel contacted the 2nd defendant who agreed to buy the phone, and when the claimant brought the phone to the 2nd defendant to buy that was when Pandora Box was opened. Blessing Samuel told the claimant that immediately the 2nd defendant saw him, he recognised him and remembered that the phone they sold to him was defective, blocked and blacklisted and therefore not transferrable, and to him, these conversations between Blessing Samuel and the claimant are contained in EXH. 'A1', 'C2', 'V1', 'V2' and 'V3'. He submitted that EXH. 'V4' contained the conversation with the 3rd defendant where the claimant was complaining bitterly about this extra cost they were asking him to pay.

He submitted that EXH. 'A2', 'V5', and 'V6' contain conversations between the claimant and the 3rd defendant where the 3rd defendant promised to replace the claimant's phone and called him that the new phone has arrived and later admitted that she lied that the phone has not arrived. He added that EXH. 'V8', 'V9', 'V10' and 'V11' contain phone conversations where the 3rd defendant was begging the claimant to exercise more patience and forgive them

for their several deceits and lies, and it was after this case that Frank Okoye, the 1st defendant's procurement officer called the claimant requesting for his login details (password) and promised to replace the phone, and this conversation is contained in EXH. 'V7' where Frank Okoye clearly stated that in cases like this they ought to do a replacement.

To him, the facts that the claimant did not know or understand the nature of this defect or report same, even when he noticed the phone could not work with any other sim or login details is immaterial. That the defendants knew the nature of the defendants, and that the new phone was blocked and blacklisted and is not transferrable but they still went ahead to sell it to the claimant, and that is why in EXH. 'V12' the 3rd defendant is heard promising to do a permanent unlock on the claimant's phone instead of giving him a new phone as they earlier promised.

On whether the claimant went to the 1st defendant for a phone swap or not, and whether did they ask for his password when they collected the phone of the claimant, the counsel to the claimant submitted that the defendants claimed they knew all along that the swapping of the claimant's iphone will require the supply of the password, and he posed these questions:

1. **Why did they not ask for the password at the point of collection, if indeed he came to swap?**
2. **If the password is used to swap a phone who has refused to provide this password, then why did they not return the phone to the customers immediately?**

The counsel submitted that when this question was put to the 3rd defendant during cross-examination, she stated

that she asked the claimant for the password at the point of collecting the phone but the claimant refused to provide it.

The counsel submitted that they did not ask for the password because they knew it was a defective phone they had promised to replace.

To the counsel, assuming without conceding that they even asked for the password of the claimant and he refused to provide it, they still could not return the phone because they were under an obligation to replace it, if it were to be a swap at customer's instance, they will be doing the customer a favour and will quickly return it if he refuses to supply his password. He submitted further that during cross-examination the DW2 contradicted herself by saying she knows that the password is needed to access the claimant's phone, that the claimant refused to supply his password, and that the phone was sent to Lagos for assessment even though she knows the phone cannot be accessed and assessed without the password. On this, the counsel posed these questions:

1. **Why the 3rd defendant would have sent the phone to Lagos?**
2. **How was the phone to be assessed without the password she claimed the claimant had refused to supply?**

To him, these questions leave him with the following conclusion:

> **That the password was never requested because the claimant did not come to swap his phone, and there were invented as a defence when the claimant has gone to court.**

On the testimony of Blessing Samuel (the PW2), the counsel submitted that all the documentary evidence, pleadings and depositions of other witnesses into account

that she is a barefaced liar as she was clearly guided and doctored by the 1st defendant which she works under, and to urge the court to hold that her testimony should be believed and held against the claimant is tantamount to urging this court to uphold her tissues of lies.

The counsel further submitted that her oral testimony cannot override the place of documentary evidence as EXH. 'A1', 'A2', 'C1', 'C2', 'V1', 'V2' and 'V3' and 'V13A' contain conversations between the claimant and the PW2 where she stated that indeed the defendants sold the claimant a defective phone, and these chats were admitted, and he cited the case of **Fagbenro V. Arobadi & Ors (2006) LPELR – 1227 (SC)** to the effect that the best evidence of the contents of a document is the production of their document; and also cited the case of **Udo V. State (2016) LPELR – 40721 (SC).** He submitted that the witness, in open court, identified her name, phone number and even bank account number EXH. 'A1', 'A2', 'C1' and 'C2', and she admitted that she and the claimant have spoken several times and even exchanged text messages, and he urged the court to hold that EXH. 'A1', 'A2', 'C1', 'V1' 'V2' and 'V3' are the true and correct conversations that happened between the claimant and the PW2.

On the inconsistencies in the testimony of the 2nd and 3rd defendants, DW1 and DW2, the counsel submitted that no court can rely on the depositions and testimonies of DW1 and DW2 because of the fundamental inconsistencies therein. He submitted that during cross-examination, the witnesses denied averments made on their witness statement on oath and their statement of defence, as the DW1 was asked if he is aware that the CEO/MD of the 1st defendant and one Frank called the claimant on phone, and he said he is not aware, meanwhile he stated in

paragraphs 3(f) and 7 of his witness statement on oath that Frank Okoye and the CEO/MD called the claimant.

The counsel submitted that the witnesses are not of truth and this court cannot rely on both their written and oral testimonies, and he cited the cases of **Consolidated Breweries Plc & Anor. V.Alsowieren (2002) FWLR (pt 116) p. 949; Hon. Jeffrey Moses Owor V. Hon. Bereware Christopher & Ors (2008) LPELR – 4813 (CA)** to the effect that he who makes statement mutually inconsistent is not to be listened to. He submitted that it is settled law that a witness who has given materially inconsistent evidence on oath ought not to be believed, and such evidence ought not to be relied upon by the court.

On the admissibility of documents EXH. 'A1', 'A2','C1', 'C2', 'V1' to 'V13' and the weight to be attached thereto, the counsel submitted that the documents are already tendered and admitted, and therefore they are properly before the court and the court ought to look at them and to rely on, and any objection be discountenanced. He submitted that relevancy is the ultimate determinate in admitting a document or weight to be attached to it, and to him, the documents are relevant in determining the issue of defective phone was indeed sold to the claimant.

The counsel to the claimant submitted that the learned counsel to the defendants made heavy weather on the case of **Orogun V. Fidelity Bank (supra)** however, the facts of that case are different from the facts of this instant case, as in that case, the purported sender of the said sms or text message denied sending any of such text message, in other words, the existence of the text message was in issue, thus, the need for further proof to ascertain the existence of the text message while in the instant case the existence of these sms, whatsapp chats and phone calls or conversations are

not in doubt, as they have not been denied by the defendant. He further submitted that their objections to the documents is that they allege the documents are false or forged and the onus is on the party who alleges that the documents are false or forged, and he cited the case of **Emesiani V. Emesiani (2013) LPELR – 21360(CA)** to the effect that he who alleges must prove, and it is for the party alleging that a document is forged to prove that it is forged, and he cited the case of **Babatunde & Anor. V. Bank of the North & Ors (2011) LPELR – 8249(SC).** To him, the way to prove is by producing the purported true recording for the court to compare and contrast with the alleged forged in order to make a decision, and he cited the case of **APC V. PDP & Ors (2015) LPELR – 24587 SC.** He also cited the case of **Lumatron Nig. Ltd & Anor. V. FCMB Plc (2016) LPELR – 41409 (CA)** and submitted that the pleadings and the record of proceedings will clearly show that the claimant specifically related each of such documents (exhibits) to that part of his case in respect of which the document is being tendered, and no single document was dumped on the court.

On the whether the claimant has proven his case even without the exhibits, the counsel submitted that the facts, pleadings and testimonies of witnesses have proven that, indeed, the defendants sold the claimant a defective phone, and on the whole the counsel urged the Honourable Court to hold that the defendants, jointly and severally, ought to replace the defective phone they sold to the claimant.

In reply on points of law to the claimant's final written address, the defendants responded to the issues as highlighted by the claimant.

On the defendants admitted selling defective phones, the counsel to the defendants submitted that no admission

was made either expressly or impliedly by the defendants in these pleadings or evidence in support of same, and further submitted that it is presumed that no man would declare anything against himself except it was true, and he cited the case of **INEC V. Oshiomhole (2009) 4 NWLR (pt 1132) 607.**

The counsel further submitted that a highly codified phone is expressly different from a faulty phone, and does not require any other interpretation. That a phone is highly coded is not the same thing as defective, and the defendants were very clear when they said and stated that the first phone was highly coded, and they never mention "faulty" or "defective" and so it cannot be said by the use of the word "coded", there is an admission of defective phone.

The counsel submitted that though the defendants never admitted selling defective phone to the claimant, and before an admission can be relied upon by a court, it has to be full, unambiguous and freely made and there must be element of clarity and he referred to the case of **Kenlink Holdings Ltd V. R.E. Invest Ltd. (1997) 11 NWLR (pt 529) 438.** The counsel further cited the case of **Coker V. Olukoga (1994) 2 NWLR (pt 392) 648** where the Court of Appeal enumerated the qualities that an admission in law must possess to wit: clarity, precise and unequivocally express. The court further held that admission which is bubbles, or mere rhetorics, lacking exactness and firmness of purpose does not qualify as an admission, and to him, there is no such place in both their pleadings and during evidence that the defendants expressly or impliedly admitted selling faulty or defective phone to the claimant.

On how did the claimant find out the phone was defective, the counsel to the defendants submitted that the

allegation that Blessing Samuel (PW2) informed the claimant that the phone sold to him by the defendants is defective phone was unambiguously denied by the PW2, who is equally the claimant's witness, in her testimony. The PW2 denied all the exhibits tendered by the claimant purportedly linking her to the allegation; and the denial of the PW2 has put the claimant's claim to rest and worried if, since that is the only source the claimant relied on to claim the mobile phone is detective, and the denial also corroborates and reinforced the defendants' position that they never sold defective or malfunctioning phone to the claimant.

To him, the law is that when the evidence of a witness supports the case of the opponent against whom he purports to give evidence, that opponent can take advantage of that evidence to strengthen his case if it is consistent with or corroborates his case, and that will be on admission against the interest of the party that called the witness and the admission is relevant and admissible and he cited the cases of **Ojiegbe V. Okwaranyia (1962) 2 SCNLR 358;** and **N.B.N. V. T.A.S.A. Ltd (1996) 8 NWLR (pt 468) 511.**

On the question whether the claimant go to the first defendant for a phone swap, or whether the defendants ask for his password when they collected his phone, the counsel to the defendants responded and submitted that the claimant's PW2 in her evidence stated that the claimant came to the defendants' shop to swap his phone, and this corroborates the evidence of the defendants' witnesses was maintained during evidence-in-chief and during cross-examination that the claimant came for phone swap and not to lay complaint about defective phone, and the position of the law is that if the evidence of a witness who is called by a party supports the case of his opponent that

evidence serves as a solemn admission in favour of the opponent, and he cited the case of **Adeyeye V. Ajiboye (1987) 3 NWLR (pt 61) p. 432.**

On the testimony of PW2, the counsel submitted that the claimant in his final written address urged the court not to believe her testimony as same is a lie, and to him, the claimant initiated the process against the defendants not because he personally discovered any fault in the mobile phone sold to him by the defendants, nor did any mobile phone technician told him so, but on a false allegation that the PW2 informed him that the said phone is defective. He argued that in the claimant's pleadings and during cross-examination, the claimant maintained that the PW2 told him the phone is defective, and informing that the claimant tendered some exhibits documentary and discs showing that they are the voices discussions of the claimant with the PW2. He further submitted that during the testimony of the PW2 the counsel to the claimant branded the PW2 as a liar, and now the same claimant declared his witness, PW2, as a liar and urged the court in his final written address not to believe her tissues of lies and now urging the court to believe and act upon exhibit 'A1', 'A2', 'C1', 'C2', 'V1', 'V2', 'V3' and 'V13A', the conversations the claimant claimed were between him and the PW2, and this he already urged the court not to believe. To him, this amounts to approbating and reprobating which a party cannot be allowed to blow hot and cold, and he cited the case of **Ude V. Nwara (1993) 2 NWLR (pt 278) 638.** He submitted that it could be legally unjustifiable for the claimant to expect the Honourable Court to believe even his claim that the PW2 told him that the phone was bad initially, being the reason he instituted this suit. He submits that the claimant is not entitled to the honour of credibility when he has two

material inconsistencies given on oath in his case, and he referred to the case of **Ayanwale V. Atanda (1998) 1 NWLR (pt 68) 22.** And he submitted that what was pleaded is not what was proved, and he referred to the case of **Magaji V. Cadbury (Nig.) Ltd. (1985) 2 NWLR (pt 7) 393.**

On the inconsistencies of the testimonies of the 2nd and 3rd defendants and he submitted and reiterated his position as canvassed in his final written address that the contradictions referred to in the testimonies of the DW1 and DW2 are not material as they are minor details which do not affect the substance of the issue of whether defective phone was sold to the claimant or not and whether the claimant came to swap his phone or not. Therefore, to him, the contradictions are immaterial and irrelevant and the mobile phone sold to the claimant is not defective, and he cited the case of **Magaji V. Cadbury (Nig.) Ltd (supra).**

On the admissibility of EXH. 'A1', 'A2', 'C1', 'C2', 'V1' to 'V13' and weight to be attached thereto, the counsel submitted that the admissibility of a document and the evidential value to be attached to it are not the same thing, and he referred to the case of **Adefarasin V. Dayek (2007) 11 NWLR (pt 1044) 89.** He submitted that the court cannot attach any weight to EXH. 'V7' and 'V13' which the claimant denied to be his conversation between one Frank Okoye, the 1st defendant's procurement officer and the MD/CEO of the 1st defendant, having not seen nor heard them speak, and the DW1 and the DW2 denied the said voices. He submits that the fact that the court admitted such documents does not mean that it must attach probative value to them, and he referred to the case of **Jwan V. Ecobank (Nig.) Plc (2021) 10 NWLR (pt 1785) 449.** He also submitted that the evidence of the claimant himself is based upon what he was told, which is hearsay, and such

evidence has no probative value, and he cited the case of **Onovo V. MBA (2014) 14 NWLR (pt 1427) 391,** and to him, once it is discovered that any evidence or testimony is laced with hearsay as in the instant case, the court cannot ascribe probative value to it, and he cited the case of **Kakih V. PDP (2014) 15 NWLR (pt 1340) 374.**

On the issue whether the claimant has proven his case, the counsel submitted that he failed to prove the content of the documentary evidence that is the whatsapp chats and the voice discussion between him and the PW2 and DW2 as they denied the whatsapp chats and voices as theirs.

The counsel submitted that the claimant relied on what he was told and in the course of cross-examination when he was asked to show anything to show that the phone is defective, and the claimant answered that he is relying on what the PW2 told him, and she is not a phone technician and the claimant never complained about having issue with the phone even up to the point of filing his written address, however, the claimant relied on what he was told and conclude that the phone is defective, and all the evidence which the claimant was based upon what he was told, and this is hearsay, the counsel submitted, and it is inadmissible.

The counsel submitted that the claimant failed to tender the phone or operate same in the open court to show that the phone is defective even when the phone is in the custody of the defendants, and the claimant had the opportunity to plead same and to give notice for its production. The counsel relied on the cases of **Kakih V. PDP (supra)** and **Atadi V. Ajibola (2004) 16 NWLR (pt. 898) 91** to submit that the exhibit and the evidence is based on hearsay which is not admissible.

The counsel submitted further that the evidence of the claimant ought to be expunged and should not be attached any probative value and the case be dismissed as it is based upon hearsay, and he referred to the case of **Omidiran V. Owolabi (1994) 6 NWLR (pt 350) 361,** and he urged to dismiss the suit in its entirety.

Having reviewed the pleadings, evidence adduced and the submissions of both counsel, let me adopt the issue for determination as formulated by the counsel to the claimant, to wit:

> **Whether by the facts pleaded, testimonies given and evidence adduced, the claimant has made out a case to be entitled to the reliefs sought?**

Thus, in order to narrow down the grouse of the claimant in this suit and to discover what is germen, recourse has to be had to his statement of claim and more particularly paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 of the statement of claim. From those paragraphs of the statement of claim, it can be inferred that what is germen is whether the defendants sold the iPhone XS MAX, which is the second sold, and which is defective, malfunctioning and non-transferrable to the claimant.

The claimant called two witnesses including himself in trying to prove the claim that the defendants sold a defective phone to him on the 6th day of April, 2019, while the defendants called two witnesses to disprove the claim, all these are in satisfaction of the requirements under the provisions of sections 131, 132 and 133 of the Evidence Act, 2011. See the case of **Azike V. Nigerian Bottling Co. Ltd (2019) All FWLR (pt 989) p. 1229 at pp. 1260 – 1261, paras. G-F** where the Court of Appeal Lagos Division held that by the provisions of sections 131-134, Evidence Act, 2011, in

resolving issues as joined by the parties in their pleadings, and evidence led thereon, the burden of proof in civil cases is not static. In that it depends largely on the issues of facts as joined by the parties in their pleadings, so much that the burden of proof or evidential burden properly so called, shifts from one party to the other depending on who positively asserts what and on whom the burden of introducing evidences. The onus shifts from one party to the other depending on the nature of the case and evidence adduced by either party. In the instant case both parties adduced evidence starting by the claimant, and later by the defendants.

Let me at this juncture analise and evaluate the evidence with a view to ascribe probative value to the one that is credible. See the case of **Azike V. Nigerian Bottling Co. Plc (supra).** However, let me bring out the brief fact of this case as is succinctly given by the counsel to the claimant in his final written address that on the 6th of April, 2019 the claimant bought an iPhone XS MAX from the 1st defendant's shop, as this is the second phone as the first phone sold to him was defective. That the second phone given to him was not properly checked because the technician, being the 2nd defendant, was in a hurry to go home on that 6th of April, 2019, and that throughout the period of the use of the phone by the claimant, he found out that the phone, though working fine with his sim card and log in details, could not be used with another person's sim card or log on details, like that of his daughter, and the claimant did not think much of it as at that time.

That until on or about the 17th of September, 2019 when the claimant called one Blessing Samuel (PW2) who is a staff of the 1st defendant and asked her if she can get someone to buy his phone, the iPhone XS MAX, which he bought from

the defendants, so that he can raise money for school fees for his daughter to go back to school. The said Blessing Samuel called the claimant on the 20th September, 2019 that he should bring the phone for the 2nd defendant, who is the technician in the 1st defendant, that is willing to buy it and resell to someone else. That when the 2nd defendant saw the claimant and the phone, he immediately recognised him and the phone he sold to him, and though the 2nd defendant proceeded to buy the phone, he later told the said Blessing Samuel that once he saw the claimant and the phone he recognised the phone sold to the claimant which was part of a bad batch of phones that has been blacklisted and blocked. To the claimant, it means that he would never sell the phone or gift it to anybody else, and that it was when the 2nd defendant recognised the claimant and the phone that he revealed that the said phone was defective from the very day it was sold to the claimant.

So what is germen in this suit is as averred in paragraph 15 of the statement of claim which reads:

> **Two hours after the time the 2nd defendant promised sending the money to the claimant's account, the claimant did not receive it, so he called the 2nd defendant on phone, and the 2nd defendant did not pick the call but rather asked one of his colleagues, the said Blessing Samuel, to speak to the claimant. The colleague told the claimant that the moment he walked into the shop and the 2nd defendant saw that the claimant was the seller, the 2nd defendant recognised him and knew that the phone would not sell. This was because the 2nd defendant knew from the day the phone was sold to the claimant in their Banex shop**

that it was part of a bad batch of phones that had been blacklisted and blocked. It meant that the claimant could never sell the phone or gift it to anybody else.

By the above, it can be inferred that it was the PW2 (Blessing Samuel) that made such statement ascribing it to the 2nd defendant, and that is the basis of the complaint of the claimant.

Now, paragraph 16 of the statement of claim reads:

When the claimant asked why the 2nd defendant did not tell him this initially and even when he came to resell the phone, the 2nd defendant claimed that he did not want the 1st defendant to know he was the one who revealed the truth to the claimant, in order to save his job. But he advised the claimant to return the phone to the 3rd defendant in Banex and he would get replacement for it.

The above paragraph is also germen to this suit, however, it is not clear whether it was in furtherance to the discussion between the claimant and Blessing Samuel on phone that the said Blessing Samuel made such statement, or it was the 2nd defendant that made that statement, having regard to the averment in paragraph 15 of the statement of claim where the claimant averred that the 2nd defendant did not pick the call but rather asked the said Blessing Samuel to speak to the claimant. This will be analised in due course.

These same paragraphs 15 and 16 of the statement of claim are the replica of paragraphs 15 and 16 of the witness statement on oath of the claimant, which are also denied by the defendants.

The PW1 during cross-examination was asked by the counsel to the defendants thus:

> **This iPhone XS MAX in question that you bought from the defendants, you bought it on the 6th April, 2019 and on 17th of September, 2019 you called one Blessing Samuel and asked her that you wanted to sell the phone, am I correct?**

The claimant being the PW1 answered "Yes"

When he was asked by the counsel to the defendants again, thus:

> **When you called Blessing Samuel, did you tell her that the phone you wanted to sell has a fault?**

The claimant (PW1) answered "no".

He was further asked:

> **The reason you wanted to sell the phone was that because you believed that was good, is it true or false?**

The claimant answered "it is false"

The claimant was asked:

> **From the 6th of April, 2019 to the 17th of September, 2019, have you ever complain that the phone has a fault?**

The claimant (PW1) answered "I did not"

He was also asked:

> **The necessary functions like text messages, internet browse, and whatever features and for the five months you used the phone, did you bring the attention of the 1st defendant that every feature of the phone is malfunctioning before you called Blessing Samuel to sell the phone?**

The claimant (PW1) answered "no".

Thus, by the above questions and answers during cross-examination, it can be inferred that the claimant from the

6th of April, 2019, the time he bought the phone, to the 17th of September, 2019, when he wanted to sell the phone in question, did not complain to the defendants that the phone is faulty.

In the course of cross-examination, the claimant (PW1) was asked whether he met the 2nd defendant physically or face to face, and answered in the affirmative. He was also asked whether he stated in paragraph 12 of his witness statement on oath that when he met the 2nd defendant and the 2nd defendant told him not worry that the he (the 2nd defendant) recognised him (the PW1), and that he (the 2nd defendant) knew the phone and it is good, and he also answered in the affirmative.

By the above, it can be inferred that during the verbal discussion between the claimant and the 2nd defendant, the 2nd defendant confirmed that the phone was good. The following question and answer further shows that the 2nd defendant confirmed that phone was good when the PW1 was asked:

> **When he told you that the phone was good, the 2nd defendant said that he agreed to buy the phone for N300,000.00, am I correct?**

The claimant (PW1) answered: "yes".

The claimant (PW1) was asked:

> **When the 2nd defendant could not answer your call for whatever reason, it was Blessing Samuel that told you that the phone was not good, is that so?**

The claimant (PW1) answered: "yes, she told me that the 2nd defendant was not going to pay the phone as it was not good."

The claimant (PW1) was also asked that the 2nd defendant did not tell him that the phone was bad, but Blessing Samuel, and he answered in the affirmative.

By the above questions and answers, it can be inferred that it was the PW2 (Blessing Samuel) that was alleged to have told the claimant that the phone was not good, and not the 2nd defendant, this is because from the face to face discussion between the claimant and the 2nd defendant, the later did not say that the phone was bad, rather it was Blessing Samuel (the PW2) during the phone conversation between her and the claimant when the 2nd defendant could not pick the call from the claimant, therefore, paragraph 16 is now very clear to the court that it was not the 2nd defendant that made such assertion that the phone was bad as it is alleged to have been blocked and blacklisted, and to this I so hold.

The claimant (PW1) was asked that at the point of his discussion with the 2nd defendant on the repurchase of the phone, whether he told the 2nd defendant that the phone was not good, and the PW1 told the court that he lodged the complaint. He was also asked what fault does the phone has, and he told the court that two weeks prior to the taking his phone to the 2nd defendant, his daughter tried using her sim card in the said phone, and it did not work, and he didn't understand what the problem was, and he took it to the 2nd defendant and Blessing Samuel that they should check it, and the 2nd defendant said the phone was good that he should go and they would send the money into his account. He was also asked what problem or defect of the phone in question, and the PW1 (the claimant) answered that it was blocked and blacklisted according to the staff and employee of the 1st defendant that told him and which was the reason the 3rd defendant called him to say that they would try to do the permanent unlock of the phone which means, to him, it is locked and is not supposed to be so. He was also asked whether he operated the

phone to confirm whether the phone was blocked or blacklisted after he was told, and he answered that he can't confirm that. He was asked whether there is anything to show that the phone is blacklisted or it is permanently locked, and he narrated that the 3rd defendants confirmed to him that they wanted to do a permanent unlock, and the procurement officer of the 1st defendant called from Lagos claiming that Apple that made the phone has received his phone from them, and that they were going to unlock the phone. That Blessing Samuel who is the sales person of iPhone inside the 1st defendant's shop confirmed both on chat and audio that herself and the 2nd defendant checked the phone and was locked and blacklisted and that it could not be fixed. That the CEO of the 1st defendant called him after filing this suit and confirmed that they supposed to have replaced the phone immediately he brought it back and the CEO offered him a bigger phone.

The claimant was then asked:

> **So the discussion you have with the CEO of the 1st defendant, Frank Okoye and the 2nd defendant and Blessing Samuel are the things you have to show that the phone is bad, is that so?**

From the above, it can be inferred that the claimant did not confirm as to whether the said phone was blocked and blacklisted rather he relied on what he was told by the 3rd defendant that the defendants wanted to do a permanent unlock of the phone, and he also relied on what the procurement officer of the 1st defendant, the CEO of the 1st defendant, Blessing Samuel told him, and the confirmation of the 3rd defendant that they would do a permanent unlock, and to this, I so hold.

The counsel (PW1) was asked to look at paragraph 3 of his reply statement on oath where he stated that the

defendants already admitted in paragraphs 10, 12, 13, 14 and 15 of their statement of defence that they ought to replace the phone as it was defective, and he was asked to have the statement of defence and to point out where such admission was made, and he answered that "no" he has not seen. He was also asked that when the procurement officer of the 1st defendant put a call to him from Lagos and demanded that he should supply a password of his phone for them to have access to it and to evaluate it, did he supply the password, and the PW1 answered in the negative. He was asked whether anybody can have access to the said phone without having the password, and the PW1 answered in the negative.

By the above, it can be inferred that the evidence of the claimant, the phone cannot be accessed without having the password which should have been given by the claimant.

The claimant was asked during cross-examination to look at EXH. 'A2' which are the text messages between the claimant and the 3rd defendant, and was asked whether there is anywhere his telephone number to say that it was a text message between him and the 3rd defendant, and the claimant (PW2) answered in the negative. He was asked whether there is anywhere his name appeared on the EXH. 'A2' to show that it was a text message between the claimant and the 3rd defendant, and the claimant answered in the negative.

I have painstakingly gone through EXH. 'A2' which is alleged to be the text message between the claimant and the 3rd defendant, while there is the phone number of the 3rd defendant (DW2), no phone number of the claimant, and in it the 3rd defendant said "sorry about every inconvenience, the issue will be resolved tomorrow. Thank

you for your patience", also the DW2 said in that exhibit "good evening Mr. Mike, we will need you to disable the icloud. Thank you" and that was on the 2nd day of October, 2019, and this shows that the averment in paragraph 22 of the witness statement on oath that the 3rd defendant sent a text message to the claimant promising to finalise the matter the following day.

The counsel to the claimant in his final address submitted in paragraph 1.10 that EXH. 'A2' contains conversations between the claimant and the 3rd defendant where the 3rd defendant promise to replace the claimant's phone. However, going by the said EXH. 'A2', it can be inferred that what the 3rd defendant (DW2) said was that the issue will be resolved tomorrow, and that on the 12th day of October, 2019, she said they will need the claimant to disable the icloud.

By the above, it can be inferred that the 3rd defendant (DW2) did not promised the claimant that his phone would be replaced and to this, I therefore so hold. It can also be inferred that the mention of the name of the claimant by the 3rd defendant on the whatsapp chat dated the 12th day of October, 2019, even without his phone number, is enough for this court to conclude that the claimant is involved in chat, and to this, I so hold. I refer to the same case of **Orogun V. Fidelity Bank (supra),** and also refer to section 94 (2) of Evidence Act, 2011 which provides:

> **"Evidence that a document exists to which the document the making of which is in issue purports to be a reply, together with evidence of the making and delivery to a person of such earlier document, is admissible to show the identity of the maker of the disputed document with the person whom the earlier document was delivered."**

By this, it can be inferred that the earlier document is that of the claimant while the 3rd defendant replied on the same date the 12th day of October, 2019 and the document EXH. 'A2' is admissible to show the identity of the maker of the disputed document, therefore, the argument of the counsel to the defendants is discountenanced.

The claimant in his reply to the statement of defence of the defendants averred that there are whatsapp chats between the said Blessing Samuel and the claimant, audio recordings, recorded phone calls where she told the claimant that the defendants sold him a blocked and blacklisted phone and where she also told the claimant that the new phone has arrived from Lagos. The whatsapp chat between the claimant and Blessing Samuel is the EXH. 'A1', in page 5 of the exhibit the PW2 said this:

> **"Let me tell you the truth about the phone and why I keep insisting they change it, when me and Ejike checked the imel online it showed locked and blacklisted which means it can't be unlocked."**

The counsel to the defendants asked the claimant (PW1) whether there is anywhere his phone number appeared on that exhibit to show that it was a direct conversation between the claimant and Blessing Samuel, and the PW1 explained that there is no way his phone number will appear on that message and there is no need to put any name in the message.

As I said earlier on, and having relied on section 94(2) of the Evidence Act, the EXH. 'A1' is admissible to show the identity of the maker of such document, and to this, I so hold.

The claimant was asked, having listened to all the audio discs, whether they are telephone conversations between the claimant and Blessing Samuel, 3rd defendant,

the CEO/MD of the 1st defendant and the procurement manager of the 1st defendant, and the claimant (PW1) answered that the court will determine that.

It is on the above premise that I have to painstakingly listened to the audio discs with a view to ascertain the following:

1. **The veracity of the evidence;**
2. **Their sources, whether they were truely the voices of those concerned; and**
3. **Whether the determination of the above cannot be done without the opinion of an expert as contends by the counsel to the defendants.**

Beginning with EXH. V1 which is alleged to be the phone conversation between the claimant and Blessing Samuel, and even though the name of Ejikeme was mentioned, however, no mention was made of the name Blessing Samuel to show that the conversation was with her.

Assuming the conversation was with her, it is however, not so clear and categoric as to how the phone became bad as at the time the claimant brought to the 2nd defendant, even though she said the 2nd defendant knew that it was blocked. She did not mention how it was blocked, whether it was from the manufacturer or from the 1st defendant or whether it was from the claimant because, according to the evidence of the claimant, he brought the phone to sell with a view to raise money and pay school fees and not that the phone is bad. Blessing Samuel said that the problem is Ejike and he did not check, what made Ejike to delay, and the claimant suggested as to why Ejike was delaying was because it was bad, and that Ejike did not check the phone in question. Blessing also said they know how they are doing in their company, and at the end she said that Ejike said is locked. Also, it can be inferred from

the conversation that Blessing Samuel is not the staff of the 1st defendant.

By this, it can be inferred that the evidence is not so direct in proof the fact that the phone was originally bad.

EXH. 'V2' does not seem to suggest with whom the claimant was talking, in which the female person telling the claimant that they brought back the phone but they are going to open and remove the accessories and they would use the old accessories for the claimant.

By the above conversation, it is not clear with whom the claimant was talking, and assuming it was with the 3rd defendant, she only said that the phone was brought back and they would use the old accessories by removing the accessories of the phone.

By the above, it can be inferred that still there is no categorical statement that the phone was bad from the initial time it was purchased.

EXH. 'V3' appears to be a conversation between the claimant and Blessing Samuel which leads to suggest that they would be going to the 1st defendant's shop.

EXH. 'V4' appears to be a conversation between the 3rd defendant and the claimant whereupon the claimant is reiterating his position to take the matter to whatever level, and the 3rd defendant appears to be pleading with the claimant to be patient.

EXH. 'V5' appears to be the conversation between the claimant and the 3rd defendant in which the claimant was complaining to her that Blessing called him that the accessories of the phone would be removed, and the old ones would be put. And the 3rd defendant told him that that was how they swap.

EXH. 'V6' appears to be conversation between the 3rd defendant and the claimant and the claimant was telling

and requesting that his phone be given to him as they are inconveniencing him, and he decided not to say anything again.

EXH. 'V7' appears that it was a conversation between the claimant, the procurement officer of the 1st defendant from Lagos requesting the claimant to give his password so that the phone could be reactivated, and for it to be evaluated and do the swap, and also the procurement officer was begging and pleading for the claimant to give the password.

EXH. 'V8' appears to be a conversation between the 3rd defendant and the claimant whereupon the 3rd defendant was begging the claimant to allow her to handle the issue himself.

EXH. 'V9' appears to be a conversation between the 3rd defendant and the claimant whereupon she admitted they alleged she did, and she was begging the claimant that she did not have the strength, and also begged him to accept whatever they give him, and the claimant insisted that they should give him his phone. The claimant asked her to speak to his lawyer.

EXH. 'V10' appears to be a conversation between the 3rd defendant and the claimant whereupon the 3rd defendant was begging the claimant, and it is not clear what she is begging him for, and the claimant also suggested to her that they promised to replace his phone as a bad phone was initially sold to him, and she said the phone can be replaced. The claimant restated his position that he would not provide his password.

EXH. 'V11' appears to be a conversation between the 3rd defendant and the claimant begging the claimant to settle the matter out of court and to replace his phone with new, and she also spoken with the lawyer to the claimant

for the matter to be settled out of court. The 3rd defendant was begging the claimant to the extent that she could kneel down for him, and she begged in the name of God and for the sake of his daughter, however, the claimant said that until his lawyer comes back.

EXH. 'V12' appears to be a conversation between the claimant and the 3rd defendant whereupon the 3rd defendant said that they were not going to swap the phone for him rather they were going to permanently unlocked it.

EXH. 'V13' appears to be a conversation between the MD of the 1st defendant calling the claimant on phone in which he told the claimant that the issue is on the unlocking the phone, which the claimant objected that it was not an issue of unlocking the phone. The MD explained that he felt pain himself, and he said he was sorry that the claimant has gone all these. The MD also said the phone could have been swapped which is normal, and he did not know what could have been the problem. He said whether it was because of the lack of the password, and at the end the MD offered the claimant iPhone 11 and the sum of N200,000.00 for the cost of action, and also offered an apology to the claimant as the owner of the 1st defendant. The MD blamed the 3rd defendant and every other person that is involved in the mess up in his company. At the end, the claimant promised to get back to the MD after the later made the offer.

EXH. 'V13A' appears to be a conversation between the claimant and one Kenom whereupon the claimant asked the woman to tell someone that he was waiting for that person.

Now the question that arose is whether the evidence of the PW1 can be accepted in prove of the claim?

The claimant bought the phone in question on the 6th April, 2019 and he used it for the period of five months, that is from the 6th April, 2019 to the time he brought it for resell on the 20th September, 2019, and throughout the period of five months, there has not been any complaint being made by the claimant to the defendants that the phone he bought since April, 2019 was bad. Nowhere in the evidence-in-chief did the claimant ever mention that between that period that he noticed that the phone was defective or malfunctioning, and during cross-examination the claimant admitted that from the 6th April, 2019 to 20th September, 2019 that he purchased the phone, he never brought any complaint that any of the features of the said mobile phone was defective and malfunctioned. It is also in evidence of the PW1 that he took the phone to lay complaint to the defendants two weeks before the 20th day of September, 2019, and this is contrary to the evidence that he never complaint to the defendants that the phone was faulty. This court is not obliged to pick and choose between the two versions of the evidence. See the case of **Zakirai V. Muhammad (2018) All FWLR (pt 964) p. 1933 at 1985; paras. B-D** where the Supreme Court held that, a piece of evidence is contradictory to another when it asserts or affirms the opposite of what the other asserts. In other words, the evidence contradicts evidence when it says the opposite of what the other evidence says, not on just any point, but on a material point. In the instant case, since the pieces of evidence of the PW1 contradict each other, the appropriate thing to do is to reject both.

In addition to the above, the PW1 is not even sure whether the phone is defective because during cross-examination the PW1 told the court that he could not confirm whether the phone is defective, but that he was

told by the PW2 that the phone was bad as it was blocked and blacklisted, and to him, this was confirmed by the 3rd defendant. The claimant tendered the whatsapp chats made between him and the 3rd defendant, and also between him and Blessing Samuel which are marked as EXH. 'A1' and 'A2'. I have examined the exhibits and I hold the view that the voices are identified as those of the PW2 and the DW2 simply because the names of the DW2 and the number of the claimant were identified. In EXH. 'A1' which is the printed copy of the whatsapp chat backed up by a certificate of compliance with the provisions of the Evidence Act, the PW2 said "Let me tell you the truth about the phone and why I keep insisting they change it, when me and Ejike checked the imel online, it showed locked and blacklisted which means it can't be unlock" and the PW2 in EXH. 'V1' told the claimant that Ejike did not check the phone in question, and she did not tell the claimant as to how the phone was blocked and blacklisted. Certainly there is a contradiction between the evidence in EXH. 'A1' and 'V1' of the PW2. The PW2 having supported the claimant in the two exhibits, however being the witness of the claimant and during cross-examination, she told the court that she did not say that the phone was blocked and blacklisted.

Therefore, in a situation like this, the court is bound to reject the two contradictory pieces of evidence. See the case of **Zakirai V. Muhammad (supra).** In the instant case what is material is whether the iPhone XS MAX is blocked or not.

Also, having listened to EXH. 'V1' – 'V13' and 'V13A', I have not heard where directly any of the voices of the PW2, DW2, Procurement Officer of the 1st defendant and the MD of the 1st defendant that says that the phone was blocked

and blacklisted, rather some begged the claimant to accept a replacement which he rejected and refused to concede.

In the circumstances and based upon the above analises, I hold the view that the evidence of the claimant are so contradictory to each and both are hereby rejected. The contradictions are so germen and not so minor, which go to the root of the case. See the case of **Yakubu V. Jauroyel (2014) All FWLR (pt 734) p. 6 at pp. 38-39; paras. G-A** where the Supreme Court held that it is not all contradictions in the evidence proffered and relied upon by a party in prove of its case that results in the rejection of the evidence. It is only material discrepancies which constitute substantial disparagement of the witnesses concerned, in the sense that reliance on their testimony will likely result in miscarriage of justice, that show impact negatively on the case of a party who relies on such evidence. Contradictions are fatal only if, not being minor, they go to the substance of the case, and what is material and substantial remains a question of fact. In the instant case, what is material and substantial is the determination of whether the phone in question is defective or not as at the time the claimant took the phone to the defendants for resell.

Now, having rejected the evidence of the claimant for the prove that the phone in question is blocked and blacklisted, the question is:

Can the court go ahead to examine the evidence proffered by the defendants?

The claims before the court are declaratory in nature which the claimant must succeed on the strength of the defence, if any. See the case of **Ilori V. Ishia A (2019) All FWLR (pt 1007) p. 813 at 840; para. G.** where the Supreme Court held that where a party seeks for declaratory reliefs

he must succeed on the strength of his case and not on the weakness of the defence. In the instant case, I have to go through the evidence of the defendants with a view to ascertain whether it supports the case of the claimant.

I have gone through the statement of defence of the defendants and I have not seen where the defendants or any of the defendants admitted to the fact that the claimant was sold a defective phone to him. Even in the witness statement on oath of the defendants, and during cross-examination of the DW1. In fact the DW1 was categorically asked when it was put to him by the counsel to the claimant that the DW1 sold to the claimant a defective phone and the DW1 answered in the negative. The DW2 too did not say anything in either her witness statement on oath and during cross-examination which leads to support the case of the claimant. See the case of **University of Ilorin V. Adesina (2009) All FWLR (pt 487) p. 78 at 128; paras. G-H** where the Court of Appeal, Ilorin Division held that the exception to the rule that a plaintiff must succeed on the strength of his case and not the weakness of the defence in a declaratory action occurs where the facts of the defendant's case support the plaintiff's case. The plaintiff can capitalize on the facts in the defendant's case that support his case to establish or prove his case. In the instant case, the pleads and beggings for the matter to be resolved amicably out of court by the 3rd defendant and the MD/CEO of the 1st defendant do not transcend to admission of liability that the defendants have sold to the claimant a defective phone, and therefore cannot be taken as supporting the claimant's case. See the case of **Ibalehim Ltd V. Vsa Investment & Securities Ltd (2009) All FWLR (pt 485) p. 1772 at 1784; paras. E-F** where the Court of Appeal, Lagos Division held that before a court can rely on

an admission, it must be full, clear, unambiguous and freely made by the party. The trial judge has the duty to examine the factual matter of the content of the admission without the need to call for oral evidence. In the instant case, and having listened to the EXH. 'V1' to 'V13' and 'V13A', I have not heard where any of the defendants who categorically and unequivocally admitted to the fact that the defendants sold to the claimant a defective phone, and have not heard where any of the defendants admitted that the phone in question is defective, however, the 3rd defendant and the MD/CEO of the 1st defendant pleaded and begged the claimant to accept the replacement and to settle the matter out of court, to which the claimant refused.

In the circumstances of this case, I have come to the conclusion that the claimant has not been able to prove that the defendants have sold a defective phone to him and is therefore not entitled to the relief sought.

The claim is hereby dismissed accordingly.

Hon. Judge
Signed
16 /5/2022

Appearances:

Opatola Victor Esq holding the brief of F. Baba Isah Esq for the claimant.

C.T. Odor Esq appeared for the defendants.

CC-CT: The claimant is in court.