IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA,
BEFORE HIS LORDSHIP: HON. JUSTICE MUHAMMAD S. IDRIS
COURT: 28
DATE: 4th May,2023

FCT/HC/CV/CR/411/2022

BETWEEN: -

COMMISSIONER OF POLICE---------- **COMPLAINANT**

AND

MAJEBI RAPHEAL ---------- **DEFENDANT**

JUDGMENT

On the 1st day of December, 2022, the Defendant was arraigned before the Honourable Court on two counts Charges of Conspiracy under sections (b) of the Robbery and Firearms (Special Provision) Act, CAP R11 LPN 2004 and Armed Robbery under Section 1 (2) (a) (b) of the Robbery and Firearms (Special Provision) Act, CAP R11 FLN 2004 and upon taking his plea, he pleaded not guilty.

The Prosecution opened its case and its sole witness, Inspector Nuhu Shuaibu, a Police Officer at Investigation Department, FCT Command, Abuja (PW1) was examined-in-chief and the Defendant's confessional statements made at Dutse Alhaji Police Station were tendered through him as Exhibit I while the purported statement made at FCT Command was admitted as Exhibit 1A.

PW1 while relying on the story of the nominal complainant and the Defendant's confessional statements testified that on the 20 of May, 2022, it was discovered that an armed robbery incident had occurred at the residence of one Sunday Na- Allah at DutseZhabu Village FCT, Abuja and in the course of investigation, the Defendant was arrested at the scene of the crime and he confessed to have committed the crime alone.

PW1 further testified that the Defendant's case file containing the statement of the nominal complainant, that of the Defendant and some exhibits was transferred from Dutse Alhaji Police Station to FCT Police Command. The statement of the nominal complainant and the exhibits were not tendered at the trial though listed as proof of evidence but the recorded by one Insp. Michael M. shall tendered through PW1 and both were marked as exhibit 1 and 1A

At the tendering of the three statements during trial, the Defendant raised an objection to the admissibility of the same and reserved the argument to his address stage which he shall firstly interrogate the competence and propriety before delving into the offence of Conspiracy and Armed Robbery in the main.

During cross examination, PW1 was asked, witness confirm to this Court that your investigation revealed that the Defendant acted alone" and he testified thus, "He confessed to have acted alone but the act as confirmed by the Complainant that he was not alone because the complainant saw 4 people in his room. PW1 further testified that it was the Nominal Complainants, Sunday Na- Allah that told him the Defendant did not act alone not that the investigation of PW1 revealed that the Defendant acted with others. The said Nominal complainant though listed as a witness did not testify as a witness before this Honourable Court to enable the Defendant cross-examine him.

PW1 also testified that he was not present when EXHIBIT1 was recorded by the Defendant but told the Court that the Defendant was the one that made the statements at Dutse Alhaji and FCT Command. Upon showing PW1 Exhibit 1 and Exhibit IA, it was revealed that the handwriting on the statements differed despite the testimony of PW1 that the Defendant wrote both statements. It was also the testimony of PW1 that he was not present when the alleged exhibits were retrieved -even though none of the retrieved exhibits were tendered by the prosecution before this court to establish its case against the Defendant.

At the close of the Prosecution's case the Defendant opened his case and testified as DW1. It is the case of the Defendant that on the 23rd June, 2022 he went to play ball in (Bmuko) village at Dutse Alhaji. That after playing the ball, he decided to pass a short route to his house ad on his way he met one man who called him and asked of his name, which he replied the man. The man then asked him where he was going and after he told him, the man grabbed him by the trouser and called him and armed robber and started beating him. That people then gathered and while trying to explain to them what happened, police Hilux Car drove in, they arrested him and brought him to Court.

DW1 further testified that when he reached the station, they told him to write his statement but he informed them that he cannot write, so the Inspectors wrote his statements. DW1 also denied the allegations of Conspiracy and Armed Robbery. During his cross examination, the Prosecution asked DW1, "Did Police recover anything from you" and he testified, "Nothing."

The Defendant closed his case and the matter was adjourned for parties to address this Court to enable this Court determine on the strength of evidence if the Defendant is guilty of the charges or not and having raised objection on the admissibility of exhibits 1 and 1a, Counsel to the Defendant canvassing argument on the competence and propriety of the said exhibits.

On the competence, propriety and admissibility of EXHIBIT 1, Counsel submit that the said exhibit is inadmissible and their reason for this is argued hereunder.

Section 83 (1) (a) (i) (b) of the Evidence Act, 2011 provides as follows:-

In a prosecution where direct oral evidence of a fact would be admissible, any statement made by a person in a document which seems to establish that facts shall on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied.

(a) If the maker of the statement either-

(b) Had personal knowledge of the matter's dealt with by the statement:

(c) If the maker of the statement is called as a witness in proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness of if he is outside Nigeria and it is not reasonably practicable to secure his attendance, or if all reasonable effort to find him have been made without success.

The law is that a non-maker of a document cannot speak to the contents of such document. The result is that when a document is tendered through a person who did not make the document, such document is deemed to have dumped on the Court. See- ***FAMOROTI V. FRN (2022) LPELR-57789(CA),*** it was held.

"Dumping of document simply means that the document was tended without leading oral evidence to identify and tie it to the specific aspect of a party's case. The law is that it is not the duty of a Court to conduct when the party that tenders it fail to demonstrate its purport in open Court. See ***PDP V. ALECHENU (2019) LPELR-49199(CA); APGA VS. AL-MAKURA (2016) LPELR- 47053 (SC).***" Per MUHAMMAD IBRAHIM SIRAJO, JCA (pp 59-60 paras E-A)

In the case of ***ALIYARA & ANOR V. SHIDI & ORS (2019) LPELR-55277 (CA***), it was held:

"Finally, and most importantly Exhibits P119-P143 would be said to have been dumped the Tribunal. This is because PW14 who spoke to the Exhibits was indeed neither the maker of the document, or party agents at the polling units. See ***NYESON V PETERSIDE (2016) 7 NWLR (PT. 1512) 452 AT 522-523" Per MOJEED ADEKUNLE OWOADE, JCA (Pp 15-Paras E-A)"***

A quick glance at the right-side bottom of the second page of the Defendant's confessional statement from Dutse Alhaj Station dated 20th May, 2022 and 21st May,2022 which were marked as EXHIBIT 1, it can be gleaned that the purported confessional statement dated 20th May,2022 was recorded by one Insp. Michael M and the purported confessional statement dated 21stMay,20022 was recorded by one Sgt. Ogunbi Josephine. The two statements before this Court as Exhibit 1 were recorded on behalf of the Defendant by Insp. Michael M and Sgt Ogunty Josephine, which make the makers of the statements Insp Michael M who is the maker of the statement dated 20th May,2022 was not called as a witness before this Court so that he can give evidence and be cross examined.

Counsel submit that DXHIBITS 1 was dumped on this Court by the Prosecution who tendered same through PW1 who is not the maker of the document as it has been long settled that only a maker of a document can tender same in Court, see the case of ***SANIA & ANOR V. AKWE & ORS (2019) LPELR-48756(CA)***, it was held thus:-

> *" I agree that the trial tribunal found that PWZ not being the maker of exhibits 2011) and (iv) could not tender the said documents* ***OTTI (2016) LPELR-40055(SC)****. I have already noted that exhibits 2(i) has neither name nor signature to confirm its maker. It has no probative value; omega* ***BANK (NIG) PLC V. O.B.C LTD (2005) LPELR-2636(SC); JINADU & ORS V ESUROMBI-ARO& V. ALOA & ANOR (2000) LPELR-104757(CA).****Per OTISI, J.CA (Pp 50-51 paras. E) "*

In the recent case of MOBIL *PRODUCING (**NIG) UNLIMITED V. AJANAKU & ANOR (2021) LPELR-52566(CA**),* the Court of Appeal opined thus:-

"Unarguably, a document must be tendered by its maker or else it will be declared a documentary hearsay, see ***BUHARI V. INEC (2008) 18 NWLR (PT 1120) 246, NYESOM V. PETERSIDE (2016) 7 NWLR (PL 1512) 452; IKPEAZU V OTTI (2016) 8 NWLR (PT 1513) OKEREKE V UMAHI***

(2016) 11 NMWLR (PT 1524) 438; ISIAKA V. AMOSUN (2016) 9 NWLR (PT. 1518) 47; APGA V. AL-MAKURA (2016) NWLR (PL 1505) 316." Per OGBUINYA, J.C.A (Pp. 46 paras. C) Unarguably, it is safe to submit that EXHIBIT 1 is only a mere documentary hearsay as PW1 tendered the confessional statements dated 20th May,2022 and 21ST May,2022 could not possibly vouch for the authenticity of their contents. This position was echoed in ***MAKU V. STATE (2021) LPELR-56324***(CA), where the Penultimate Court held thus;

> *"Generally speaking, a document is said to amount to a "documentary hearsay," when the person who purports to have made and/or signed the document is to the one tendering it in Court and consequently cannot vouch for the authenticity of the contents of the document as it did not come from his personal knowledge. See the House of Lords decision in* ***MYERSVS DPP (1965) AC 1001*** *on the issue of Documentary Hearsay Evidence" Per OHO, J.CA (Pp. 40-41 paras. F)* "

It has be held by legion of authorities that documentary hearsay is Inadmissible in Court. In the case of ***ECOBANK NIG PLC V. IZOMO (2021) LPELR-56060(CA);***

> *"Indeed, the mere fact that hearsay evidence was reduced into writing does not make it cease to be hearsay as at best it is mere documentary hearsay, which remains equally inadmissible as oral hearsay is inadmissible." Per GEARGEWILL, JCA (Pp 22 paras A)*

It is imperative to also state that Section 83 of the Evidence Act, 2011 permits a witness to dispense with the fulfilment of this condition if, and only if, the maker of the document is dead, or unfit by reason of his body or mental condition to attend as a witness, or if the is outside Nigeria and it is not reasonably practicable to secure ha attendance or if all reasonable efforts to find him have been made without success, PWI did not lead any evidence as to why the makers of exhibit 1 were not present in Court to speak to the veracity of the contents and be cross examined on same. The failure of

PW1 to furnish this Honourable Court with any substantial reason as provided for under section 83 of the Evidence Act, 2011 renders the said Exhibit 1 inadmissible and without probative value.

Though, it is on record before this Court that Sgt. Ogunbi Josephine was listed as a witness but the Prosecution failed to call the witness being a vital witness to its case. The question now is what is the case of the Prosecution for its failure to call vital witnesses before this Court? In ***ADAMU V. STATE (2019) LPELR-46902 (SC),*** the Supreme Court had this to say on failure to call a vital witness:

> *"…..Where a vital and material witness is not called, the failure could be fatal to the prosecution's case. See* ***ALAKE VS THE STATE (1992) LPELR- 403 (SC), SMART VS THE STATE (2016) LPELR-394****. A material or vital witness is one whose evidence may determine the case one way or another. See* ***HASSAN VS THE STATE (2016) LPELR-42554 (SC) @ 188-C SMART VS THE STATE (SUPRA); OCHIBA VS THE STATE (2011) 17 NWLR (PL 1277) 663.*** *"Per KUDIRAT MOTONMORI OLATOKUMBO KEKERE-EKUN JCS (Pp24-24 paras A-C) In* ***OLORUNMADE V. NIGERIA ARM (2022) LPELR-57424(CA),***
> *it"*
>
> *"The prosecution in every criminal case, have full discretion to call any witness they believe will help in proving the charge against the Defendant. They also have the discretion to call vital witnesses in proof of their case against theDefendant? In the of* ***CHIBA VS STATE (2011) 17 NWLE (PT. 1277) PAGE 663 AT 696 PARAS A- B****.It was held thus: A vital witness is a witness whose evidence may determine the case one way or the other and failure to call a vital witness who something significant about a matter is a vital witness" to case of* ***STATE VS. NNOLIN ANOR (1994) LPELR-3222 (SC****) it was held per Adio, 35C that: "The question is: who is a vital witness? A vital witness is a witness whose evidence*

may determine a case one way or the other. Failure to call a vital witness by the prosecution is fatal to the prosecution's case. Per MUHAMMED BRA IDRIS JCA (Pp 16-17 Paras E-D)"

Counsel respectfully urge this Honourable Court to hold that exhibit1is inadmissible as it does not wear the garment of a documentary evidence and cannot be accorded probative value Counsel place ample reliance on the case of ***GBADAMOSI V. WEMA BANK & ANOR (2021) LPELR5423(CA***), it was held thus:-

"It is trite law that the maker of a document is the proper person to tender it in evidence. If a person who did not make a document tender it, he is permitted to tender it in evidence but no probative value would be attached to such document because the person who tendered it not being the maker cannot be cross-examined on the contents of the documents. The maker of exhibit "D" was not called as a witness therefore the document lacks probative value. See the fallowing cases: ***FLASH FIXED ODDS LTD VS. OKAGBE (2001) 9 NWLR (PT 717). PAGE 146 AT 163; SURAKATU VS NIGERIA HOUSING DEVELOPMENT LIMITED (1981) 1 F.N.LR AT 131 AT 141; PAUL & ANOR VS. OWOLABI & ANOR (2020) LPELR-51449 (CA). "PER BADA, J.CA (Pp. 16-17 paras. C)***

On the competence, propriety and admissible of EXHIBIT 1A which is the purported confessional statement from FCT Command dated 23rd May,2022, Counsel urge this Court to discountenance same having not been written by the Defendant who testified before this Court that he does not know how to write and therefore could not have written the said statement. PW1 was asked during cross-examination, "But you told this Court that he was the one that made statement at Dutse Alhaj and also FCT Command is that not so?"PW1 responded, "PW1 responded, "Yes", Exhibits 1 and 1A were then shown to PW1 to confirm thehandwritings on the statements and he testified that the handwritings are not the same.

A cursory look at EXHIBIT 1 and EXHIBIT 1A, it can be gleaned that the handwriting on all the confessional statements differ. So how can it be said that the Defendant was the one that wrote all the statements, Assuming, indeed the Defendant was the one that wrote EXHIBIT 1A would that not make him the maker of the purported confessional statement and as such PW1 could not have been able to tender same as he cannot vouch for the contents of the statements and authenticity. But, that is not the case here as the Defendant could not have possibly written the statement being an illiterate and as such does not know anything about exhibits 1 and 1A.

A comparison between exhibit 1 and Exhibit 1A, it can be gleaned that in Exhibit 1 the name and signature of the police officer who recorded the statements were counter-signed by that of the Defendant at the foot of the statement but in that of Exhibit 1A it can be seen that only the statement. Even the storyline as contained in exhibit 1A does not align with that of exhibit 1. The purported confessional statement made reference to one man "Sony" and one would wonder if it is the same nominal complainant that never came to court. Certainly, the story does not add up. In ***ACHAMA VS. THE STATE (2018) LPELR 46416, OJO VS. THE STATE (2018) LPELR 44699. AHMED V STATE (2021) LPELR-56565(CA) (Pp. 21 paras A) OKUNDAYE V THE STATE (2020) LPELR-50782(CA***) the Superior Court in these cases instructively emphasized thus:-

Where an accused challenged the admissibility of a confessional statement and other documents on the ground that he did not sign them, he has alerted the Court to properly examine the documents and take a decision one way or another on the true ownership of those documents bearing in mind that it is the duty of the prosecution to always show that the accused was the maker of such documents, a bigger duty on the Court to count for some corroborative evidence beyond accepting the truth or ascribing a probative value to the confessional statements. This the Court can do by applying the test for

determining the truthfulness or otherwise of a confessional statement.

It is trite that a Court is empowered to compare the handwriting and signature n documents under the provisions of Section 101(1) of the Evidence Act. We urge theCourt so to hold.

A common virus that runs in both EXHIBIT 1 and 1A is the lack of an illiterate jurat as required by law. Section 3 of the illiterate Protection Act provides for anilliterate jurat to be contained in the statement of an illiterate and the following requirements must be fulfilled by the writer.

> *"Any person who shall write any letter or document at the request, or on behalf or in the name of illiterate person shall also write on such letter or other document, his own name as the writer thereof and his address and his so doing shall be equivalent to statement*."

That he was instructed to write such letter or document by the person to whom it purports to have been written and that the letter or document fully and correctly represents his instruction;

If the letter or document purports to be signed with the signature or mark of the illiterate person that prior to its being so signed, it was read over and explained to the illiterate person and that the signature or mark was made by such person.

" A cursory look at EXHIBIT 1 and 1A vis-à-vis the illiterate protection Act, this Court will come to the realization that EXHIBITS 1 and 1A ran afoul of the provisions of the illiterate Protection Act. The said exhibits did not comply with provisions and it is the law strict compliance is obligatory. Counsel refer the Court to decision of the Apex Court in the case of ***EZEIGWE V AWUDU (2008) LPELR- 1200(SC***), where it was held as follows:

> "*The Respondent, being an illiterate, the execution of the document was expected to comply with the provisions of*

Section 3 of the Illiterate Protection Law. The Section provides as follows: 3. Any person who shall write any letter or document his own name as the writer thereof and his address and his so doing shall be equivalent to a statement-(a) that he was instructed to write such letter or document by the person for whom it purports to have been written and that the letter or document fully and correctly represent his instruction; and (b) if the letter or document purports to be signed with the signature or mark of the illiterate person that prior to its being so signed it was read over the explained to the illiterate person and that the signature. Or mark made by such person. The position of the law is that the provisions of the said Section 3 of the Illiterate Protection Law must be strictly complied with. Thus, the effect of failure to comply inadmissible in evidence: se ***EKE V. ODOLOFIN (1961) 4 NLR 404: (1961) ALL NLR 404****. The object of the Illiterate Protection Law is to protect an illiterate person from possible fraud. Strict compliance with the law is therefore obligatory as regards the writer of the document. If therefore a document creates legal rights and the write benefits there under, those benefits are only enforceable by the writer of the document if he complies strictly with the provision of the Law: see U****.A.C OF NIGERIA LTD VS AJAYI (1958) N.N.LR 33;*** *and* ***SCOA ZARIA V. OKON (1960) 4 F.S.C 220: (1959) SCNLR 562****." Per AKINTAN, J.S.C (Pp. 23-25 paras f)*

It is also the position of the law that it is only an illiterate that can complain about a document not containing an illiterate jurat as the purpose of the jurat is to protect the illiterate and not punish him. See; ***MAIGADAJE V. SULEI & ORS (2018) LPELR-46504(CA);***

"As regards the complaint in respect of the illiterate jurat, it has to be noted that the sole essence of the illiterate protection jurat is to protect the illiterate and not to hurt him. See ***LAWAL V AKANDE (2009) 2 NWLR (PT.***

1126) 425& @429, UBN PLC V IDRIS (1999) 7 NWLR (Pt. 609) 105*. It is therefore the law that only illiterate can challenge the content of a document where he signs as an illiterate without jurat." Per ADZIRA GANA MSHELIA, JCA (Pp 22- 22 Paras D-F) "*

In this our instant case, DW1 being an illiterate has raised an objection as to the admissibility of EXHIBITS 1 and 1A documents that do not contain an illiterate Jurat. Counsel submitwith the respect that the contents of EXHIBITS 1 and 1A do not reflect the true intention of the Defendant and as such cannot be used against him in Court. We most respectfully urge this Hounorable Court to hold that EXHIBITS 1 and 1A are inadmissible in facie curiae. Assuming this Honourable Court finds that Exhibits 1 and 1A are admissible, we respectfully submit that the Defendant having denied the said statements, the issue then would go to the weight to be attached to the Exhibits. It is a settled principle of law that the retraction of the statement does not actually render it inadmissible but goes to the weight to be attached. We refer my Lord to the case of ***AMAECHI V. STATE (2021) LPELR-54571(CA):***

"On the retraction or denial of the confessional statements by the appellant, the law is settled that the mere retraction or denial of a confessional statement does not affect the admissibility nor render the statement worthless or untrue. Denial of a confessional statement merely aids the Court in determining the weight to be adduced the determine the weight to be attached to it. See ***ALAO V. STATE (2019)17 NWLR (PT. 1702) P. 524, PARAS. F-G (SC); STATE V MUSA (2020) 2 NWLR (PT. 1709) 499 SC; 9: TORAPUU V. STATE (2020) 1 NWLR (PT. 1706) 391 (SC) IMOH V STATE (2016) 17 NWLR (PT. 1540) 117 (SC) Per UCHECHUKWU ONYEMENAM, JCA (Pp 20-20 Paras B-E)"***

This Court is left with the duly to determine whether the evidence of DWI is more believable than that of the Prosecution and test the veracity of Exhibit 1 and 1A with other credible evidence. There is no ray of evidence before this Court other than the confessional statements which states that the Defendant while armed and in company of others committed the act, the said story differs from the testimony of OWI There is no direct or circumstantial evidence to corroborate the content of the confessional statement which the Defendant has also denied making See, ***MBAGHA V. COP (2020) LPELR-51466(CA):***

"On retraction of the confessional statement of the appellant, the Supreme Court put this to rest when it held in the case of ***ALAO V STATE (2019) LPELR-47856 (SC****) that the retraction of a confessional statement does not render the confession inadmissible. What the Court is expected to do is to test veracity and truthfulness of the statement in the light of other credible evidence to determine whether it is consistent with other facts proved and ascertained. The settled position of the law is that the Court can convict on a retracted confessional statement if it is satisfied of its voluntariness. See* ***AKPAN V THE STATE (2020) 8 WRN 130; STATE V ISAH (2012) 10 NWLR PT 1327, 629 and OMOLAYE V STATE (2017) LPELR-43632 (CA)," Per PATRICIA AJUMA MAHMOUD, JCA (Pp 30-31 Paras E-C)"***

Counsel urge thisHonourable Court to discountenance EXHIBITS 1 and 1A and accordingly discharge and acquit the Defendant. The Defendants Counsel filed their written address and raised two issue for determination.

ISSUE FOR DETERMINATION

For the Defendant to properly address this charge against him, he has raised two issues for determination by this Court.In view of the evidence adduced at trial and the parties before this Court, the Defendant can be solely charged and convicted for the offence of conspiracy to commit armed robbery, and if decided in the negative, can it be said that the Prosecution has

discharged the evidential burden placed on him beyond reasonable doubt?

Whether having regards to the evidence, burden and standard of proof, the prosecution has proved all the essential elements and ingredient of the offence of armed robbery by accurate, credible and compelling evidence in relation to the Defendant, beyond reasonable doubt?

The Supreme Court has admonished that in a trial for conspiracy, and where the indictment contains a substantive offence, the proper approach, is to deal with the substantive charge first and decide the former, bearing in mind the findings on the latter. This was the dictum in ***OSETOLA & ANOR V STATE (2012) LPELR-9348(SC), held:***

"First and foremost, I must state that the proper approach to an indictment containing conspiracy charge and substantive charges is to deal with the later, that is, the substantive charges first and then proceed to see how far the conspiracy count has been made out in answer to fate of the charge of conspiracy. Conspiracy is an agreement between two or more persons to do an unlawful fact Failure to prove a substantive offence does not make conviction for conspiracy inappropriate, as it is a separate and distinct offence, independent of the actual offence conspired to commit. See: ***SEGUN BALOGUN V. ATTORNEY GENERAL OGUN STATE (2002) 2 SC (PT. 11) 89, (2002) 4 SCM 23, (2002) 2 SCNJ 196. "PER OLUKAYODE AROWOOLA, JSC (PP 27-28 PARAS E-B)***

In due fidelity to the commandments of the Supreme Court, Counsel argue issue two dealing on the substantive indictment first and defer the first issue formulated on conspiracy for subsequent argumentation.

Whether having regards to the evidence, burden and standard of proof, the prosecution has proved all the essential elements and ingredients of the offence of armed robbery by accurate, credible and compelling evidence in relation to the Defendant, beyond reasonable doubt?

Counsel address the Court in sub headings in order to properly argue all the identified issues in this case. WHOM DOES THE BURDEN AND STANDARD OF PROOF IN CRIMINAL MATTERS LIE –

The law is trite that the burden of proof is on him who assert and not on him denies. Section 132 of the Evidence Act, 2011provides:-

'The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

Section 135(1) of the Evidence Act, 2011 prescribes the extent to which this burden of proof may be discharged thusly:-

"If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt."

The Prosecution is duty bound to establish the guilt of the Defendant beyond reasonable doubt. See the case of ***PETER V. C.O.P (2022) LPELR-SM(CA).*** the Court of Appeal held thus:-

"... it is apt to asset that in all criminal matters; the burden of proof is often saddled on the Prosecution to establish the guilt of the Accused person(s) beyond reasonable doubt. This was the position of the Apex Court where OGUNBIYI, JSC in the case of ***SUNDAY NJOKWU V. THE STATE (2013) LPELR-19890*** opined that: "The general principle of law is well settled in a plethora of authorities that the burden of proof in all criminal cases is upon the Prosecution to prove the accused guilty of the offence charged beyond reasonable doubt.... "per IGNATIUS IGWE AGUBE, JCA (Pp 29-29 Paras A-D)

The Prosecution in discharging this burden placed on him is allowed to prove the offence by accurate, cogent and credible evidence through any of the following ways provided for in the case of ***UMAR V. KANO STATE (2022) LPELR- 56958(CA***) as follows:-

> *"Well established is the law that, in discharging the burden of proof vested in the prosecution, the*

prosecution may employ any one or more of the following four modes to establish the commission of a crime voz: (i) By direct evidence, also know as evidence of eye witness; (ii) By confessional statement of the accused person; (iii) By circumstantial evidence, where direct evidence or confessional statements are absent and (iv) By admission by conduct of the accused person. See the cases of: (1) ***DAPARA GIRA V. THE STATE (1996) 4 SCNJ P.95 AT P.106; (2) MOSES V. THE STATE (2003) FWLR (PT.141) p.1969 at p.1986 and (3) OGOGOVIE V. THE STATE****(2016)* ***LPELR-40501 (SC****)."* *Per OYEBISI FOLAYEMI OMOLEYE, JCA (Pp 25-25 Paras A-D)*

Having established on whom the burden of proof lies, Counsel now address the substantive charge against the Defendant, which is the offence of armed robbery. The law provides for specific ingredients and elements to be proved bythe prosecution beyond reasonable doubt before the Defendant can be convicted for the offence of armed robbery, whether there is doubt, it must be resolved in favour of the Defendant who would be entitled to an acquittal.

ON THE OFFENCE OF ARMED ROBBERY

Count 2 which is the charge of Armed Robbery was brought und Section I (2) and (b) of the Robbery and Firearms (Special Provision)Act, CAP R11 LFN 2004 which provides:-

(2) If –

(a) Any offender mentioned in subsection (1) of this section is armed with any firearms or any offensive weapon or is in company with any person so armed; or

(b) at or immediately before or immediately after the time of the robbery the said offender wounds or uses any personal violence to any person, the offender shall be liable upon conviction under this Act to be sentenced to death.

" It has been decided in legion of authorizes that for the prosecution to succeed in a charge of armed robbery, it must prove the following:-

(a) that there was a robbery or series of armed robbery,

(b) that the robbery or each of the robberies was an armed robbery, and

(c) that the accused person was one of those who took part in the armed robbery these ingredients must be proved beyond reasonable doubt by the Prosecution as they are conjunctive and not disjunctive, which means they must be established together, See-***STATE V. ABDULLAHI (2021) LPER-56650(CA).***

Counsel now addressed the 3 ingredients in relation to the facts and evidence adduced before this Court. During the course of trial, the Prosecution in proof of this charge called a sole witness (PW1) and tendered the purported confessional statements of the Defendant dated 20th May,2022 and 21st May,2022 which were marked as EXHIBIT 1 and the Defendants purported confessional statement dated 23rd May,2022 which was marked as EXHIBIT 1A. Counsel argue ingredient 1 and 2 together for tardiness. During the course of trial, PW1 testified that during investigation it was discovered that there was a robbery incident at the residence of one Sunday Na-Allah in DutseZhabu Village where he claimed to have arrested the Defendant at the scene of the crime. PW1 was asked during cross- examination, "Confirm to this Court that you did not visit the scene of crime" and he testified thus, "I visited the scene of crime but it was after the crime had been committed as the suspects already ran away." A question that crops up in the mind of the Court is, how did PW1 now know there was indeed a robbery or armed robbery if he was not at the scene of crime when the incident happened? How did PW1 know that the robbery was an armed robbery? How did PWI know that the Defendant was one of those that partook in the robbery?

It is the testimony of the Prosecution before this Court that it was the Nominal Complainant that informed PW1 that he was robbed, not that the PW1 witnessed the robbery take place. The Nominal Complainant who was listed as a witness before the Court failed to appear before this Court to narrate the incident that occurred on that day which would have been direct evidence of what transpired that day instead of the hearsay story as stated by PW1. It is on record that on the 2 continuation of hearing but PW2 which is the victim is not interested and therefore applied for the case of the Prosecution to be closed.

A key question to be asked now is, what is the fate of the case of the Prosecution without the direct evidence of the victim-Sunday Na-Allah? It was held in the case of ***HASSAN V. STATE (2016) LPELR-42554(SC)***thus:-

"A vital witness is an eyewitness to the commission of a crime or/and a witness would resolve the case one way (sic) or the other. A witness who gives evidence on what is logical and true is a vital witness." Per OLABODE PHODES-VIVOUR, JSC (pp 18-18 Paras B-C)

In this recent case of ***OSHI V. STATE (2022) LPELR-58105(CA),*** it was held that the failure of the Prosecution to call a vital witness is fatal to its case:-

> "The law is that; a vital witness is that witness whose evidence is required to determine the case one way or the other. He/she matter. Failure to call such a witness is fatal to the case of prosecution. See ***LASE VS. THE STATE (2018) 3 NWLR (Pt. 1607) 502, STATE VS NNOLIM (1994) 5 NWLR (Pt. 345)394 and ONAH VS. STATE (1985) 3 NWLR (Pt. 12) 236." Per FOLASADE AYODEJI 030, JCA (pp 23-23 Paras B-D).”***

I know if no rule or law that says that a person accused of committing armed robbery cannot be convicted on the credible and unimpeached evidence of a single witness.... The conviction for the offence or armed robber of the appellant can

be sustained by LPELR-46910(SC) 24, C-E, per Peter-Odili, J.S.C; ***IKENNE V STATE (2018) LPELR-44695(SC) 16-17, F-A***, Per Nweze, J.S.C.; ***PATRICK V STATE (2018) LPELR-43862(SC)***35, D-F, Per Augie, 14J.S.C." Per State(2018) LPELR-43826(SC) 35, D-F per Augie, J.S.C." F-D)

Counsel pray this Honourable Court to resolves this issue in favour of the Defendant.

"Whether in view of the evidence adduced at the trial and the parties before this court, the Defendant can be solely charged and convicted for the offence of conspiracy to commit armed robbery, and if decided in the negative can be said that the Prosecution has discharged the evidential burden placed on him beyond reasonable doubt"

Counsel, submit that their answer to issue is in the negative. Count 1 which is the charge of conspiracy to commit armed robbery was brought under section 6(b) of the Robbery and Firearms (Special Provision) Act, CAP R11 LFN 2004 which provides:-

Any person who-

(a) conspires with any person to commit such an offence; whether or not he is present when the offence is committed or attempted to be committed shall be deemed to be guilty of the offence as a principal offender and shall be liable to be proceeded against and punished accordingly under this Act.

It is the law that for the Prosecution to succeed in proving the charge of conspiracy against the Defendant, the Prosecution must lead cogent and credible evidence in proof of the following Ingredients and elements as provided for in ***SA'IDU V. STATE (2022) LPELR-57298(CA):-***

"The essential elements or ingredients of the offence of conspiracy are enunciated in the case of ***ADELEKE VS THE STATE (2017) ALL FWLR PT. 878 P.519 @522***thus: (a) "An agreement between two or more persons to do or cause to be done some illegal acts or some acts which is not illegal by

illegal means; (b) Where the agreement is other than an agreement to commit an offence. That some act besides the agreement was done by one or more of the parties in the agreement; and, (c) Specifically, that each of the accused persons individually participated in the conspiracy. "In ***ALATISE VS THE STATE (2013)All FWLR Pt. 686 P. 552 @ 557-577***, the Court espoused that: "The essential ingredient of the offence of conspiracy lies in the bare agreement and association to do on unlawful thing, which is contrary to or forbidden by law, whether that things to be criminal or not and whether or not the accused had knowledge of its unlawfulness. Evidence of conspiracy is usually a matter of inference from surrounding facts the fact of doing things towards a common conspiracy from the fact of doing things towards a common purpose. In the instant case, where the prosecution failed to establish a conspiracy among the accused, they were offence of criminal conspiracy, the following ingredient must be proved by cogent evidence: (a) There must be consent of two or more persons. (b) There must be an agreement which is an advancement of an intention conceived in the mind of each person secretly i.e. mens rea. (c) The secret intention must have been translated into an overt act or omission or mutual consultation and agreement i.e. actus reus." See ***ADELEKE VS THE STATE (2017) All FWLR Pt. 878 P.519 @522***. "Per IBRAHIM SHATA BDLIYA, JCA (Pp 10-11 Paras A-D)

From the evidence before this Court can it be said that the essential elements as provided in the above authority have been proved beyond reasonable doubt by the Prosecution to enable this Court ground a conviction against the Defendant? We answer in the negative. During the cross-examination of PW1 he was asked, "Witness can you confirm to this Court that your investigation revealed that the Defendant acted alone and he testified, 'he confessed to have acted alone but the act as confirmed by the complainant that he was not alone because the complainant saw 4 people in his room." Counsel further asked PW1, "So it was the complainant that told you? "and he said, 'yes as it happened in his house." Upon further cross examination PW1 was asked, after the nominal complainant

told you that there were other persons involved at the scene of the crime did you make any arrest?", he responded, "Effort was made to make the arrest but the Defendant insisted that he was alone and that he has been doing alone then they could not go and arrest an innocent person."

From the testimony of PW1 it is evident that no proper investigation was carried out to show that the Defendant conspired with some other persons to commit the alleged offence of armed robbery. PW1 solely relied upon what the nominal complainant told him and not what was revealed after proper investigation was carried out the testimony of PW1 clearly amount to a hearsay and cannot be relied upon to ground a conviction against the Defendant. The nominal complainant who had eye witness of the incident was not a witness before this Court to testify that he indeed saw the Defendant and other persons commit the alleged offence. We submit that there is no straw of evidence showing that the Defendant indeed formed a common intention with other persons to commit the offence of armed robbery.

Assuming, the Prosecution can even manage to establish some ingredients of the offence of conspiracy against the Defendant, can the Defendant who was solely charged before this Court, be convicted for the offence of conspiracy? Counselrespectfully refer to the Supreme Court in the case of ***MARTINS V. STATE (2019) LPELR – 48889 (SC***) the held that one person cannot commit the offence of company decades o possible for the person to be convicted as a conspirator,

"In a nutshell the ingredients of the offence of conspiracy include the followings: (1) There must be an agreement of two or more persons (2) The persons must have plain mind to carry out an unlawfu or illegal act or a crime (3) Bare agreement to commit an offence constitutes the offence (4) An agreement to carry out a chill wrong does not constitute the offence (5) one person cannot commit the offence of conspiracy because he cannot be convicted as a conspirator (6) A conspiracy is complete if there are acts on the part of the accused person which led the trial court to the conclusion that

he and others were engaged in accomplishing a common object or objectives. See ***USMAN KAZA V THE STATE (2008) LPELR 1683 (SC)."*** Per AMIRU SANUSI, JSC (***Pp 16-17 Paras D-B)***

A quick glance at the face of the charge sheet, this Court will see that there are only two proper parties before this Court which are, Commissioner of Police as the Complainant and MajebiRapheal M 19 years as the Defendant. It is obvious that the Defendant was solely charged for the offence of conspiracy to commit armed robbery, which is unattainable and unfounded to commit armed robbery, which is unattainable and unfounded in law as it has been long settled by ocean of authorities that conspiracy is the coming together or agreement of two or more persons to commit an offence-meaning one person cannot be a conspirator. Counsel referthe Court to the case of ***DOGO V. C.O.P (2021) LPELR-52623(CA)*** it was held:-

....However the charge for conspiracy to commit the offence of Armed Robbery was not established against the Appellant. This is because conspiracy is the coming together or the agreement of two or more persons to commit an offence or carry out an unlawful act. See ***AKINLOLU V. THE STATE (2017) LPELR - 42670 (SC) and SAMINU V THE STATE (2019) LPELR-47622(SC).*** The appellant was the only person charged before the trial Court, who then did the Appellant conspire with? It cannot be properly and reasonably said that one person conspired to commit an offence. The decision of the Apex Court in the case of ***STATE V. AJAYI (2016) All FWLR (Pt. 854) 1838*** where theAccused Person was also charged for conspiracy is very instructive his this issue and it is reproduced anon; "Another interesting part of this case is that the Respondent's Co-Accused were discharged and acquitted under Count 1, the Charge of conspiracy, meanwhile Respondent was convicted thereof and sentence to 14 years. This is funny thing as the implication is that the Respondent conspired with himself, a legal impossibility which cannot stand and the Court believe as right in its findings and conclusions. "Per PETER-

ODILI, JCS. Similarly, in a contributory judgment to the above cited case, my lord, AKA'AHS, JSC stated thus: "In his Ruling on the no-case submission, the learned trial judge held that there was in prima facie case of conspiracy made against the 21nd and 3 Accused persons as to all upon them to defend themselves. Since the three Accused Persons were jointly charged for conspiracy and there was no evidence against the co-conspirators the 1 Accused should have equally been entitled to a discharge since he could not conspire with himself to commit the offence; neither was there a separate count charging hum and persons unknown with conspiracy." Per MONICA BOLNA'AN DONGBAN-MENSEM, JCA (Pp 32-33 Paras A-E)

Counsel further submit that the fact that the Defendant was solely charged for the offence of conspiracy to commit armed robbery, the case of the Prosecution is doomed to fail as one person cannot be charged and convicted for the offence of conspiracy to commit armed robbery. It is glaring that an offence of conspiracy as contained in the charge before Court is against a single Defendant and a such contradicts the extant provision of the law under which an action for conspiracy can be maintained. The court with a view to further x-ray the leg implication of the word conspiracy has held that " it is the agreement of two more persons to do an unlawful act or to do a lawful act by unlawful means."

Unless two or more persons are found to have combined there cannot conviction in the charge of conspiracy***-NWONKOW VS FRN (2003) 4NW (Pt.809)1 @ P37***. It is our humble submission that the offence of conspira cannot exist without the consent of two or more persons. Therefore, the offer of conspiracy is not perfected where there is no true or genuine agreement commit the crime between two people. As it takes two to conspire, a per cannot be convicted of conspiracy if the others are discharged and acquit which in effect implies that at least, two persons must be charge whether large or otherwise. See the of case of ***STATE OSOBA (2004)21 WRN,***

UBIERHO VS STATE (2005)20 WRN III @ AJE VS STATE (2006)29 WRN @ 75

Counsel further submit that the offence of conspiracy can only be committed if there is a meeting of two or more minds, the offence convicted as a conspirator, the meaning of which is one involved in conspiracy, therefore the offence of conspiracy for which the Defendant is charged before this court is frivolous, unfounded in law and an abuse of the process of the Court. The Supreme Court in the case of ***SULE VS THE STATE (2009)17NWLR (PT 1142)33 AT 63-64 SC PARAS*** F-E stated thusly:-

"An offence of conspiracy can be committed where persons (underline mine) have acted either by an agreement or in concert... and the case of the case of ***ONYENYE VS STATE (2012)15 NWLR (PT 1324) 586 AT 617, PARA B,*** where it was held instructively that: Common intention to commit a crime is an important ingredient of the offence of conspiracy..."

The germane question at this juncture reads, "Is It permissible within the extant laws to charge one person for conspiracy?" our answer to the above question is in the negative my Lord. Strictly speaking, one person cannot conspire in law and as such, cannot be charged alone in a charge of conspiracy. In the case of ***SULE V STATE (SUPRA***), the Supreme Court held thus;

"It takes two to conspire. A person cannot be convicted of conspiracy if the others alleged to have conspired with him are acquitted and discharged. To convict only one person for conspiracy suggests that the others were equally quilt of conspiracy though acquitted and discharged...

> *" It is on the above submission that we urge this Honourable Court to hold that he offence of conspiracy for which the Defendant is charged as Count 1 is bound to fail, and it fails and it is accordingly dismissed. We urge this Honourable Court to hold that the Prosecution has woefully failed to establish the offence of conspiracy to commit armed robbery against the Defendant. We pray is*

Honourable Court resolved this issue in favour of the Defendant. We are most grateful.

Having regards to the evidence, presumptions of law, burden of proof, standard proof and judicial authorities, we pray the Court to determine as follows: -

a. That the Prosecution has failed woefully to prove the essential ingredients and elements of the offence of conspiracy and armed robbery.

b. That Exhibits 1 and Al are inadmissible having been tendered PW1 who is not the maker and also the lack of compliance with the literate Protection Act on the provision of an iterate Jurat

c. That the Prosecution in attempt to establish the offence of armed robbery failed to call a vital witness the nominal complainant and as such as the case of the Prosecution is doomed to fall

d. That the testimony of PW1 amounts to hearsay evidence and cannot be relied upon by this Court e. That there is no direct or circumstantial evidence that points to mile fact that indeed the Defendant committed the offence charged

f. That the Defendant being a sole Defendant before the Court cannot be charged and convicted for the offence of conspiracy.

On Issue one, that is, whether the prosecution proved the commission of an armed robbery beyond reasonable doubt, the Prosecution submitted that it did and relied exclusively on Exhibits 1 and A1- the alleged confessional statements. But Exhibits 1 and 1A are piece of documentary hearsay. Whilst it is the law that an investigating Police Officer (IPO) can give evidence as to what transpired in the course of his investigation, this law does not render admissible evidence given by an IPO in respect of a document he did not author or co-author. The case of ***ANYASODOR V. STATE (2018) LPELR-43720(SC)*** relied on by the Prosecution speaks for itself. In that case, the Supreme Court was of the view that an IPO could detail fact which came to his knowledge during

investigation and that a non-maker would not qualify as hearsay. This alone is true, and not a non-maker of a document can speak to the contents of a document. PW1 did not give any evidence that he was privy to the making or present when the confessional statement was allegedly made. In the circumstances, he is a stranger to the documents. See- ***MAKU V. STATE (2021) LPELR-56324(CA),*** held:

"Generally speaking, a document is said to amount to a "documentary hearsay", when the person who purports to have made and/or signed the document is not the one tendering it in Court and consequently cannot vouch for the authenticity of the contents of the document as it did not come from his personal knowledge. See the House of Lords decision in ***MYERS VS. DPP (1965) AC 1001*** on the issue of Documentary Hearsay Evidence." Per FREDERICK OZIAKPONO OHO, JCA (Pp 40-41 Paras F-B)
Counsel note that the Prosecution has not responded to their challenge of the authenticity of the alleged confessional statements. The prosecution has not responded to the fact that Exhibits 1 and 1A contain different hand writings and were not made by the accused. It is the law that failure to respond to an essential issue is an admission. In the case of ***UGBOJA V. AKINTOYE SOWEMIMOM & ORS (2008) LPERL-3315(SC),***

"…It was held: "..It is the8 law that where a party fails or neglects to react to an issue in contention between the parties, the party in default is deemed to have conceded the point/issue to his opponent..." Per WALTER SAMUEL NKANU ONNOGHEN, JCS (Pp 15-15 Paras B-C)

The concatenation of the foregoing brief response is a revelation of the barrenness of the Prosecution's address; the Prosecution expressed unsurprising difficulty in linking up the elements of the sole charge. Counsel urge the Court to resolve these issues in favour of the Defendant, discharge and accordingly acquit.

ISSUES FOR DETERMINATION

On the other hand the prosecution filed their final written address which contain the following:-

1. Whether the prosecution has proved the offence criminal conspiracy and armed robbery under the robbery and fire arms special provision act beyond reasonable doubt

2. Whether the evidence of investigating officer on what he discovered during investigation can amount to hearsay evidence?

3. Whether an extra judicial statement of a Defendant who understands English language but cannot write requires illiterate jury

4.Whether an objection can be raised on the admissibility of an extra judicial statement after it has been admitted in evidence without objection

5. Whether a police officer can tender an extra judicial statement recorded by another police officer.

6.Whether it is mandatory that the nominal complainant to testify before prosecution can proof his case.

ANALYSIS ON ISSUE ONE

Whether the prosecution has proved the offence criminal conspiracy and armed robbery under the robbery and fire arms special provision act beyond reasonable doubt?

Prosecution Counsel concede that no evidence has been adduced to prove the offence of Criminal Conspiracy and in the absence of that Counsel pray the court to deem same as to have been abandoned and above all the law is trite that one person cannot be charged and found guilty for the offence of criminal conspiracy.

Ingredients of Armed Robbery

In the Supreme Court decision in the case of ***BABATUNDE V. STATE (2018) 17 NWLR (PT. 1649) 549, (P. 568, PARAS. E-G*** Court: S.C., the Supreme court reiterated the ingredients

of the offence of armed robbery and stated as thus- The essential ingredients of the offence of armed robbery are: (a) there was a robbery or series of robberies; (b) the robbery or each robbery was an armed robbery; and the accused person was the robber or one of those who (c) took part in the armed robbery. These three ingredients of the offence of armed robbery must co-exist and roved beyond reasonable doubt in order to secure a conviction. In this the evidence presented by the prosecution proved the charge ed robbery against the Appellant beyond reasonable doubt. ***AFOLALU V. P010) 16 NWLR (PL.1220) 584; IKARIA V. STATE (2014) 1 NWLR 639*** *referred to.*

Also in the case of ***SMART V. STATE(2016) 9 NWLR (PT. 1518) 447***, Court: S.C., Supreme Court stated that to succeed in a case of armed robbery contrary to section 1(2)(b) of the robbery and Firearms (Special Provisions) Act, 1990 the prosecution must prove the following beyond reasonable doubt:(a) that there was a robbery, and that the accused person was armed, or was (b) in company of any person so armed, and that the accused person while armed (c) participated in the robbery. In the Instant case, by the appellant's own confession he was in the company of other persons who were armed when he and his gang stormed the Co- operative Bank, Ifon, for an armed robbery operation. The ingredients of the offence of armed robbery were proved beyond reasonable doubt. (P. 481, paras, A-D).

From the decision the above ingredients can be proved in any of the following ways:-

a. By an eye witness account

b. Confessional Statement of the defendant

c. Circumstantial evidence

In the case of ***OFORDIKE V. STATE(2019) 5 NWLR (PT. 1666) 395, (P. 421,paras. E-G)*** -Court: S.C. On What prosecution must prove in a charge of armed robbery the court held - In a charge of armed robbery, the prosecution must

prove that: (a) There was robbery or series of robberies. That the robbery or each robbery was an armed (b) robbery. That the accused was one of those who took part in (c) the armed robbery. In the instant case, from the evidence of PW1 and the confessional statement of the appellant, the three ingredients of the offence of armed robbery were complete.

Therefore where the confessional statement of the defendant is positive and unequivocal the court can safely convict on it like in the instant case
[04/05, 2:17 pm] Peace: where the defendant narrated how he participated in the robbery incident. From the statement of the defendant he stated that there was a robbery, he participated in the robbery with others at large, they were in possession of knife and other weapons and they made away with the properties of the victims. He went ahead to narrate how they shared the loot and how he sold his own part of the loot.

On Whether court can convict on a confessional statement alone and effect of retraction of confessional statement, the supreme court in the case of ***SULE V. STATE(2009) 17 NWLR (PT. 1169) 3***3- the Court held that a confessional statement is part of the evidence adduced by the prosecution.

A Court can still convict on the confessional statement alone even if the accused person resiles from it. In the instant case, even if exhibit 'B', the appellant's confessional statement, was retracted by him in his evidence at the trial, it was of no moment. ***OBOSI V. STATE (1965) NMLR 119; IKEMSON W. STATE (1989) 3 NWLR (PT. 110) 455; EJINIMA V. STATE (1991) 6 NWLR (PL. 200) 627; DURUGO V. STATE (1992) 7 NWLR (PT. 255) 525; EGBOGHONOME V. STATE (1993) 7***

In the instant case no objection was raised against the admissibility of the confessional statement or a retraction made at the point of tendering it and he urge the Court to rely on it and convict the Defendant
ANALYSIS ON ISSUE TWO

WHETHER THE EVIDENCE OF INVESTIGATING OFFICER ON WHAT HE DISCOVERED DURING INVESTIGATION CAN AMOUNT TO HEARSAY EVIDENCE?.

The learned defense Counsel either not current in the position of law in this area of his argument that the evidence of the investigating police officer is a hearsay evidence as well as documents tendered by him or there is a calculated attempt to mislead this Honourable Court.

In the case of ***ANYASODOR V. STATE (2018) LPELR-43720(SC***). When the question arose as to whether the evidence of an Investigating Police Officer as regards what he saw or discovered during an investigation is hearsay, the court held as thus, "on the appellant's counsel's submission that the testimony of PW3 was hearsay, I am also at one with the lower court's conclusion that such testimony as given by the PW3 was not and cannot be described as hearsay evidence. To my mind, all that the PW3 (IPO) did was to give evidence on what he actually saw or had witnessed, or discovered in the course of his work as an investigator. His testimony on what the appellant told him was positive and direct which was narrated to him by the appellant and other witnesses he came in contact with in the course of his investigation of the case. Evidence of (IPO) is never to be tagged as hearsay. This court in a plethora of its decided authorities had adjudged such evidence as direct and positive evidence and therefore not hearsay evidence".

The authority quoted above is clear that the academic gymnasium and intellectual summersault of the learned defence Counsel holds no water and cannot achieve the purpose of misdirecting this Honourable Court and he urge the Court to reject such submission in its entity and uphold his submission that the evidence of the investigation police officer before this Court cannot amount to hearsay .

The authority cited above is a Supreme Court decision and I need not belabor, on several other settled decisions of our Appellant Courts on this area of law.

ISSUE THREE WHETHER AN EXTAR JUDICIAL STATEMENT OF A DEFENDANT WHO UNDERSTANDS ENGLISH LANGUAGE BUT CAN NOT WRITE REQUIRES ILLETERATE JURAT?.

It is in evidence that the Defendant understands English language and same was admitted by the learned defence Counsel in paragraph 2.6 of the defendant's final written address where he stated that the defendant understands English language minimally for the purpose of communication.

What the law requires for the purposes of writing a statement is a person who understands English Language even pigin English minimally for the purpose of communication and not a professor of English language who can read and write. Therefore a person who understands English language does not require an interpreter for the purposing of making statement.

The learned defence Counsel elucidated a strange principle of law when he stated that the statement does not contain an illiterate jurat. Most respectfully to my learned friend our criminal law does not understandmeaning of illiterate jurat. Illiterate jurat is a principle of law only applicable to civil law and not in criminal law and such should not be illicitly imported to contaminate the follow of the clean water of criminal justice.

In the case of ***DAJO V. STATE(2019) 2 NWLR (PT. 1656) 281***, Court: SC, On Meanings of JURAT and illiterate JURAT- The court held that JURAT is a latin word which means "to swear". An illiterate JURAT is a certification added to an affidavit or deposition by a witness stating when and before what authority the deposition or affidavit was made and that the person affected by such deposition or affidavit, though an illiterate has understood the meaning of the contents of such deposition. It is usually associated with civil cases. In the instant case, a close perusal of the signature of the interpreter and that of the recorder in the STATEMENT of the appellant tendered as exhibit A before the trial court showed that the person who recorded exhibit A was also the person who

interpreted it. The STATEMENT was admissible in evidence even without insertion of illiterate JURAT. (P. 299, paras. D-F).

The above decision is to the effect that illiterate jurat is unknown to our criminal law and we urge the court to so hold and align with the Supreme Court on this issue. What our criminal law recognizes is the use of an interpreter when the defendant is an illiterate.

The Supreme Court again in the case of ***ADELANI V. STATE(2018) 5 NWLR (PT. 1611) 18,*** Court: S.C.- On When CONFESSIONAL STATEMENT recorded through an INTERPRETER will be inadmissible-

In a criminal case a CONFESSIONAL STATEMENT recorded through an INTERPRETER will be treated as inadmissible if the officer to whom it was made was not called as a witness. It is inadmissible for non- compliance with the law. But in a civil case formal proof of such a document/STATEMENT can be waived. In the instant case, Exhibit N (the appellant's CONFESSIONAL STATEMENT) was not properly tendered and admitted in evidence.

From the above decision it is only when the defendants is an illiterate that an interpreter is required but in the instant case the defendant understands English Language and the statement was properly admitted through the investigating Police Officer who recorded the statement on behalf of the Defendant. Therefore such statement does not require an interpreter or an illiterate jurat and we urge the court to so hold.

It is the position of the prosecution that the statement of the Defendant did not require an interpreter. Even statement made in Pigin English does not require any interpretation. The Supreme Court led strong voice on this issue in the case of ***OLANIPEKUN V. STATE(2016): S.C.-*** On Whether extra-judicial statement recorded in Pidgin English requires translation -When they held that it is erroneous for anyone to assume that people who communicate in pidgin English do not understand proper or Queen's English especially in Nigeria. The use of Pidgin English allows for free expression without minding

the grammar which is usually employed in the proper English. Consequently, a statement recorded in Pidgin English does not require translationinto proper English and any statement made in Pidgin English can be recorded in proper English. Pidgin English is English language whether spoken or written. A distinction between Pidgin English and English language is that of half a dozen and six. In the instant case, the appellant's statement, exhibit "D", could not be treated as secondary evidence but was treated as primary evidence.

See also the instructive decision of the supreme court on the same issue in the case of ***JOHN V. STATE (2017) 16 NWLR (PT. 1591) 304,. (PP. 335, PARAS. C-E; 348, PARAS. G-H) COURT: S.C.*** wherein the court held that A STATEMENT made to a POLICE OFFICER by an accused person in the course of investigation does not fall within the protection under the Illiterates Protection Law, as such STATEMENT does not involve the civil rights and/or obligations of either the accused person or the POLICE OFFICER. One of the statutory duties of a POLICE OFFICER is to investigate crimes. A STATEMENT obtained from a person accused of a crime or witnesses thereto cannot be equated with a document that confers an interest in the writer. The STATEMENT so obtained becomes part of the evidence for the prosecution which, in any event, has the onerous duty of proving its case beyond reasonable doubt. In the instant case, the Illiterates Protection Law did not apply to exhibit 1 RECORDED by PW11 in the course of the investigation of the case against the Appellant.

See also the most recent decision of the supreme court on the above issue in the case of ***ENEBELI V. STATE(2022) 17 NWLR (PT. 1860) 487***DATE: FRIDAY, 4 JUNE, 2021COURT: S.C-On Whetherprovisions of the Illiterate Protection Act/Law is applicable in criminal matters-the court held that A STATEMENT made to a POLICE OFFICER by an accused person in the course of investigation does not fall within the protection under the Illiterate Protection Law, as such STATEMENT does not involve the civil rights and/or obligations of either the accused person or the POLICE OFFICER. A STATEMENT obtained from a person

accused of a crime or witnesses thereto is not equated with a document that confers an interest in the writer. The STATEMENT SO obtained forms part of the evidence of the prosecutor which has the burden of proving its case beyond reasonable doubt. To put it straight, the Illiterates Protection Law did not apply to the confessional STATEMENT of the appellant RECORDED in the course of investigation. Where an accused is an illiterate and his STATEMENT was RECORDED in English language by a POLICE OFFICER, the courts have always accepted such STATEMENTS without the need for an illiterate jurat.

ANALYSIS ON ISSUE FOUR

Whether an objection can be raised on the admissibility of an extra judicial statement after it has been admitted in evidence without objection?

The law is trite that the only time to raise an objection to a confessional statement is at the point of it being tendered in evidence and not when it has been admitted. In the case ***OGUNO V. STATE (2013) 15 NWLR (PL. 1376) 1, (P. 23, PARA. H)*** Court: S.C., On when accused person to challenge voluntariness of his EXTRA-JUDICIAL STATEMENT - An accused person who denies the voluntariness of his EXTRA-JUDICIAL STATEMENT made to the Police should object to the STATEMENT when the prosecution seeks to tender it in evidence.

In the Supreme Court decision in the case of ***OGHENEOVU V. F.R.N. (2019) 13 NWLR (PT. 1689) 235,*** Court: S.C. On when to object to admission of extra -judicial statement - The Court held that the appropriate time to object to the admission of extra-judicial statement is at the time it was tendered in evidence at the trial court. In this case, exhibit A was made voluntarily and was never retracted for whatever reason. ***SULE V. STATE (2009) 17 NWLR (PT. 1169) 33: ANAGBADO V. FARUK (2019) 1 NWLR (PT.1653) 292 REFERRED TO.] (P. 255, PARAS. E-F).***

Prosecution Counsel submit that it is too late in the day to cry by the Defendant's team and asking the Court at this stage to hold that the statement was retracted will be like asking the court to exercise the miraculous power to resurrect the dead like what our Lord Jesus did in the tomb of Lazarus. And we know it as in law and fact that this court has only judicial power and not miraculous power.

Counsel urge the court not to attach any legal or probative value to the argument of the learned defense counsel and to warn that this is a criminal matter and principles used by my learned senior before election tribunals where documents are admitted and objections raised during address if imported into criminal jurisprudence will undermine the sacred stream of our criminal law,

The Court of Appeal has also followed the above principles in the case of ***ACHUKU V. STATE(2015) 6 NWLR (PT. 1456) 425***, Court: CA, On When to object to voluntariness of EXTRA-JUDICIAL STATEMENT The proper time to attack the voluntariness of an EXTRA- JUDICIAL confessional STATEMENT is at the point of tendering it, not after its admission into the province of the prosecution's (Respondent's) case. (Pp. 453,-454, paras. H-A).

Counsel urge the court to accept their submission as the correct position of our laws and reject the argument of the defence as misleading and not interdem with the dynamic and kaleidoscopic nature of our criminal jurisprudence. The document was properly admitted by the Court and Counsel urge the Court to rely on it during judgement.

ANALYSIS ISSUE FIVE WHETHER A POLICE OFFICER CAN TENDER AN EXTRA JUDICIAL STATEMENT RECORDED BY ANOTHER POLICE OFFICER?

Provided that a statement was made in English language were no interpreter is required, any police officer who is part of the investigation and have the knowledge of the content of the statement can tender it in evidence.

This is the position of the Court of Appeal Court in the case of ***AWOSIKA V. STATE (2010) 9 NWLR (PT. 1198) 49, (P. 76, PARA. G) C.A.*** wherein On Whether a POLICE OFFICER can TENDER documents that form official record of another Police Officer - The Court held that one POLICE OFFICER can properly TENDER documents that forms the official records of ANOTHER POLICE OFFICER made in the course of his employment.

It is in evidence that the divisional IPO transferred the suspect with the case file to the office of PW1 who then produced the suspect and the documents forming part of his official records before the court. The above position was better put by the Supreme Court in the case of ***EKPO V. STATE(2018) 12 NWLR (PT. 1634) (P. 418, PARAS. C- D), COURT: S.C.-*** On Admissibility of confessional STATEMENT tendered by POLICE OFFICER other than the OFFICER who RECORDED same - By virtue of section 83(2)(a) of the Evidence Act, 2011, the court may at any stage of the proceedings, if having regard to all circumstances of the case, it is satisfied that undue delay or expense would otherwise be caused admit a STATEMENT in evidence notwithstanding that the maker of the STATEMENT is available but is not called as a witness. In the instant case, exhibit P7, was a STATEMENT made to the POLICE and PW3 through whom the STATEMENT was tendered is a POLICE OFFICER. It is therefore presumed that he had knowledge of the document that was tendered through him.

From the above position of the supreme court it has laid to rest the misplaced position of the learned defense counsel that it must be the police officer who recorded the statement can tender it in evidence.
[04/05, 2:42 pm] Peace: Also in the case of ***SANMI V. STATE(2019) 13 NWLR (PT. 1690) 551, (P. 582, PARAS. C-E)***

Court: S.C.-On Whether Investigating POLICE OFFICER who initially investigated crime must be called as a witness in criminal proceeding -The Supreme court held that the Nigerian Police is an institution where any of its officers can takeover

investigation of a case from another officer and indeed produce documents that were executed by the previous officers and tender them in court for the purpose of proving the prosecution's case. Thus, in this case, the fact that the initial Police Investigating officer was not called as a witness was not fatal to the prosecution's case. We urge the Court to place reliance on the above authority and hold in our favour that failure to call the initial IPO is not fatal to the case of the prosecution

I have reproduced the position of both the prosecution and the defence in this judgment. However, from the evidence of PW1 essentially created a serious doubt in the minds of this Court particularly on the allegedconfessional statement admitted by this Court. As exhibit 1 and 1 A respectively the evidence Act is very clear in that circumstances on the issue of tendering a document in evidence not by a maker. Ours is accusatorial criminal system of justice as provided by the constitution of the Federal Republic of Nigeria as amended an accused is presumed innocent until the contrary is proof. Although the alleged confessional statement is admitted in evidence going by section 27, 28 and 29 of the Evidence Act. Nevertheless, I am of the view that in the spirit of justice and fairness same requires corroboration I have found nothing in the exhibit 1 and 1A respectively. The fundamental element which form the most requirements of establishing a crime committed by the Defendants have not been established as can be seen above.Those key elements are necessary to establish the alleged offence of armed robbery without wasting the precious time of the Court. Although writtenaddress is only to aid the Court. However, the prosecution has also agreed with the defence that the charge of conspiracy cannot be sustain in law. The burden of proof as provided have not been established by the prosecution. i.e section 35 of the Evidence Act. It is better to release 10 criminals than to convict one innocent person. I would also like to place in this judgment apart from the alleged confessional statement nothing was tendered in evidence in order for the charge to be sustain. It is the law that any doubt created in the mind of the Court that doubt shall be resolved in

favour of the Defendant. I have totally agreed with the Defendant's position especially on the law cited by the same I so much relied on same and came to the conclusion that the prosecution has failed to discharge its burden in establishing the guilt of the Defendant in this case. The line of augment on the issue that the Defendant did not raise any objection regarding the admissibility of the confessional statement in evidence that is not the case the defence raise an objection and choose to address the Court on that which they subsequently does that. Although section 75 of the Evidence Act now section 123 of the Evidence Act provides that what is admitted need no further proof the provision to the section gives trial Court the discretion in relevant cases to require the fact admitted to be proof. Since in law admission parse do not constitute conclusion of evidence of the matter admitted, the Court in considering the worth of such admission must take into account the circumstances under which they are made and the weight to be attached therein see ***NAVINDEX TRUST LTD VS NCCMB LTD (2001) FWLR (pt 49) 1546.***

I would safely conclude in this judgment that the entire evidence given by the lone witness who acted as PW1 has not established the ingredient of the offence of robbery equally on the evidence raised by the prosecution i.e confessional statement exhibit 1 x 1A respectively made this Court not to rely on same because of the lacunas and other consideration as required by section 83 of the Evidence Act with all these issue those lacunas must be resolve in favour of the defence. Consequently, the Defendant in this case is hereby discharge an acquitted on the ground that the prosecution fail to proof the essential element of the offence and more importantly lack of material evidence made this Court

to so hold.

HON. JUSTICE M.S IDRIS
(Presiding Judge)

Appearance

Defendant in Court
Prosecution :- Absent
T.P Tochukwu:- For the Defendant.
Court:- Judgment read in open Court and also recorded that the defence Counsel handled their matter probono.