

**THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION**

HOLDEN AT HIGH COURT MAITAMA –ABUJA

BEFORE: HIS LORDSHIP HON. JUSTICE S.U. BATURE

COURT CLERKS: JAMILA OMEKE & ORS

COURT NUMBER: HIGH COURT NO. 23

CASE NUMBER: SUIT NO. FCT/HC/CV/326/2023

MOTION NUMBER: FCT/HC/M/14467/2023

DATE: 14THMARCH, 2024

BETWEEN:

COMMISSIONER OF POLICE.....APPLICANT/RESPONDENT

AND

- 1. DAVID SOLOMON**
- 2. JANET F. ADENIYI**



APPLICANTS

AND

- 1. SENIOR MAGISTRATE GRADE II MR.
TARIBO Z. JIM OF MAGISTRATE COURT OF THE FCT, BWARI**
- 2. COMMISSIONER OF POLICE, FCT COMMAND**



RESPONDENTS

Appearance:

A.A. OkoribidoEsq with RidwanBabatundeEsq for the Applicants

ChinasaUnaegbunamEsq with AkinolaOladimejiEsq for the 2nd Respondent

ChijiokeOkekeEsq watching brief for the nominal claimant.

JUDGMENT

This matter was instituted via an Originating Summons with Motion No. M/14467/2023 dated 23rd November 2023 and filed on the same day, wherein Counsel to the Applicants raised the following questions;

- a. "Whether, having regard to the provisions of sections 6(2), 7(1)(b), 17 and 97 of the criminal procedure code, LFN 2004 and sections 271 and 273 of the Penal Code, the 1st Defendant (Senior Magistrate Grade II, Mr. Taribo Z. Jim of Magistrate Court of the FCT, Bwari Division in Charge No: CR/91/2022: between COMMISSIONER OF POLICE V DAVID SOLOMON AND ANOR.) has the requisite jurisdiction to entertain and adjudicate the offences contained in the purported First Information Report dated 23rd November 2022, that is offences of Conspiracy and Kidnapping?"***
- b. Whether the Ruling delivered on the 3rd day of October, 2023 in the absence of the Applicants and the entire proceedings of the trial Court (Senior Magistrate Grade II, Mr. Taribo Z. Jim of Magistrate Court of the FCT, Bwari Division in Charge No" CR/91/2022: between COMMISSIONER OF POLICE V DAVID SOLOMON AND ANOR.) complied with the principle of fair hearing under Section 36 of the 1999 Constitution (as amended) and section 266 of the Administration of Criminal Justice Act, 2015?"***

The applicants pray this Honourable Court for the following reliefs;

- 1. "AN ORDER OF CERTIORARI quashing the Ruling of the Senior Magistrate Grade II, Mr. Taribo Z. Jim of Magistrate Court of the FCT, Bwari Division in charge No: CR/91/2022: between Commissioner of Police V David Solomon and Anor. Delivered on 3rd October, 2023.***
- 2. AN ORDER of this Honourable Court, quashing the First Information Report (FIR) dated 23rd November 2022 in charge No: CR/91/2022: between Commissioner of Police V David Solomon and Anor. Pending before the Senior Magistrate Grade II, Mr. Taribo Z. Jim of Magistrate Court of the FCT, Bwari Division for lack of jurisdiction.***

- 3. AN ORDER of this Honourable Court quashing the Ruling delivered on the 3^d day of October 2023 and the entire proceedings of the Senior Magistrate Grade II, Mr. Taribo Z. Jim of Magistrate Court of the FCT, Bwari Division in charge no: CR/91/2022 between Commissioner of Police V. David Solomon and Anor for breach of the Applicants right to fair hearing.**
- 4. A DECLARATION that the Senior Magistrate Grade II, Mr. Taribo Z. Jim of Magistrate Court of the FCT, Bwari Division lacks the requisite Jurisdiction to try and determine the offences contained in the First Information Report (FIR) dated 23^d November 2022, (that is the offences of Criminal Conspiracy and Kidnapping).**
- 5. AND FOR SUCH ORDER AND FURTHER ORDER(S) this Honourable Court may deem fit to make in the circumstance."**

Filed in support is a 6-paragraph Affidavit deposed to by one Afolabi-Ajayi Omowonuola, the litigation Secretary in the law firm of Vantage Attorneys, Counsel to the applicants, annexures attached therewith and a written address in support dated 23rd November, 2023, and a 4-paragraph Affidavit of non-multiplicity of action.

Prior to this, a Motion Exparte was filed with Motion No. M/14467/2023 seeking leave of this honourable court to grant leave to the Applicants file their application for Judicial Review which leave shall in turn serve as a Stay of Proceedings in the trial at the lower court, dated 18th October 2023 and filed on the same day, supported by a statement made pursuant to Order 44 rule 3 of the High Court of the Federal Capital Territory, a 4-paragraph verifying affidavit and a written address in support equally dated 18th October, 2023. The application was granted.

In the said Written Address of the applicants, the two questions raised in their originating summons were argued. In arguing the first issue which states thus;

a. "Whether, having regard to the provisions of sections 6(2), 7(1)(b), 17 and 97 of the criminal procedure code, LFN 2004 and sections 271 and 273 of the Penal Code, the 1st Defendant (Senior Magistrate Grade II, Mr. Taribo Z. Jim of Magistrate Court of the FCT, Bwari Division in Charge No: CR/91/2022: between COMMISSIONER OF POLICE V DAVID SOLOMON AND ANOR.) has the requisite jurisdiction to entertain and adjudicate the offences contained in the purported First Information Report dated 23rd November 2022, that is offences of Conspiracy and Kidnapping?"

Counsel to the applicants began by stating, that it is trite that Jurisdiction is the legal authority that entitles a Court to enter into adjudication in a matter before it. He stated that a court is said to have jurisdiction in a particular matter when that matter can be initiated before it. Reliance was placed on the cases of ***IJIFA V STATE (2019) 16 NWLR (PT. 1697) 45 CA; ADAMU V A.G ., BORNO STATE (1996) 8 NWLR (PT. 465) 203; ESUKU V LEKO (1994) 4 NWLR (PT. 340) 625; MADUKOLU & ORS V NKEMDILIM (1962) LPELR- 24023 (SC).***

In another submission, counsel stated that the persons alleged to have been kidnapped by the Applicants were the children of the 2nd Applicant and siblings of the 1st Applicant. He stated that the nominal complainant is the ex- husband of the 2nd Applicant and the father of the children alleged to have been kidnapped. Counsel submitted that the issue of custody was the foundation of the kidnap alleged in the First Information Report (Exhibit A). He stated that in the instant case, the Applicants were standing trial before the 1st respondent, charged with the offences of criminal conspiracy and kidnapping. He further stated that the Senior Magistrate Court Grade II before whom the matter was instituted, lacks the jurisdiction to try the aforementioned offences. Counsel then reproduced the provisions of ***sections 271 and 273 of the Penal Code, sections 6(2), 7(1)(b), and 17 of the Criminal Procedure Code, (CPC) LFN 2004, Chapter VII, Item 97, Appendix A of the CPC and the case of ENUKORA V F.R.N (2018) 6 NWLR (PT. 1615) 355***

In a further submission, counsel stated that in the administration of criminal justice, the determination of jurisdiction must be in light of the enabling law setting out the jurisdiction of the court with the charge against the accused. He stated that in order to have jurisdiction, the court must be satisfied that the offence or crime is directly covered by the jurisdiction conferred on the court in the enabling law and that where the offence is outside the ambit of the enabling law, the court cannot exercise jurisdiction. Reliance was placed on the cases of ***IKUFORJI V FRN (2021) 6 NWLR (PT.1772) 249 CA; BOLAKALE V STATE 92006) 1 NWLR (PT. 962) 507.***

Consequently, counsel submitted that the continued trial of the applicants before the 1st respondent for offences which the 1st respondent lacked jurisdiction to entertain was an aberration and abuse of court process, an infraction to the applicants' right to fair hearing and liberty and has placed the applicants in fear and hopelessness as to how to enforce their rights.

In his final submission on the issue, counsel stated that the 1st respondent has no jurisdiction to try the offences of conspiracy and kidnaping pursuant to the criminal procedure code and penal code and that the continued trial of the applicants without jurisdiction is a denial of the principle of fair hearing as enunciated in section 36 of the 1999 constitution (2011 as amended).

In arguing the second issue which states thus;

b. "Whether the Ruling delivered on the 3rd day of October, 2023 in the absence of the Applicants and the entire proceedings of the trial Court (Senior Magistrate Grade II, Mr. Taribo Z. Jim of Magistrate Court of the FCT, Bwari Division in Charge No" CR/91/2022: between COMMISSIONER OF POLICE V DAVID SOLOMON AND ANOR.) complied with the principle of fair hearing under Section 36 of the 1999 Constitution (as amended) and section 36 of the 1999 Constitution (as amended) and section 266 of the Administration of Criminal Justice Act, 2015?"

Counsel began by stating that it is trite law that an accused person must be present in court at all times during his trial as an accused person cannot be tried for an offence in his absence. Reliance was placed on ***section 266 and 135 of the Administration of Criminal Justice Act, 2015.***

He stated that the trial of the applicants started on the 23rd of November, 2022 when only the 1st Applicant was arraigned and the trial was substantially conducted in the absence of the 2nd applicant. He further stated that the offences the applicants are being tried for exceeds six months imprisonment and mentioned sections ***271 and 273 of the Penal Code.***

Moreso, counsel stated that the 2nd applicant did not apply to the 1st respondent to dispense with her presence during her trial as provided in ***section 135(1) of the ACJA 2015,*** and that for these reasons, the 1st respondent cannot try the 2nd applicant in her absence. Counsel then submitted that section ***135(1)(a) of the ACJA, 2015*** is not applicable to the 2nd Applicant, hence her personal attendance at the trial cannot be dispensed with, therefore making the entire proceedings of the 1st respondent a nullity and amounts to a complete denial of the principle of fair hearing. Reference was made to the decision of the court in the case of ***STATE V LAWAL (2013) 7 NWLR (PT. 1354) 574; SECTION 272 OF THE 1999 CONSTITUTION (2011 AS AMENDED).***

Consequently, counsel stated that the applicants filed an application dated 28th August 2023 challenging the jurisdiction of the 1st respondent, which application was argued on the 22nd day of September 2023 and a ruling was delivered on the 3rd of October, 2023 in the absence of the applicants thereby amounting to a denial of the applicants right to fair hearing. The case of ***STATE V LAWAL (SUPRA)*** was further relied upon.

In his final submission, counsel stated that the 1st respondent upon discovering that the applicants were absent on the day the ruling was to be passed, ought to have adjourned the ruling to a date when the applicants will be in court and that for this reason, the ruling of the 1st respondent in the absence of the applicants has rendered the proceedings a nullity and

amounts to a breach of section 36(1) of the 1999 constitution of Nigeria (2011 as amended).

In opposing the applicants' application for judicial review, the 2nd respondent filed a 2-paragraph counter affidavit dated 12th December, 2023, deposed to by one Hallel- TobielNweze, a Legal practitioner in the law firm of Streamsowers&kohn, counsel to the respondents, which was supported by a written address also dated 12th December 2023.

In the said written address, counsel to the respondent formulated a sole issue for determination thus;

"Whether a case has been made out by the applicants entitling them to the reliefs sought from this Court?"

Counsel began by stating that the Senior Magistrate Court Grade II (lower court) has the jurisdiction to try the offences of criminal conspiracy and kidnapping pursuant to the FIR filed on the 23rd of November, 2023. He stated that the applicants have mistakenly argued that the lower court has no jurisdiction in those matters as contained in sections **97 and 271 of the Penal Code** which was made on the erroneous assumption that the punishment for the said offences exceed the jurisdiction of the lower court, which according to the applicants is ten years imprisonment upon conviction. He stated that the provisions of the Criminal Procedure Code relied upon by the applicants has been repealed by the Administration of Criminal Justice Act 2015 by virtue of **section 493 of the ACJA 2015**. Reference was also made to the case of **UBOH V FRN (2019) LPELR-48739 (CA)**. He further stated that the ACJA is an applicable law to the proceedings commenced at Magistrate Courts and that its provisions are binding on all federal courts including the FCT. Reference was made to section **2(1) and 494 of the ACJA 2015**. Counsel then stated that when an Act is repealed it is taken as though it never existed except actions which were commenced, executed and concluded at the time the Act was in existence. Reliance was placed on the cases of **SURTEES V ELLISON 9 B & C 750; KAY V GOODWIN (1830) 6 BINGS 576; OLAFISOYE V FRN (2004) LPELR-2553 (SC); OGHENEVO & ANOR V GOVERNOR OF DELTA STATE & ANOR (2022) LPELR-58062(SC)**.

In a further submission counsel stated that having established that the provisions of the CPC are no longer applicable to criminal proceedings in the FCT by virtue of the ACJA 2015, a perusal of the Penal Code shows nothing to support the applicants' position that the magistrate court has no jurisdiction to entertain the offences of Criminal conspiracy and kidnapping. Counsel stated that even if the CPC were still extant, the argument of the applicants fail even on its own terms as the said item 97, Chapter VII, Appendix A of the CPC reveals that even a lesser Magistrate, i.e Magistrate Grade I has the jurisdiction to entertain the said offences. Counsel then reproduced the said provision in support of his argument. Reference was consequently made to the case of **SKYE BANK V IWU (2017) LPELR-42595 (SC); KOLAWOLE V ALBERTO (1989) 1 NWLR (PT. 98) 382.**

In another submission, counsel stated that it is without doubt that the substantive offence of kidnapping for which the applicants are being charged is neither punishable with death nor life imprisonment, because by the provision of **section 273 of the penal code**, a court may upon conviction sentence a person to any term of imprisonment which may extend to 10 years. He stated that the applicants have fallen into grave error in their arguments and that it is an attempt to mislead the court. Reliance was placed on the case of **YAKAJE V HAIRE & ORS (2002) LPELR-7124 (CA).**

Counsel to the respondents after quoting section 273 of the Penal Code Act stated that the offence of kidnapping shall be punished with imprisonment with a term which may extend to ten years. He stated that this does not make a mandatory sentence of 10 years as the applicants want this Honourable Court to believe, but rather the court is given discretion to determine the appropriate sentencing upon conviction for the offence. Reliance was placed on the case of **UZOMA V C.O.P (2021) LPELR-55919(CA)**

In response to the argument of the applicants regarding the application of section 17 of the CPC that a magistrate of the second grade may only impose a term of imprisonment not exceeding eighteen months, counsel said that the said section does not apply to the 1st Respondent who is a Senior Magistrate of Grade II. On the jurisdiction of the Magistrate court,

counsel listed the jurisdiction of Magistrate courts as contained in the Magistrate Court (increase of Jurisdiction of Magistrates) Order, 2014; section 257 of the CPC; **ADEBIYI V ADEBIYI & ANOR (2018) LPELR-45964 (CA).**

On the issue of Fair hearing being the second issue raised by the applicants in their written address, counsel submitted that after perusing the record of proceedings, depositions of the affidavit in support of the motion, nothing was found regarding when the motion was heard or particulars of the date the matter came up for argument. He stated that the law is that address of counsel no matter how brilliant cannot take the place of evidence. Reliance was placed on the case of **ANAGADI V PDP & ORS (2018) LPELR-44375 (SC); ADUA V ESSIEN (2010) 14 NWLR (PT. 1213) 141 AT 167; ATAMAH V EBOSELE (2010) ALL FWLR (PT. 1925).**

He stated that the failure of the applicants to place material facts and necessary documents to enable this honourable Court to make a declaration as to whether their rights were breached by not being present on the date of the ruling. Reliance was placed on the case of **MAJOR-GENERAL ZAMANI LEKWOT (RTD) AMP & ORS V JUDICIAL TRIBUNAL ON CIVIL AND COMMUNAL DISTURBANCES IN KADUNA STATE (1997) 8 NWLR PART 515 PAGE 22 AT 35 PARA E-G; HADEJIA V LADAN & ORS (2018) LPELR-45638(CA); IKENTA BEST LTD V A.G RIVERS STATE (2008) 6 NWLR (PT. 1084) SC 612 AT PARA 649; GALADIMA V STATE (2012) 18 NWLR (1333) SC 610; OBASI BROS. MERCHANT COY LTD V. MERCHANT BANKING AFRICA SECURITY LTD (2005) 2 SC (PT I); MU;AZU V APC (2023) 16 NWLR (PT. 1909); DANGOTE C C.S.C PLATEAU STATE (2001) 9 NWLR (PT. 717) 132; INDABAWA & ORS V INDABAWA (2019) LPELR-48095 (CA).**

In another submission, counsel stated that in the unlikely event that the applicants were not informed of the date for the ruling, it however does not amount to a miscarriage of justice. Reliance was placed on the case of **FORTIS MICROFINANCE BANK V AMAEFULA & ORS (2021) LPELR-52780.**

Moreso, counsel stated that the applicants' contention that the 2nd Applicant was being jointly tried before the 1st respondent is not borne from the record of the lower court. He stated that from the face of the FIR attached to the applicants' affidavit, it is clear that the FIR was only issued to the 1st applicant as the 2nd applicant was at large at the time. He stated that a defendant who is alleged to have committed an offence may be tried and convicted in the absence of other co-accused who are at large. Reliance was then placed on the case of **AJUDUA V FRN (2018) LPELR-43923 (CA)**.

Counsel further submitted that waiting until the 2nd Applicant would be apprehended to commence the prosecution of the charge would amount to unnecessary delay and occasion a miscarriage of justice as the said 2nd Applicant was aware of the pendency of the proceedings but elected not to appear in order to frustrate the proceedings. He submitted further that a party who has been given the opportunity to be heard but has not utilized same should leave the issue of fair hearing alone. Reliance was then placed on the cases of **KOLO V COP (2017) NWLR (PT. 1569) 157-158; GEBI V STATE & ORS (2022) LPELR-57564 (CA)**.

Furthermore, counsel submitted that upon arraignment and adjournment of the matter by the lower court, the court may elect to recall the witnesses already called by the prosecution for the 2nd Applicant for the purpose of cross examination, and stated that the provisions of sections 135 and 266 relied upon by the Applicants are not applicable to the facts and circumstances of the case. Reliance was placed on the cases of **EGUNJOBI V FRN (2013) 3 NWLR (PT. 1342) 534; OLATUNBOSUN V STATE (2013) 17 NWLR (PT. 1382) 167; NYAKO V FRN & ORS V REGISTERED TRUSTEES OF DIOCESE OF NDOKWA CHURCH OF NIG) & ORS (2023) LPELR-60512 (ca)**

On the issue of whether this honourable court should exercise its discretion infavour of the applicants, counsel stated that judicial review is based on a fundamental principle that is inherent in our legal system, which is that powers can be validly exercised within their true limits. He then relied on the definition of certiorari in the Black's Law Dictionary 6th Edition and the cases of **AMADI V ACHO (2005) 12 NWLR (PT. 939) 386; NIGERIA**

ASSOCIATION OF GENERAL PRACTICE PHARMACISTS EMPLOYERS (NAGPPE) V PHARMACIST COUNCIL OF NIGERIA & ORS. 2013 LPELR- 21834 (CA); ACB V NWAIGWE (2011) 7 NWLR (PT.1246) 380 SC; KOREA NAT. OIL CORP V OPS (NIG LTD) (2018) 2 NWLR (PT. 1604) SC 394

Consequently, the Applicants filed a reply on point of law dated and filed 14th December 2023 in further response to the counter affidavit of the respondents. In the said reply, counsel argued that the Magistrate Court did not have jurisdiction to try the offences of criminal conspiracy and kidnapping as canvassed by the respondents. He stated that he had relied on the law that provides for the establishment, division and jurisdiction of the classes of criminal courts which is the Criminal Procedure Code Cap 41 Laws of the Federation of Nigeria, 2004. And that the said section 493 of the ACJA did not expressly state the CPC as one of the laws it repealed.

Furthermore, counsel argued that the "life imprisonment" as quoted by the respondents as the provision of Chapter VII, Appendix A of the Criminal Procedure Code in paragraph 3.11 -3.14 of their written address is wrong as it only provides for "imprisonment" and not "life imprisonment". Counsel then went further to reproduce the said section and reliance was placed on the case of **SKYE BANK V IWU (2017) LPELR-42595 SC.**

In a further reply, counsel stated that the 2nd respondent in paragraph 3.15 – 3.19 erroneously included the word "may" to section 273 of the Penal code of which it does not contain. Counsel then went further to reproduce the said section and relied on the cases of **AMOSHIMA V STATE (2011) 14 NWLR (PT. 1268) 53; NWANKWO V YARADUA (2013) 13 NWLR (PT. 1263) 81; ACCESS BANK PLC V OGBOJA (2022) 1 NWLR (PT.1812) 547; ODUSOTE V ODUSOTE (2012) 3 NWLR (PT.1288) 478 CA; CORPORATE IDEAL INS. LTD V AJAOKUTA STEEL CO. LTD (2014) 7 NWLR (PT. 1405) 165 SC; TUMSAH V FRN (2018) 17 NWLR (PT. 1648) 238; ABUBAKAR V MICHELIN MOTOR SERVICES LTD. (NO.1) (2020) 12 NWLR (PT. 1739) 555**

In a further submission, counsel stated that the Criminal Procedure Code Law is applicable to courts of the Federal Capital Territory and that the

CPCL superceded the Magistrate Court (Increase of Jurisdiction of Magistrates) Order 2014 cited by the 2nd respondent.

Finally on the issue of fair hearing, counsel stated that the arguments of the 2nd respondent in paragraphs 3.23 -3.30 goes to no issue as it is evident on the face of the ruling that the applicants were absent and unrepresented on the day the ruling was delivered. Reliance was placed on the case of **STATE V LAWAL(supra)**. He also stated that the 2nd respondent in paragraph 3.31 of the written address argued that it is not borne from the record of the 1st respondent that the applicants were being jointly tried before the 1st respondent. He then stated that the 2nd respondent never filed a fresh FIR against the 2nd applicant and it was the same FIR dated 23rd November 2022 that was read to the 2nd applicant on the 17th of July 2023 even though three witnesses had already been called before the 2nd applicant was arraigned and her plea taken, hence, a breach of the 2nd applicant's fundamental right to fair hearing. Reference was made to section 36 of the 1999 constitution 2011 as amended. Counsel further stated that the 2nd respondent admitted in paragraph 3.34 in the written address that the trial was conducted in the 2nd applicant's absence as it was stated that the 1st respondent may elect to recall the witnesses already called upon. Reliance was placed on the case of **MADUKOLU V NKEMDILIM(SUPRA)**.

I have carefully perused the originating summons of the applicants, the affidavit in support, annexures attached therewith and the written address in support of the applicants originating process.

I have equally perused the counter affidavit of the 2nd respondent and the written address in support.

I have also considered the reply on points of law to the counter affidavit of the 2nd respondent.

Therefore it is my humble view that the issues for determination in this matter are:-

1. The answer to the questions raised in the originating process initiating this matter

2. Whether the applicants have adequately proven their case to be entitled to the reliefs sought.

Before delving into the issues proper, let us recount the case of the claimant.

The claimant averred in his supporting affidavit that by a First Information Report (FIR) dated 23rd November, 2022 that the applicants were charged with offences of criminal conspiracy and kidnapping under sections 271 and 273 of the Penal Code before the 1st respondent in Charge No. CR/91/2022: Commissioner of Police V David Solomon and Anor. That the persons alleged to have been kidnapped are the nominal complainant's and 2nd applicant's children, as well as the 1st applicant's siblings. That the two Applicants were charged jointly in the FIR dated 23rd November 2022 and that on the day of the arraignment, only the 1st applicant was present as the 2nd applicant was not in the country at the material time. That despite this the FIR was never amended and that trial commenced in the absence of the 2nd applicant on the 23rd of November 2022. That the 2nd applicant was subsequently arrested in Lagos and detained in Suleja Prison for one month before being arraigned at the Magistrate Court on the 17th of July, 2023 where her plea was taken and was granted bail on the same day, but that by that time, the prosecution had already called three witnesses- PW1, PW2 and PW3.

It is further the case of the claimant that the prosecution witnesses were never recalled to enable the 2nd Applicant cross examine them since she started appearing in court. That prior to the order of court, the 2nd applicant wrote a petition dated 22nd June 2023 requesting intervention in respect of the children alleged to have been kidnapped, which was received by the Ministry of Youth and Social Development, Lagos. That the Lagos State Government through the offices of the AG, Ministry of Youth and Social Development had filed an application for Care and Protection Order of the two children upon receipt of the 2nd applicant's petition. That before the petition could be considered by the Ministry, the 2nd applicant and her children were arrested and detained at the State Criminal Investigation Department (SCID), Pantai, Lagos state. That the Hon. Commissioner, Ministry of Youth and Social Development, Lagos state,

secured the protection of the children by effecting their release from the SCID.

Furthermore, that the Court granted the Emergency Protection Order in respect of the children on the 5th of July 2023 and the children have since been under the custody of the Lagos State Government, but that these facts were omitted in the FIR, Proof of evidence and Statement of witnesses. That the 1st respondent lacks jurisdiction to try the offences of criminal conspiracy and kidnapping as contained in the FIR. That the applicants had challenged the jurisdiction of the trial court by a Motion dated 28th August, 2023, but that the trial court by a ruling delivered on the 3rd day of October 2023 dismissed the application and awarded cost against the Applicants' counsel in the sum of N100,000 (One hundred thousand Naira), which the said ruling was delivered in the absence of all the parties. That therefore, the applicants through their counsel filed an application for leave for an order of Judicial Review by way of Certiorari before this Honourable Court which was granted on the 6th of November 2023. Hence, this suit.

Note that the powers of this Honourable Court to conduct a judicial review on the decision of the lower court is contained in Order 44 Rules 1-11 of the High Court Civil Procedure Rules of the FCT, which I shall discuss at the latter part of this judgment.

ISSUE ONE

"The answer to the questions raised in the originating process instituting this matter"

The questions raised in the originating summons of the applicants are as follows;

- a. "Whether, having regard to the provisions of sections 6(2), 7(1)(b), 17 and 97 of the criminal procedure code, LFN 2004 and sections 271 and 273 of the Penal Code, the 1st Defendant (Senior Magistrate Grade II, Mr. Taribo Z. Jim of Magistrate Court of the FCT, Bwari Division in Charge No: CR/91/2022: between **COMMISSIONER OF POLICE V DAVID SOLOMON AND ANOR.**) has the requisite

jurisdiction to entertain and adjudicate the offences contained in the purported First Information Report dated 23rd November 2022, that is offences of Conspiracy and Kidnapping?"

- b. Whether the Ruling delivered on the 3rd day of October, 2023 in the absence of the Applicants and the entire proceedings of the trial Court (Senior Magistrate Grade II, Mr. Taribo Z. Jim of Magistrate Court of the FCT, Bwari Division in Charge No" CR/91/2022: between **COMMISSIONER OF POLICE V DAVID SOLOMON AND ANOR.**) complied with the principle of fair hearing under Section 36 of the 1999 Constitution (as amended) and section 36 of the 1999 Constitution (as amended) and section 266 of the Administration of Criminal Justice Act, 2015?

The issue of jurisdiction of a court is a very delicate one. Its effect is so fatal, which is why much emphasis has been made on it in a plethora of cases. In the case of **CRUTECH V OBETEN (2011) 15 NWLR (PT. 1271) 588**, the court held thus:-

"The lack of jurisdiction is detrimental, disastrous, devastating and without leverage for salvaging the situation, regardless of desirability of such a course of action."

Similarly held in the case of **AUNAM (NIG) LTD V LEVENTIS MOTORS LTD. (1990) 5 NWLR (PT. 151) 458**, the court held thus:-

"The legal effect of defect in competence or lack of jurisdiction is that the proceedings and judgment will be a nullity no matter how well conducted or decided the case is. That is why where the jurisdiction of a court to determine a matter is challenged, it is better and neater to settle the issue before proceeding to hear the case or appeal thereon on its merits."

See also the cases **of MADUKOLU V NKEMDILIM (1962) 1 SCNLR at 595; P.E LTD V LEVENTIS TRAD. CO. LTD (1992) 5 NWLR (PT.244)675**

However, before answering the first question, we first need to tackle the issue raised by the respondents challenging the applicability of the Criminal Procedure Code in this matter. The first issue contained in the written address of the applicants was primarily founded upon sections 6(2), 7(1)(b), 17 and 97 of the Criminal Procedure code LFN, 2004. The said issue states thus:-

"Whether, having regard to the provisions of sections 6(2), 7(1)(b), 17, 97 of the Criminal Procedure Code, LFN 2004, sections 271 and 273 of the Penal Code, the 1st Defendant (Senior Magistrate Grade II, Mr. Taribo Z. Jim of Magistrate Court of the FCT, Bwari Division in Charge No: CR/91/2022: between COMMISSIONER OF POLICE V DAVID SOLOMON AND ANOR.) has the requisite jurisdiction to entertain and adjudicate the offences contained in the purported First Information Report (FIR) dated 23rd November 2022, that is offences of Conspiracy and Kidnapping."

The Respondents on the other hand stated in response to the said issue at exactly paragraph 3.5 of their written address in support of their counter affidavit to the applicants' originating summons thus:-

"3.5. In response to the foregoing contentions, it is instructive to note that the Criminal Procedure Law was initially enacted by the Northern Region Government in 1963 as the Criminal Procedure Code to govern criminal proceedings in the Northern Region. It has been re-designated as the Criminal Procedure Code Laws of the various states. The Criminal Procedure Code Act was the law applicable in the High Court of the FCT until the enactment of the Administration of Criminal Justice Act 2015 (ACJA). The ACJA has also repealed the Criminal Procedure Act (CPA) and Criminal Procedure Code (CPC)".

The respondents further stated in paragraph 3.12 of the same written address thus;

"In any event, even if it were to be argued that the CPC heavily relied upon by the Applicants are still extant, the Applicants' argument fails even on its own terms as a surgical scrutiny of the said item 97, Chapter VII, Appendix A of the CPC would immediately reveal to a blindman that even a lesser magistrate, i.e Magistrate Grade I has the jurisdiction to entertain the offence of conspiracy."

The said Chapter VII was reproduced to back up their argument whereby Criminal conspiracy to commit offence punishable with death or life imprisonment will be instituted at the High Court, while conspiracy in any other offence aside the two earlier mentioned can be instituted from the Magistrate of the first Grade.

In further response, the applicants in their reply on points of law stated in paragraphs 2.7 to 2.11 that, the argument of the respondents was not the correct position of law, as "life imprisonment" was not stated in the said provision, but simply "imprisonment", and they as well reproduced the said provision to support their argument.

The said section of the Administration of Criminal Justice Act in question is section 493 which repeals some stated legislations and it states thus;

"The Criminal Procedure Act CAP, C41 Laws of the Federation of Nigeria 2004, Criminal Procedure (Northern States) Act Cap. C42 Laws of the Federation of Nigeria 2004, and the Administration of Justice Commission Act Cap. A3 Laws of the Federation of Nigeria, 2004 are repealed."

It is clear from the above provisions, that the Criminal Procedure Code has not been repealed. It was not listed in the repeal section of the ACJA, 2015, hence, we cannot on our own assume the repeal of the CPC simply because its counterpart legislation has been repealed, as erroneously believed by many legal practitioners. The argument canvassed by the respondents reveals that since the ACJA is the principal legislation for criminal trials (i.e for Federal offences as contained in section 2(1) of the

Act and offences contained in part 8-30 of the said Act as provided in section 86 except as expressly provided otherwise), then by implication the CPC is no longer in force. By virtue of the doctrine of implied repeal, where a new Act can reasonably be construed to be able to co-exist with an earlier law of similar effect, this must be done. Courts should not rush to declare a statute as repealed except expressly stated as so, or the implication of the said repeal is very clear and unambiguous. In the case of **C.B.N V. REGD. TRUSTEES, N.B.A (2021) 5 NWLR (PT.1769) 268**, the court held thus;

"In law, there are circumstances in which a repeal of an enactment can be implied or inferred, and that is where two Acts of the legislature are plainly repugnant to each other that effect cannot be given to both at the same time. Thus, repeal by implication cannot be prohibited where circumstances warrant. The doctrine of implied repeal of statute will not be invoked unless the two Acts of the legislature are repugnant to each other that effect cannot be given to the two enactments at the same time. The courts usually lean heavily against implied repeal of an earlier statute by a later statute on the same or similar subject matter, unless the words of the provisions of the later statute is very clear either in express terms or lucid implication. Therefore, if both the earlier and the later statutes can reasonably be construed in such a way that both can be given effect to, this must be done."

See also the cases of **BARRY V ERIC (1998)8 NWLR (PT.562) 404;**
C.C.B (NIG.) PLC V OZOBU (1998) 3 NWLR (PT.541) 290

Therefore, it is my humble opinion that the Criminal Procedure Code has not been repealed and remains validly in force to be relied upon at anytime. I so hold.

That notwithstanding, the current legislation applicable to criminal trials in the FCT is the Administration of Criminal Justice Act of 2015. Section 2 of the ACJA 2015 provides thus;

- (1) "Without prejudice to section 86 of this Act, the provisions of this Act shall apply to criminal trials for offences established by an Act of the National Assembly and other Offences punishable in the Federal Capital Territory, Abuja.**
- (2) The provisions of this Act shall not apply to a court Martial"**

The said section 86 referenced above makes provisions with respect to criminal trials and inquiries in general and it states thus;

86) "The provisions of this part and part 9 to 30 of this Act shall apply to all criminal trials and proceedings unless express provision is made in respect of any particular court or form of trial or proceeding"

A combined reading of the above provisions shows expressly that the ACJA, 2015 is the legislation which SHALL apply to all criminal trials for offences established by an Act of the National Assembly (Federal offences) and those encapsulated in parts 8 to 30 of the ACJA, 2015, except expressly stated otherwise. This just shows that the ACJA, 2015 has become the principal legislation governing criminal proceedings in the Federal Capital Territory, Abuja even though the CPC has not been repealed.

Moving forward, it is pertinent to note that the Jurisdiction of Magistrates to try offences is different from the jurisdiction of Magistrates to impose punishments. In an event where a Magistrate tries an offence whose punishment is beyond its power, the said Magistrate may refer the convict to the Chief Magistrate for sentencing, as a Magistrate cannot impose a punishment in excess of his jurisdiction. To this effect, see item 97 of Chapter VII, Appendix A of the Criminal Procedure Code and the Magistrate Court (increase of Jurisdiction of Magistrates) Order, 2014.

As rightly argued by the 2nd respondent in paragraph 3.21 of the written address in support of the counter affidavit, a court having jurisdiction to try an offence may after conviction record its opinion and forward the convict to a court with the requisite jurisdiction to impose the punishment which

may be beyond its powers to impose. In section 257 of the CPC, it has been provided thus;

"257(1) whenever a court having jurisdiction-

- (a) Finds a person guilty after hearing the evidence for the prosecution and the defence; or**
 - (b) Accepts a plea of guilty from a person, and after convicting such person is of the opinion that he ought to receive a punishment different in kind from, or more severe than that, which such court is empowered to inflict, it may record such opinion and send the accused to a court having the necessary powers of punishment or to the High Court.**
- (2). The court to which proceedings are submitted under subsection (1) shall pass such sentence or order in the case as it thinks fit and in accordance to law.**
- (3). When more accused than one are being tried together and the court considers it necessary to proceed under subsection (1) in regard to all the accused, it shall forward all the accused who are in its opinion guilty to the appropriate court."**

The above provision is to the effect that even if a court lacks the sentencing power to punish a convict of an offence in which he has been found guilty, the court in question may forward the said convict to a court of a higher grade or a superior court of record to impose the punishment deserved by the convict. This goes without saying that the Senior Magistrate Court Grade II, has the requisite jurisdiction to entertain the matter before it. However in the event of conviction where the Magistrate wishes to impose a sentence beyond the scope of its punishment jurisdiction, then he may refer the convict to the appropriate court having the power to impose the punishment.

I equally refer to notes on the Penal Code annotated by S.S. Richardson at page 181, where it is stated that the offence of kidnapping under section 273 of the Penal Code may be tried by a magistrate of the First Grade.

Therefore it is my humble view that the Senior Magistrate Grade II, has the requisite jurisdiction to try the offences of Criminal Conspiracy and Kidnapping contained in sections 271 and 273 of the Penal Code. I so hold.

Therefore, from the careful consideration of the facts of this matter in tandem with the applicable laws as well as relevant statutory and case laws, I hereby answer the first question in the Affirmative. I so hold.

Now to the second question which states:-

"Whether the Ruling delivered on the 3^d day of October, 2023 in the absence of the Applicants and the entire proceedings of the trial Court (Senior Magistrate Grade II, Mr. Taribo Z. Jim of Magistrate Court of the FCT, Bwari Division in Charge No" CR/91/2022: between COMMISSIONER OF POLICE V DAVID SOLOMON AND ANOR.) complied with the principle of fair hearing under Section 36 of the 1999 Constitution (as amended) and section 36 of the 1999 Constitution (as amended) and section 266 of the Administration of Criminal Justice Act, 2015?"

Fair hearing under section 36 of the 1999 Constitution of the Federal Republic of Nigeria, 2011 as amended provides:-

"In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."

Section 266 of the administration of Criminal Justice Act, 2015 provides thus:-

"A defendant shall, subject to the provisions of section 135 of this Act, be present in court during the whole of his trial unless;

- a. He misconducts himself in such a manner as to render his continuing presence impracticable or undesirable; or***
b. At the hearing of an interlocutory application.”

The said section 135 of the ACJA 2015 as referred above is hereby reproduced hereunder:-

Section 135(1) reads thus:-

"Where a Magistrate issues a summons in respect of any offence for which the penalty is a fine not exceeding N10,000.00 or imprisonment for a term not exceeding six months or both, the Magistrate on application of the defendant:

- a. May dispense with the personal attendance of the defendant where the offence is punishable by fine or imprisonment or both; and***
b. Shall dispense with personal attendance of the defendant where the offence is punishable by fine only if the defendant pleads guilty in writing or appears to so plead by his legal practitioner.”

A trial conducted in the absence of the accused is wrong except in the circumstances as provided above. Applying these principles to the instant case, there is nowhere in the record of proceedings and annexures attached to inform this Honourable court that such exceptions do apply. The gravity of the alleged offence is such that which may attract imprisonment for up to ten years and therefore does not fall within the purview of section 135 of the ACJA 2015, nor the exceptions provided in section 266 of the same Act. In this vein, let us consider.

-The ruling delivered on the 3rd day of October, 2023 in the matter stated above (which clearly stated the date of the motion, the reliefs sought and the decision of the court, therefore serving as evidence contrary to the argument of the respondents in their written address that there is nothing to show regarding the motion upon which the ruling was delivered), and

-The entirety of the proceedings.

With respect to the ruling.

At first glance, it has been evidenced on the face of the ruling thus;

"APPEARANCE: Parties absent and unrepresented"

That is to say, the ruling was passed in the absence of both parties in the proceeding which is very wrong at law. The practice is that where both parties are absent, the matter is adjourned to a later date when the parties will be present. Furthermore, criminal proceedings are peculiar in the sense that the accused or defendant must be present throughout the proceedings except in the circumstances as stated above.

In the case of ***ASAKITIKPI V STATE (1993) 5 NWLR (PT. 296) 641***, the court held thus;

"It is an essential principle of criminal law in Nigeria that the trial of a person for an indictable offence has to be conducted in the presence of that person- and for this purpose trial means the whole of the proceedings including sentence. On trials for felony, the rule is inviolable. The exception is where the violent conduct of the accused person himself which is intended to make the trial impossible to conduct renders it lawful to continue in his absence..."

The circumstances of the instant case obviously do not apply here, so it is my humble view that the Senior Magistrate Grade II erred in law when he passed the said Ruling in the absence of the parties to the trial. I so hold.

With respect to the entirety of the proceedings, the applicants stated in paragraph e, f and i of their Affidavit in support of their originating summons thus:-

Paragraph e reads thus;

"That Trial commenced on the 23^d November, 2022 when the 1st Applicant was arraigned and hearing has been substantially conducted in the absence of the 2nd Applicant.

The Record of Proceedings from 23rd November 2022 to 5th of June 2023 is hereby attached and marked Exhibit B"

Paragraph f reads thus;

"That as at the time the 2nd Applicant was arrested and brought to court on the 17th July 2023; the prosecution had called three(3) witnesses – PW1, PW2 and PW3."

Paragraph i reads thus;

"That the prosecution witnesses were never recalled to enable the 2nd applicant cross examine them since she started appearing in court"

The above averments were further argued in paragraphs 4.4 and 4.5 of the applicants written address in support of their originating summons.

The respondents on the other hand stated in paragraph e of their counter affidavit in opposition to the originating summons of the applicants thus;

"Contrary to Paragraph 4(a) (b) (c) (d) and (e) of the Afolabi-Ajayi Affidavit, the FIR was issued only against the 1st Applicant. That he knows that the paragraphs of the FIR are as follows:

Criminal Conspiracy and Kidnapping contrary to sections 97(1) and 271 of the Penal Code Law. That on 7/11/2022 at about 15:00 hours, a case of criminal conspiracy and Kidnapping was transferred alongside you David Solomon Male, adult of BiolaBango Street, Lagos to the CID, FCT Police Command that on 2/6/2022 at about 13:00 hours one Mr. OlubukolaOgungbe, male, adult of AmaPepel estate, airport road Lugbe, Abuja reported at the Ido Police Division that on the same date, about 15:00 hours you and others conspired with Mrs. Janet Olufunsho who is now at large.....weapons while in atinted glasses kidnapped(twins(named, TaiwoOgungbe and Kehinde."

It is important to note that from the instant case, that the applicants were jointly tried. In a situation where one defendant being tried is present and the other is absent, the law slightly changes with regards to the principle against trial in absentia. In order to prevent manifest injustice on the part

of the defendant present and in attendance, the presence of such other or other defendants could be dispensed with and trial continued with efforts being made to produce such defendants for the said trial through the issuance of a summons or warrant of arrest on the absent party or parties. The charge need not be amended to strike out the name of the absent defendant. See the cases of **ADAMU V STATE (2017) NWLR (PT. 1592) 353; SULE V STATE (2018) 10 NWLR (PT. 1628) 545.**

From the annexures attached by the Respondent, it has been proven that the Magistrate Court had indeed issued an Order for the arrest of the 2nd Applicant in an Order dated 5th July, 2023 with Motion No. MT/100/2023. This shows that the proceedings did not defeat the 2nd defendants right to fair hearing in the trial.

From the foregoing, my answer to the second question raised is partly in the negative and partly in the positive. Answered in the positive because, it has been established that the entire proceedings is not a nullity considering the conduct of the trial alone, and in the negative with regards to the Ruling passed on the 3rd of October 2023 because, it was passed in the absence of the parties and their representatives, hence invalid.

The first part of this issue on jurisdiction is hereby resolved in favour of the respondents, while the second part of this issue on fair hearing is resolved in favour of the Applicants. I so hold

ISSUE TWO

" Whether the applicants have adequately proven their case to be entitled to the reliefs sought."

The jurisdiction of this Honourable Court to entertain application for judicial review of decisions of lower courts has been vested in it by virtue of Order 44 Rules 1-11 of the High Court Civil Procedure Rules of the Federal Capital Territory, Abuja, 2018. I shall be reproducing the relevant provisions below;

"1. (1) An application for:

(a) An order of mandamus, prohibition or certiorari; or

(b) An injunction restraining a person from acting in any office in which he is not entitled to act shall be made by way of an application for judicial review in accordance with the provisions of this Order.

(2) An application for a declaration or an injunction (not being an injunction in rule (1)(b) of this Rule) may be made by way of an application for judicial review and the court may grant the declaration or injunction if it deems it just and convenient, having regard to:

(a) The nature of the matters which relief may be granted by way of an order of mandamus, prohibition or certiorari;

(b) The nature of the person and bodies against whom relief may be granted by way of such an order;

(c) All the circumstances of the case.

2. On an application for judicial review any relief mentioned In Rule 1 may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of, relates to or is connected with the same matter.

3. (1) No application for judicial review shall be made unless the leave of the court has been obtained in accordance with this rule.

(2) An application for leave shall be made ex-parte to the court and shall be supported by:

(a) A statement setting out the name and description of the application, the reliefs and the grounds on which they are sought;

(b) An affidavit verifying the facts relied on; and

(c) A written address in support of application for leave.

(3) The court hearing an application for leave may allow the applicant's statement to be amended, whether by specifying

different or additional grounds of relief or otherwise on such terms, if any, as he deems fit.

(4) The court shall not grant leave unless he considers that the application has a sufficient interest in the matter to which the application relates.

(5) Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgement, order, conviction or proceedings which is subject to appeal and a time is limited for the bringing of the appeal, the court may adjourn the application for leave until the appeal is determined or the time for appealing has elapsed.

(6) Where leave to apply for judicial review is granted, then:

(a) If the relief sought is an order of prohibition or certiorari and the court so directs, the grant shall operate as a stay of the proceeding to which the application relates until the determination of the application or until the court otherwise orders;

(b) If any other relief is sought, the court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ;

(c) The court may impose such term as to cost and as to giving security as he deems fit.

4. An application for judicial review shall be brought within 3 months of the date of occurrence of the subject of the application.

5. (1) where leave has been granted and the court directs, the application may be made by motion or by originating summons."

From the processes before this Honourable Court, the applicant has successfully satisfied all the necessary requirements for an application for

judicial review as contained in Order 44 of the Rules of this Honourable Court.

In respect of when a writ of certiorari may issue, the court of appeal stated in the case of **AGWUEGBO V KAGOMA (2000) 14 NWLR (PT. 687) 252** thus;

"Whenever an inferior tribunal exceeds its jurisdiction, the writ of certiorari may be employed to remove the matter from the lower court to the High Court so that the decision made in excess of jurisdiction may be quashed. The writ of certiorari when issued exists to ensure that any tribunal or inferior court endowed with powers of judicial function will operate within the limits of its jurisdiction."

See also the case of **LAWALV QUADRI (2004) 6 NWLR (PT.868) 1; J.S.C., CROSS RIVER STATE V YOUNG (2013) 11 NWLR (PT. 1364) 1**

With respect to the first relief sought, it has earlier been established that the lower court does indeed possess the jurisdiction to entertain the matter of the case of **COMMISSIONER OF POLICE V DAVID SOLOMON AND ANOR** with Charge No. CR/91/2022, therefore the first relief fails. I so hold.

With regards to the second relief sought by the Applicants, it also fails as the jurisdiction of the Senior Magistrate Court Grade II has been established.

The third relief has successfully been established by the Applicants, hence they are entitled to the grant of same only to the extent that the proceedings of the 3rd of October 2023 be quashed on the grounds of lack of fair hearing and not the Ruling itself.

In line with the first and second relief, the fourth relief sought also fails.

This issue is hereby resolved partly in favor of the Applicants.

Having considered the totality of the facts, circumstances and evidence before this Honourable Court, it is hereby ordered as follows;

1. It is hereby Declared that the senior Magistrate Grade II, Mr. Taribo Z. Jim of Magistrate Court of the FCT, Bwari Division does indeed possess the requisite Jurisdiction to try and determine the offences of Criminal Conspiracy and Kidnapping as contained in the First Information Report (FIR) dated 23rd November 2022.
2. An order of certiorari is hereby made against the proceedings of the 3rd October, 2023 before, Senior Magistrate Grade II, His Worship Mr. Taribo Z. Jim of Magistrate Court of the FCT, Bwari Division in Charge No. CR/91/2022: Between Commissioner of Police V David Solomon and Anor. +For breach of fair hearing.
3. It is hereby ordered that a fresh Hearing Notice be served on both parties in the matter before, Senior Magistrate Grade II, His Worship Mr. Taribo Z. Jim of Magistrate Court of the FCT, Bwari Division in Charge No. CR/91/2022: Between Commissioner of Police V David Solomon and Anor, and the said ruling of 3rd October 2023 be delivered again in the presence of both parties and the trial be continued thereafter.
4. The First Information Report (FIR) Dated 23rd November 2022 in Charge No. CR/91/2023: between Commissioner of Police V David Solomon and Anor. Pending before the Senior Magistrate Grade II, Mr. Taribo Z. Jim of Magistrate Court of the FCT, Bwari Division, is hereby declared valid.

Signed

HON. JUSTICE SAMIRAH UMAR BATURE
14/03/2024