**FEMI AYOADE**

**V.**

**THE STATE**

IN THE SUPREME COURT OF NIGERIA

ON FRIDAY, THE 24TH DAY OF JANUARY, 2020

SC.456/2018

**LEX (2020) - SC.456/2018**

**OTHER CITATIONS**

3PLR/2020/19 (SC)

(2020) LPELR-49379(SC)

**BEFORE THEIR LORDSHIPS**

OLUKAYODE ARIWOOLA, JSC

KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, JSC

AMINA ADAMU AUGIE, JSC

PAUL ADAMU GALUMJE, JSC

UWANI MUSA ABBA AJI, JSC

**BETWEEN**

FEMI AYOADE - Appellant(s)

AND

THE STATE - Respondent(s)

**ORIGINATING COURT(S)**

LAGOS STATE HIGH COURT [HON. JUSTICE I.O. KASALI, Presiding]

COURT OF APPEAL

**REPRESENTATION**

OSAYABA GIWA-OSAGIE, ESQ., with him, PAULYN ABULIMEN, ESQ., MICHAEL DEDON, ESQ., AND IKECHUKWU ODOZOR, ESQ. - For Appellant

AND

Y. G. OSHOALA, ESQ., (DPP, LAGOS STATE) AND JUBRIL KAREEM (STATE COUNSEL) - For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

CRIMINAL LAW AND PROCEDURE – ARMED ROBBERY:- Proof of – Inability of defence to cross-examine prosecution’s lone witness – When same would not amount to breach of fair hearing rights

CONSTITUTIONAL LAW - BREACH OF RIGHT TO FAIR HEARING: Right of an accused person to fair hearing - Whether a party who had an opportunity to be heard but who did not utilize it can bring an action for breach of fair hearing

CONSTITUTIONAL LAW - BREACH OF RIGHT TO FAIR HEARING: Test of fairness/fair hearing in proceedings - Effect of lack of fair hearing in proceedings – Cross-examination of witness – Where party was availed the opportunity to failed to utilize same – Effect

**PRACTICE AND PROCEDURE ISSUES**

ACTION - SPECULATION:- Rule against speculation on part of party – Duty on court to refrain therefrom

APPEAL - APPEAL TO THE SUPREME COURT:- Appellate jurisdiction of the Supreme Court - Whether the Supreme Court can entertain an appeal directly from the decision of the High Court

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The Appellant, as second Defendant, and two other Defendants were arraigned before the Lagos State High Court on a two-Count Charge of conspiracy to commit robbery and robbery. They were alleged to have used a toy gun to attack and rob a motorcycle rider and his passenger, and dispossessed them of the sum of N500 and N1,500 respectively. At the trial, the Prosecution called a sole Witness, Friday Ojiemen, a Policeman attached to the Special Anti-Robbery Squad (SARS), lkeja, and he tendered the Statement made by the Appellant to the Police. However, Defence Counsel objected to the admissibility of the said Statement in evidence because "the Defendant denied writing the Statement, the Defendant alleged duress in obtaining the Statement." In the circumstances, the trial Court conducted a trial-within-trial, and after its Ruling of 20/4/2012 wherein the Appellant's confessional Statement was admitted in evidence as Exhibit P2, it adjourned the matter to ''6th, 12th and 13th of June 2012", for continuation of the trial. After a series of adjournments, mostly at the instance of the Accused, the trial Court, in its Judgment of 1/4/2014, found him guilty as charged, and convicted and sentenced him to 21 years imprisonment.

DECISION(S) APPEALED AGAINST

The Court of Appeal held -

“It is obvious that adequate opportunity was given to the defence to cross examine CW1. It would have been a different thing if the Court did not bend backwards to a point of breaking just to give the Appellant on opportunity to cross examine Prosecution Witnesses. The right is not open ended. Once on opportunity is not used, the Court must move on. The Witness taken but awaiting cross examination cannot also be made to continuously appear in Court unending. I do not agree with the Appellant that he was not given on opportunity. Failure to exercise the opportunity given cannot be the fault of the Court below. Consequently, the right to fair hearing of the Appellant was not breached and he cannot be heard to complain. Trials are not overstretched merely because a Party is not ready to utilize an opportunity given for the party to take a step. Appellant was represented by Counsel on all the dates the Court below took a step in the proceedings leading to the Appellant's conviction and sentence … Flowing from above, the issues having been resolved against the Appellant, the Appeal lacks merit and is hereby dismissed. The judgment of the trial Court decided on 1/4/2014 by Hon. justice I. O, Kasali is hereby affirmed. I make no order as to cost.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

(a) Whether the Court of Appeal was right in affirming the judgment of the trial Court wherein the trial Court foreclosed the Appellant's right to cross-examine PW1, the Respondent's sole Witness.

(b) Whether the Appellant's conviction is supported by law in view of the weight of evidence given and improper trial procedure.

*BY RESPONDENTS*

The Respondent adopted the Appellant's two issues, but it noted that issue 2 is distilled from Ground 2 of the Grounds of Appeal, which says

"the judgment of the trial Court is against the weight of evidence", and cited State V. Ekanem (2016) LPELR-41304(SC), wherein this Court held that such a Ground of Appeal is improper and incompetent, and it is absolutely right; the said Ground of Appeal is clearly incompetent.

*AS ADOPTED BY COURT*

[The Court struck out Issue 2 of the Appellant’s Issues for Determination for being based on an incompetent Grounds of Appeal leaving only the lone issue viz:

“The Court of Appeal was right in affirming the judgment of the trial Court wherein the trial Court foreclosed the Appellant's right to cross-examine PW1, the Respondent's sole Witness.”

DECISION OF SUPREME COURT

1. Lone issue resolved against the Appellant. Court of Appeal was right to affirm the decision of the trial Court since the Appellant was given opportunity to cross-examine PW1 but failed to take advantage of the opportunities provided to do so.

2. On the issue of excessive sentence, which was raised at the hearing of the Appeal, there is nothing this Court can do or say on the issue of his sentence, as there is no Ground of Appeal challenging his sentence, therefore.

In the final analysis, this Appeal lacks merit. It, therefore, fails and it is dismissed. The Judgment of the Court of Appeal is affirmed.

**MAIN JUDGMENT**

AMINA ADAMU AUGIE, J.S.C. (Delivering the Leading Judgment):

The Appellant, as second Defendant, and two other Defendants were arraigned before the Lagos State High Court on a two-Count Charge of conspiracy to commit robbery and robbery. They were alleged to have used a toy gun to attack and rob a motorcycle rider and his passenger, and dispossessed them of the sum of N500 and N1,500 respectively.

At the trial, the Prosecution called a sole Witness, Friday Ojiemen, a Policeman attached to the Special Anti-Robbery Squad (SARS), lkeja, and he tendered the Statement made by the Appellant to the Police. However, Defence Counsel objected to the admissibility of the said Statement in evidence because "the Defendant denied writing the Statement, the Defendant alleged duress in obtaining the Statement."

In the circumstances, the trial Court conducted a trial-within-trial, and after its Ruling of 20/4/2012 wherein the Appellant's confessional Statement was admitted in evidence as Exhibit P2, it adjourned the matter to ''6th, 12th and 13th of June 2012", for continuation of the trial.

The trial could not proceed on 6/6/2012 because the Officer that the Prosecution intended to call was away "on a special assignment", and 12/6/2012 was a public holiday. On 13/6/2012, Friday Ojiemen, who was to continue his evidence in chief as PW1, was "not available", and the case was adjourned to "03/07/2012 for continuation of trial''.

On the next date on Record, 2/10/2012, Prosecution Counsel asked for another adjournment and the Defence Counsel opposed same. But in acceding to Prosecution Counsel's plea for one more adjournment, the learned trial Judge, I. O. Kasali, J., stated as follows at page 156 -

I am reluctantly adjourning the 2007 matter at the instance of the Prosecution for the last time. I am, however, putting it on record that the Prosecution on the next adjourned must close its case by assembling all Witnesses - - to testify on the next adjourn (sic) date failing which the Court will close the Prosecution case and call on the Defendant to open their defence. Case adjourned to 31/10/2012 for continuation of trial.

On 31/10/2012 PW1 was in Court, but the Defence Counsel said he was not ready to proceed with the trial as he had "a medical problem".

In objecting to his application, the Prosecution Counsel stated that -

We have difficulty in getting our witnesses. PW1 is a busy Officer, any attempt to adjourn will not be in the interest of justice.

PW1 continued with his evidence. A toy gun was admitted in evidence through him as Exhibit P3, and the case was "adjourned to 6/12/2012 for cross-examination of CW1 (PW1) and open the Defendant case."

On 30/1/2013, when the case came up again, PW1 was in Court, but Defence Counsel was absent. This time, the trial Court noted that:

It is very unfortunate that the Defendant Counsel is not taking this 2007 matter serious. On 31/10/2012, when he was to cross-examine CW1 he did not and he applied for a date to cross examine CW1. The matter was adjourn (sic) to 6/12/2012. On 6/12/2012, the Defendants were present, none of the Counsel were in Court, the Court did not sit as the Court was bereaved and this matter was adjourned to 10/1/2013. On 10/1/2013, the Defendants were also present, the Prosecutor Counsel was in Court, but the Defendant Counsel was absent, the Court did not sit, it was on the day Hon. Justice Ayo was buried and this matter was adjourn (sic) till today. Today, when the matter was called, the State was represented, the Defendants are present but the Defendant Counsel is equally absent. The business of the Court for today is for cross-examination of CW1 and for the Defendant to open their defence. CW1 is present. I am, however, putting it on Record that if by the next adjourn date, the Defendant Counsel is not ready to cross-examine CW1, CW1 will be discharged and the Court will call on the State to file written address. Case adjourned to 06/03/2013 for continuation of trial. CW1 to be cross-examined by Defendant Counsel, the Defendants to open their defence.

On 6/3/2013, the Defence Counsel was absent and the trial Court said:

The Court has given more than enough opportunity to the Defendant Counsel to cross-examine PW1, the only Witness for the Prosecution, yet the Defendant Counsel did not make use of the opportunity. The Application by the Assistant Chief State Counsel for the State to foreclose the right of cross examination by the Defendant counsel is meritoriding (sic). I hereby close the right of the Defendant to cross-examine PW1. PW1 is hereby discharged. This matter is adjourned to 30/04/1013 for Defence.

On 30/4/2013, a new Defence Counsel appeared for the "Defendant" and sought an adjournment to get processes from the former Counsel, and the case was adjourned to 14/5/2013 for defence. The Appellant testified as DW2 on 14/5/2013, when the Defence opened their case. But the trial Court, in its Judgment of 1/4/2014, found him guilty as charged, and convicted and sentenced him to 21 years imprisonment.

The Appellant then appealed to the Court of Appeal, and one of his complaints against the trial Court's decision was that the trial Court had "erred in law when it foreclosed [his] right to cross-examine PW1". But in its Judgment delivered on 2/3/2018, the Court of Appeal held -

It is obvious that adequate opportunity was given to the defence to cross examine CW1. It would have been a different thing if the Court did not bend backwards to a point of breaking just to give the Appellant on opportunity to cross examine Prosecution Witnesses. The right is not open ended. Once on opportunity is not used, the Court must move on. The Witness taken but awaiting cross examination cannot also be made to continuously appear in Court unending. I do not agree with the Appellant that he was not given on opportunity. Failure to exercise the opportunity given cannot be the fault of the Court below. Consequently, the right to fair hearing of the Appellant was not breached and he cannot be heard to complain. Trials are not overstretched merely because a Party is not ready to utilize an opportunity given for the party to take a step. Appellant was represented by Counsel on all the dates the Court below took a step in the proceedings leading to the Appellant's conviction and sentence. Furthermore, the decision taken by Counsel cannot be challenged nor questioned by the Court. Counsel had unfettered authority to handle the matter the way he deemed fit ... It is clear that the initial Counsel did not even have any regard nor respect for the Court. For all the times he was absent from the proceedings, there was no record that he wrote the Court to explain his absence. It is expected that Counsel should show respect to the Court and always write to explain absence from Court. That is simply extending courtesy to the Court and is the ideal conduct and behavior of Counsel before any Court. The Appellant cannot find refuge under fair hearing. He is bound by what the second Counsel also did, by not recalling the only witness for the prosecution. The Court cannot under any guise question that decision. Flowing from above, the issues having been resolved against the Appellant, the Appeal lacks merit and is hereby dismissed. The judgment of the trial Court decided on 1/4/2014 by Hon. justice I. O, Kasali is hereby affirmed. I make no order as to cost.

Further aggrieved, he filed a Notice of Appeal containing two Grounds of Appeal in this Court against the Judgment of the Court of Appeal.

Briefs of Arguments were filed and exchanged, and in his Brief of Argument, the Appellant formulated two issues for Determination -

(a) Whether the Court of Appeal was right in affirming the judgment of the trial Court wherein the trial Court foreclosed the Appellant's right to cross-examine PW1, the Respondent's sole Witness.

(b) Whether the Appellant's conviction is supported by law in view of the weight of evidence given and improper trial procedure.

The Respondent adopted the Appellant's two issues, but it noted that issue 2 is distilled from Ground 2 of the Grounds of Appeal, which says

"the judgment of the trial Court is against the weight of evidence", and cited State V. Ekanem (2016) LPELR-41304(SC), wherein this Court held that such a Ground of Appeal is improper and incompetent, and it is absolutely right; the said Ground of Appeal is clearly incompetent.

The complaint in the said Ground 2 is targeted at the trial Court; it is a ground of appeal that is fit for the Court of Appeal; not this Court, which only entertains appeals from the Court of Appeal - see Idagu V. State (2018) LPELR-44343(SC). Put in simple terms, the Constitution of the Federal Republic of Nigeria, 1999 (as amended), did not make provision for appeals to go directly from High Court to Supreme Court.

There is an intermediate Court, Court of Appeal, which serves as "a clearing house", so to speak, between both Courts. It hears appeals from the trial Court, and the trial Court's findings must be affirmed or reversed by the Court of Appeal, before its decision gets to this Court, therefore, this Court would only entertain an appeal against a decision of the Court of Appeal, and not directly against that of the High Court.

- Akibu & Anor V. Oduntan & Ors (2000) 13 NWLR (Pt. 685) 446 SC.

In the circumstances, the said Ground 2 is incompetent and must be struck out. The Appellant's issue 2 distilled therefrom is ipso facto incompetent, as an issue for determination derives its support from a ground of appeal, and cannot exist independently of the said ground; "it automatically collapses when the ground of appeal ceases to exist" - see Agbaka & Ors V. Amadi & Anor (1998) 11 NWLR (Pt. 572) 16 SC.

The effect thereof is that Ground 2 of the Grounds of Appeal and issue 2 formulated therefrom are incompetent, and are struck out.

Thus, the only issue left for determination in this Appeal is whether -

The Court of Appeal was right in affirming the judgment of the trial Court wherein the trial Court foreclosed the Appellant's right to cross-examine PW1, the Respondent's sole Witness.

The Appellant's contention is that his right to cross-examine a witness, is within the rubric of his fundamental right to fair hearing guaranteed by Section 36 (1) of the 1999 Constitution (as amended), citing Eze V. FRN (2017) LPELR - 42097 (SC), Udo V. State (1988) LPELR -3299 (SC). He also cited Section 36(6) (b) & (d) of the Constitution, and Section 233 of the Administration of Criminal Justice Law [ACJL] of Lagos State 2011, on the "Non-appearance of Defendant's Counsel", which says:

1. Where the legal representative of the Defendant ceases to appear in Court, the Court shall after a reasonable period of non-appearance enquire from the Defendant if he wishes to engage another Counsel arranged by him or a Counsel engaged by way of legal aid.

2. The Court shall allow the Defendant to make his own arrangement if he indicates to do so.

3. In circumstances where a Defendant fails or is unable to secure legal representation, the Court shall have power to order that the Defendant be represented by way of legal aid.

He argued that the appropriate step the trial Court should have taken when the defence Counsel was absent, was to direct him, Appellant, to appoint another Counsel or he should represent himself, therefore, the Court of Appeal erred when it affirmed the trial Court's decision, citing Udo Akpan Udofia V. The State (1988) LPELR-3305 (SC) 14-16.

Citing Nwabueze V. People of Lagos State (2018) LPELR-44113 (SC), Bamgboye V. Unilorin (1999) 10 NWLR (Pt. 622) 290, and Okafor v. AG., Anambra State (1991) 6 NWLR (Pt.200)656, he submitted that the effect of a breach of fair hearing is that the whole trial is vitiated, and rendered null and void, therefore, the denial of fair hearing to him is incurably fatal to the trial Court's Judgment, so it must be set aside. Kalu V. State (2017) LPELR - 42101 (SC), MFA & Ors V. Inongha (2014) LPELR -22010 (SC), FMBN V. Adu (2000) 11 NWLR (Pt. 678) 309, and Tukur V. Govt., of Gongola State (1989) 4 NWLR (PT. 117) 577 cited.

He also submitted that one of the pillars of fair hearing is equal opportunity to cross examine witnesses; that it is a constitutional right of a Defendant to be allowed to cross-examine a Prosecution witness; that a breach of same is a breach of the right of fair hearing, which can have a disastrous effect on the Judgment and it has been held that -

This right of cross-examination is considered to be of fundamental importance in the trial process and any attempt by the trial Court to deny or circumscribe the right of a Party to cross-examine his adversary's witness or witnesses, in any manner whatsoever, is frowned upon by the appellate Court and treated as a breach of fair hearing. See Iwuoha V. Okoroike (1996) 2 NWLR (PT.429) 231; Tewogbade V. Agbabiaka (2001) 5 NWLR (PT. 705) 38, and Psychiatric Hospital Management Board V. Edosa (2001) 5 NWLR (Pt. 707) (sic).

He also argued in the alternative that assuming but not conceding that the trial Court was right in foreclosing his right to cross-examine PW1, the failure to cross-examine him was not his, but rather his Counsel; and it is trite that a Party cannot be held responsible and/or punished for the mistake of his counsel, citing Adegbite & Anor V. Amosu (2016) LPELR 40655 (SC), Shanu V. Afribank (2000) 13 NWLR (PT. 684) 392, Chime & Anor V. Nelson Ude & ORS (1996) 7 NWLR (PT. 461) 376 SC.

On this issue, the Respondent cited Nwokocha V. AG., Imo State (2016) LPELR-40077 (SC), on the meaning of the term "fair hearing", and submitted that Appellant was represented by Counsel, who chose to continue with the defence rather than apply to have PW1 recalled. It cited Adebayo V. AG., Ogun State (2008) 7 NWLR (Pt. 1085) 201, wherein this Court per Tobi, JSC, so very fittingly, observed as follows:

Learned counsel for the Appellant roped in the fair hearing principle. I have seen in recent times that Parties, who have bad cases embrace and make use of the constitutional provision for fair hearing to bamboozle the adverse Party and the Court, with a view to moving the Court away from the live issues in litigation. They make so much weather and sing the familiar song that the constitutional provision is violated or contravened. They do not stop there. They rake the defence in most inappropriate cases because they have nothing to canvass in their favour in the case. The fair hearing provision in the Constitution is the machinery or locomotive of justice, not a spare part to propel or invigorate the case of the user. It is not a casual principle of law available to a Party to be picked up at will in a case and force the Court to apply it to his advantage. On the contrary, it is a formidable and fundamental provision available to a Party, who is really denied lair hearing because he was not heard or that he was not properly heard in the case. Let litigants, who have nothing useful to advocate in favour of the cases, leave the fair hearing constitutional provision alone because it is not available to them just for the asking.

The term, fair hearing, is a recurring decimal in criminal cases because, it is a fundamental right guaranteed to citizens under the Constitution, and a breach of which will nullify the proceedings in favour of a victim, therefore, it is very easy for lawyers and litigants alike to come crying to an appellate Court that their right to fair hearing has been violated.

But "fair hearing" is not just an expression of mere rhetoric or empty verbalism; it cannot be construed outside the facts, and a Party alleging the breach must show clearly that the said right is violated or breached - see Gbadamosi V. Dairo (2007) 3 NWLR (Pt. 1021) 282 SC.

In other words, it is not enough for a Party alleging such a breach to merely mention fair hearing, and expect this Court to automatically side with him and determine the case in his favour; just for the asking. The facts of his case must show that the said right was indeed violated. But more often than not, the cry of lack of fair hearing is misleading, as this Court made very clear in Adebayo V. A.-G., Ogun State (supra).

In this case, the Appellant's cry is that his right to cross-examine the said PW1, which "is within the rubric of his right to fair hearing", was foreclosed by the trial Court, and this denial of fair hearing to him, occasioned miscarriage of justice. As the Appellant put it in his Brief -

The rule of audi alteram partem postulates that the trial Judge must hear both sides at every material stage of the proceedings before handing down a decision. The learned trial Judge did not give [him] the opportunity of cross-examining the sole Witness of the Respondent. The denial of fair hearing to [him] in this case is incurably fatal to the Judgment of the trial Court. The Judgment is bound to be set aside. It is irrelevant whether or not the Judgment of the trial Judge made subsequently is correct as the proceedings leading to the Judgment are null and void.

Evidently, the Appellant's allegation is that the trial Court did not give him the opportunity to cross-examine the said PW1. Is that correct? As the Respondent pointed out, he was represented by counsel, and it is not as if PW1 was not available or unwilling to be cross-examined. PW1 was in Court on 31/10/2012, but Appellant's counsel said he had "a medical problem", and could not cross-examine PW1 on that day.

The Record also shows that the PW1 was in Court on 31/1/2013, but the Appellant's counsel was not, and that is when the trial Court warned that if Appellant's counsel was not in Court to cross-examine PW1 on the next adjourned date, 6/3/2013, PW1 will be discharged. PW1 was in Court on 6/3/2013, but the Appellant's counsel was not, and that is when the trial Court granted the Prosecution's application "to foreclose the right of cross-examination by the [Defence] counsel." But in granting the said Application, the trial Court made it clear that:

The Court has given more than enough opportunity to the Defendant Counsel (sic) to cross-examine PW1, the only Witness for the Prosecution, yet the Defendant Counsel (sic) did not make use of the opportunity.

The word "opportunity'' means "a time or set of circumstances that makes it possible to do something"- see LEXICO powered by OXFORD. Can the Appellant seriously say that he was not given the opportunity to cross-examine PW1, who was always in Court, each time the matter was adjourned to enable the Appellant's counsel cross-examine him? The trial Court granted the adjournments to enable his counsel cross-examine PW1, who also made himself available to be cross-examined, but Appellant's counsel failed to take advantage of the opportunity.

Even so, the Appellant had another opportunity opened to him, when he changed his recalcitrant counsel. On 30/4/2013, another Defence Counsel appeared for the Appellant. She informed the Court that their office had just been briefed, and that she had been trying to get the processes from the former Counsel to continue with the trial. She therefore asked and was granted an adjournment till 14/5/2013. On 14/5/2013, the new Counsel announced her appearance and said, "the matter is for defence, we are ready to go on"; and that was that.

There was no mention of re-opening the Prosecution's case, and no application was made to have PW1 recalled for cross-examination. Yes, the Appellant is right that cross-examination of witnesses of the adverse Party, is a constitutional right of a Party to fair hearing, which is guaranteed in Section 36(1) of the 1999 Constitution (as amended), and it is a right that cannot be taken away from Parties in litigation - see Ogolo V. Fubara (2003) 11 NWLR (Pt. 831)237. To this end, it is the duty of the Court to ensure that every Party before it is afforded an opportunity to cross-examine the Witness(es) of the adverse Party.

In this case, the Court of Appeal acknowledged these principles; relying upon Simon V. State (2017) LPELR-41988(SC), it observed that:

It is a constitutional right of a Defendant to be allowed to cross-examine a witness called by the Prosecution. And any breach is a breach of the right of fair hearing and it can have a disastrous effect on the judgment. In the case of Okereke & Anor V. lbe & Ors (2008) LPELR-4714(CA) the Court held - - - see Fulani V. Rafawa & Ors (2013) LPELR-20384(CA). It is fundamental that an opportunity is given for cross-examination because it is the constitutional right of on Accused Person to be given the opportunity to cross-examine Witnesses called by the Prosecution.

But there are exceptions to every rule, and the Court of Appeal added:

However, where such an opportunity has been given and the Party fails to cross-examine, then the Courts cannot be blamed … Circumstances where a Party cannot be heard to complain of being denied the right to fair hearing were stated by the Apex Court as follows:

"l said it in the past and will say it again that the duty of the Court, trial and appellate, is to create the atmosphere or environment for a fair hearing of a case, but it is not the duty of the Court to make sure that a Party takes advantage of the atmosphere or environment by involving himself in the fair hearing of the case. A Party, who refuses or fails to take advantage of the fair hearing process, created by the Court, cannot turn around to accuse the Court of denying him fair hearing. This is not fair to the Court, and counsel must not instigate his client to accuse the Court of denying him fair hearing. After all, there is the adage that the best the owner of the horse can do, is to take the horse to the water, he cannot force it to drink the water. The horse has to do that by itself and by the act of sipping. If the horse is unwilling to sip, that ends the matter. The horse will not blame anybody for death arising for lack of water or hydrate (sic)". Per Tobi, JSC, in Inakoju & Ors v. Adeleke (2007) LPELR-1510(SC)

Cross-examination is to test the correctness of the testimony of the Plaintiff and his Witnesses, while re-examination is another chance to clarify facts but not an opportunity to restate the testimony given in evidence in chief all over again. If the basic requirement in attaining fair hearing is to create and give opportunity to Parties, as observed, and a Party fails to use that window, he cannot turn to complain, this was eloquently stated by the erudite jurist, Tobi, JSC in the case of Inakoju.

So, what side of the divide does the Appellant's case fall into? He cited a number of authorities, Iwuoha V. Okoroike (supra), Tewogbade V. Agbabiaka (supra), and P.H.M.B. V. Edosa (supra), to buttress his case that the foreclosure by the trial Court of his right to cross-examine the said PW1, was a violation or breach of his right to fair hearing, and the effect thereof, is that the trial is vitiated, and is rendered null and void. I have scrutinized those cases and I do not see how they help his case.

In Iwuoha V. Okoroike (supra), the Appellant filed an Application to amend his Statement of Defence, which Application was dismissed by the trial Court, on a date that the Appellant's counsel was absent, without granting Appellant's Application to enable his counsel appear. The matter came up again, and the Counsel applied to withdraw the Application to amend the Statement of Defence, which was granted. Whereupon, the trial Court called on the Respondent to give evidence, and it refused to allow the said Defence Counsel to cross-examine the Respondent on any point other than that on the issue of damages. The Respondent got Judgment in his favour. The Appellant appealed, and in allowing the Appeal, the Court of Appeal observed as follows:

The averring question germane to this Appeal is whether there was a fair hearing in the Court below. A careful perusal of the Record of proceedings including the short judgment of three pages, reveals that although the Appellant was present through out the proceedings, he neither gave nor called evidence, nor did his Counsel address the Court. This, according to the Appellant, was due to the manner in which the learned trial judge conducted the case, which includes making statements prejudicial to the Appellant's case, pontificating on the conduct of the defence thereby muzzling the Defence Counsel from adequately presenting the Appellant's case and also refusing Applications for adjournments at the instance of the Appellant.

In Tewogbade V. Agbabiaka (supra), Respondent's counsel objected to his being cross-examined because the Statement of Defence, which had been struck out, is non-existent in law. The Court of Appeal held:

It does not matter that the opposite party - - has not filed a Statement of Defence or he does not have one, which is validly before the Court. To deny such a Party, the right to cross-examine is to deny him the right to a fair hearing guaranteed by Section 33(1) of the [1979) Constitution [i.e. Section 36(1) of the 1999 Constitution).

In the last case cited by the Appellant, that is PHMB V. Edosa (supra), the Respondent, a catering officer in the service of the Appellant, was accused of stealing fresh tomatoes, and two tins of Pronto beverage. 13 Witnesses testified against her at the Disciplinary Committee, and there was no indication that she was allowed to cross-examine them. The trial Court dismissed her action challenging the termination of her appointment with the Appellant. But the Court of Appeal allowed her appeal on the ground that not giving her opportunity to cross-examine the said Witnesses, was a violation of the audi alteram partem rule, and in dismissing the Appellant's Appeal, this Court stated as follows:

The allegation of theft is a very serious allegation and before finding a person guilty of such an offence, save where the person accused voluntarily confessed to the allegation, he or she should be given a chance to make a defence and cross-examine witnesses called to prove the allegation, as in this close. In this case, the Respondent was not allowed to cross-examine witnesses, who were heard by the Committee, as the record had shown. This means that the whole proceedings was unfair and unjust and grossly in contravention of the rules of fair hearing contrary to the provisions of Section 33 of the 1979 Constitution.

Quite frankly, I do not see how the factual situations in the three cases, can be helpful to the Appellant, since his case is easily distinguishable.

Yes, the Prosecution called only one Witness, but it is not obliged to call more than one Witness, if it chooses not to -Oduneye V. State (2001) 2 NWLR (Pt. 697) 311 SC. PW1 testified that the Appellant and two other Defendants, were transferred from FESTAC Division at state C.I.D, to Anti Robbery Annex, lkeja, where he was stationed; and that he re-arrested them, and they volunteered their Statements to him.

The trial Court conducted a trial within trial as the Appellant had objected to the admissibility of his own Statement in evidence on the ground that he was tortured to make the said Statement to the Police.

PW1 testified at the trial within trial, and he was cross-examined by the Appellant's counsel. In its Ruling, the trial Court held as follows:

PW1 narrated how he cautioned the 2nd Defendant (Appellant) and the 2nd Defendant appended his signature to the words of caution. There is no evidence before the Court by the 2nd Defendant that he was hung, beating (sic) before appending his signature to the words of caution. Neither is there any evidence from 2nd Defendant that he was forced to sign twice as indicated in the Statement sought to be tendered by the Prosecution. PW discovered that the Statement of DW1 (Appellant) was confessional, and took DW1 before a superior Police Officer, Spol Ogunwole ASP, whose endorsement Form is TWT1. The 2nd Defendant endorsed TWT1, and did not complain of beating with cutlass or hung. DW2 and DW3 are not Witnesses of truth as they were not present when the Statement of the 2nd Defendant was taken, but DW3 testified that he saw PW1 hung (sic) DW1 for 2 days, I do not accept their evidence. DW3's evidence contradicts evidence of the 2nd Defendant that he was hung for 1 1/2 hours - - - The 2nd Defendant failed to prove torture or that he was forced to give his Statement. I have, therefore, come to the conclusion that the Prosecution has proved that 2nd Defendant's Statement made to PW1 (TWT) Cpl. Friday Ojiemen was voluntarily made. In the result, the Statement of the 2nd Defendant sought to be tendered, made on 31/12/2006, is hereby admitted as Exhibit P2.

So, PW1 was cross-examined by Appellant's counsel at the trial within trial, but the law says that a trial within trial is a separate and distinct proceeding from the main trial, therefore, evidence adduced therein, "cannot be transplanted, injected or imported into the main trial" - see Ifaramoye V. State (2017) LPELR-42031(SC). Thus, whatever PW1 said at the trial within trial, in evidence in chief or cross-examination, stays there and cannot be used, in any way or form, in the main trial.

However, the confessional Statement made by the Appellant to the Police, which was admitted in evidence after the trial within trial, is a different matter altogether. It can be said to have crashed through the barrier between those two proceedings, and lawfully transported from the trial within trial to the main trial, where it entrenched itself, as part and parcel of the case for the Prosecution, which is what it is - see Egboghonome V. State (1993) 7 NWLR (Pt.306) 383 SC. In effect, the fact that PW1 was not cross-examined in the main trial, does not destroy the Appellant's Confessional Statement admitted in evidence.

Be that as it may, the Appellant has argued in the alternative that the failure to cross-examine PW1 was a mistake of counsel, therefore, he cannot be held responsible or punished for a mistake of his counsel.

But the truth of the matter is that the Appellant was represented by counsel, two of them in fact. The first counsel, the recalcitrant one, failed, refused or neglected to attend Court to cross-examine PW1, who was always in Court each time, and ready to be cross-examined; opportunities were there but the first counsel chose to waste them.

The second counsel, who had opportunity to correct the wrong, with a simple Application to recall the said PW1 for cross-examination, chose not to do so, and elected to proceed with the defence instead. It may well be that she saw no reason to recall PW1 for that purpose, but that thought belongs in the realm of speculation, and it is settled that neither the Parties nor the Court itself can indulge in speculation - Ikenta Best Ltd. V. Rivers State (2008)6 NWLR (Pt. 1084) 612 SC.

Speculation aside, I hold the strong view that the Court of Appeal was absolutely right to affirm the decision of the trial Court since the Appellant was given opportunity to cross-examine PW1 but failed to. The trial Court created the atmosphere for the fair hearing of the case, but he failed to take advantage of the opportunities provided to do so. So, he cannot accuse the trial Court of denying him a fair hearing or find fault with Court of Appeal for affirming the trial Court's decision.

Before I round up, I must comment on the issue of his sentence, which Osayaba Giwa-Osagie, Esq., learned Counsel for the Appellant, considered excessive. He raised the issue at the hearing of the Appeal, but there is no Ground of Appeal challenging his sentence, therefore, there is nothing this Court can do or say on the issue of his sentence.

In the final analysis, this Appeal lacks merit. It, therefore, fails and it is dismissed. The Judgment of the Court of Appeal is affirmed.

**OLUKAYODE ARIWOOLA, J.S.C.:**

The appellant and others had been arraigned before the trial High Court, Lagos on two count charge of conspiracy to commit robbery and robbery. The facts of the case had been beautifully captured in the lead judgment. The appellant’s complaint is that the trial Court denied him of fair hearing for failure to allow him cross examine the sole witness called by the prosecution, and the affirmation of the decision of the trial Court by the lower Court.

There is no doubt that the appellant deserves to be fairly treated and given fair hearing by the Courts at all stages, inclusive of the apex Court. Hence, a complaint of lack of fair hearing must be carefully looked into by the court. In Michael Udo Vs. The State (1988) LPELR - 3299 (SC), this Court opined thus:

“The essence and rationale of fair hearing given by the Constitution and Laws of this country to a person standing trial for a capital offence are that in view of the seriousness of the charge in such a case, the trial should not be weighted against an accused person who, not being a legal practitioner does not understand or appreciate the language, procedure, and technicalities of the Court and is therefore in a definite disadvantage if he is made or allowed to conduct his case against a legally qualified person. Anything which detracts from his right to full access to a counsel at any stage of the trial amounts to unfair hearing.”

However, in the instant case, the appellant was given every opportunity to be adequately represented by counsel of his choice and to be fairly heard but his counsel at every stage of the hearing failed to utilize the opportunity. He can therefore not be heard to say that he was not given fair hearing.

Fair hearing does not mean a person must be forcefully heard. Once he is given ample opportunity to be heard, the constitutionally guaranteed principle of fair hearing is fulfilled. The trial Court was therefore right to have proceeded with the hearing of the trial and concluded it the way it did. The Court below was equally right to have affirmed the judgment of the trial Court as there was no evidence of denial of fair hearing.

In the final analysis, I agree that the appeal lacks merit and substance. It deserves to be dismissed. I accordingly dismiss the appeal as my learned brother, Augie, JSC did in the lead judgment. I affirm the judgment of the Court below.

Appeal dismissed.

**KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, J.S.C.:**

I have had the benefit of a preview of the judgment of my learned brother, AMINA ADAMU AUGIE, JSC just delivered. I agree with the reasoning and conclusion that the appeal lacks merit and should be dismissed.

The law is quite settled that a complaint of lack of fair hearing will only avail a party where he is able to show that he was denied the opportunity of presenting his case. Whether or not he was denied fair hearing depends on the facts and circumstances of the case. It has been held in several decisions of this Court that the crucial determinant of whether or not a party has been denied fair hearing is whether the parties were afforded an equal opportunity to present their case before judgment is delivered. The Court will take an objective view of the entire proceedings. The true test of fair hearing is the impression of a reasonable man present at the trial and whether from his observation, justice has been done in the case. See: Mohammed Vs Kano Native Authority (1968) 1 ALL NLR 424; Akaninwo Vs Nsirim (2008) 1 SC (Pt. III) 151; Otapo Vs Sunmonu (1987) 2 NWLR (Pt. 58) 587 @ 605.

The effect of a breach of the right to fair hearing is that the entire proceedings and any judgment or order made therein become a nullity. See:Audu Vs F.R.N (2013) LPELR - 19897 (SC) 13; Akinfe Vs The State (1988) 3 NWLR (Pt. 85) 729; Bamgboye Vs University of Ilorin (1999) 10 NWLR (Pt. 622) 290.

Conversely, it has been held severally, that where the Court creates an enabling environment for the parties to ventilate their grievances, either in the prosecution or defence of their case, the failure of a party to take advantage of such conducive environment cannot be the basis for a complaint of lack of fair hearing. See Mfa & Anor Vs. Inongha (2014) 1-2 SC (Pt. 1) 43; Inakoju Vs. Adeleke (2007) LPELR - 1510 (SC).

In the instant case, the facts show that the appellant was represented by counsel throughout the proceedings. The respondent's witness, pw1 was in Court and available for cross-examination on several dates to which the case was adjourned. The witness could not be cross-examined owing to the absence of the appellant's counsel. After several adjournments, the prosecution's application to foreclose the right of cross-examination by the defence counsel was granted. The appellant subsequently changed his counsel. At the resumed hearing on 30/4/2013, the new counsel sought an adjournment to enable her study the case file and prepare for the trial. The request was granted. On the adjourned date, 14/5/2013 being fully seised of the matter, the learned counsel did not seek to re-call the PW1 for cross examination. She merely informed the Court that the defence was ready to proceed.

Clearly, from the above scenario, the appellant had every opportunity to cross-examine PW1, but failed to make use of the opportunity. The lower Court as well as the trial Court were right to reject the complaint of denial of fair hearing. It was not made out.

For these and the more detailed reasoning of my learned brother, AMINA ADAMU AUGIE, JSC. I find this appeal to be devoid of merit. It is hereby dismissed. Judgment of the lower Court is affirmed.

**PAUL ADAMU GALUMJE, J.S.C.:**

I have had the advantage of reading in draft, the judgment just delivered by my learned brother, AMINA ADAMU AUGIE, JSC and I agree that this appeal lacks merit and should be dismissed. Accordingly same is hereby dismissed.

**UWANI MUSA ABBA AJI, J.S.C.:**

His Lordship, Hon. Justice Amina Augie, JSC, obliged me with a copy of his lead Judgment in this appeal and I find that the reason and conclusion reached therein accord with mine that this appeal is bereft of merit and deserves to be dismissed.

The Appellant and two others were alleged to have used toy gun to attack and rob a motorcycle rider and his passenger, dispossessing them of N500.00 and N1,500 respectively. The Appellant was convicted as charged and sentenced to 21 years imprisonment. On appeal, he also lost, hence this appeal.

The issue left for determination of this appeal is:

1. Whether the Court of Appeal was right in affirming the judgment of the trial Court wherein the trial Court foreclosed the Appellant's right to cross-examine PW1, the Respondent's sole witness.

The PW1 has presented himself to be cross-examined unlike what the Appellant alleges. The horse has been taken to the river for a drink but you can't force it to drink the water. This was pathetically the case of the Appellant. The facts at play show that on 31/1/2012, the Appellant's Counsel could not cross-examine PW1 due to medical problem he had to attend to. Similarly, on 31/1/2013, PW1 was available for cross-examination but the Appellant's Counsel was unavoidably absent. After a caveat from the Court to discharge PW1 and foreclose the Appellant's right to cross-examine the PW1 on the next adjourned date, the Appellant's Counsel was surprisingly absent again on 6/3/2013 when PW1 present himself for cross-examination.

This is not the case of denial of the right to fair hearing but refusal to avail same or the waiver thereof.

The appellant who, by his own deliberate decision, mis-judgment or inadvertence fails to avail himself of the opportunity of a hearing, cannot later be heard complaining that he was deprived fair hearing. A party cannot and should not complain of breach of his right of fair hearing where he refused to avail himself, as on this instant case, of the opportunity provided under the law to present his case. See Per SANUSI, JSC in DARMA V. ECO BANK (2017) LPELR- 41663(SC). It rather goes the other way round that when a party completely refuses or fails to cross examine a witness as in this case, such a party will be deemed to have accepted the testimony of the said witness. See Per OGUNBIYI, J.S.C in ALI v. STATE (2015) LPELR-24711(SC).

I therefore align myself with my learned brother that the Appellant's right to cross-examine PW1 was not breached. This appeal therefore is dismissed.