**THEOPHILUS KURE**

**V.**

**COMMISSIONER OF POLICE**

IN THE SUPREME COURT OF NIGERIA

ON FRIDAY, THE 24TH DAY OF JANUARY, 2020

SC.317/2018

**LEX (2020) - SC.317/2018**

**OTHER CITATIONS**

3PLR/2020/46 (SC)

(2020) LPELR-49378 (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**

THEOPHILUS KURE - Appellant(s)

AND

COMMISSIONER OF POLICE - Respondent(s)

**ORIGINATING COURT(S)**

1. COURT OF APPEAL, KADUNA DIVISION

2. HIGH COURT, KADUNA STATE (Coram M. L Bello and B. F Zubairu JJ)

3. CHIEF MAGISTRATE COURT, KADUNA

**REPRESENTATION**

L. A. O NYLADER SAN, with him, J. F Adamu and Seember Wayo Esq. - for Appellant - For Appellant

AND

MR. E. E. EKHASEMOMHE, with him, P. O Iyaji - for Respondent - For Respondent

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

CRIMINAL LAW AND PROCEDURE – PROOF OF CRIME - CONVICTION:- Offences of criminal breach of trust and cheating based on the same factual situation in respect of one transaction- Section 213, 312 and 320 of the Criminal Procedure Code - Whether a person can be convicted for both in the same proceedings

CRIMINAL LAW AND PROCEDURE – PROOF OF CRIME:- Accused tried for several similar offences – Duty of the prosecution to prove each of the offences beyond reasonable doubt before a conviction on any of them can stand – Whether proof of one of the offences is not a conclusive evidence that accused is guilty for all the offences

CRIMINAL LAW AND PROCEDURE – PROOF OF CRIME:-. Arraignment and trial are under Section 213 of the Criminal Procedure Code – Distinction between trial and conviction –

CRIMINAL LAW AND PROCEDURE – PROOF OF CRIME:- Distinction between the ingredients leading to the offences of cheating and criminal breach of trust – Ingredients of the offence of cheating – Section 320(a) of the Penal Code - Section 322 of the Penal Code –Ingredients of the offence of criminal breach of trust – Necessity of proving the existence of a trust - Section 311 of the Penal Code – What the prosecution must prove to succeed in each case

CRIMINAL LAW AND PROCEDURE - CRIMINAL BREACH OF TRUST: Requirements of the law for a criminal breach of trust to be deemed to have occurred – Necessity for evidence of the existence of a trust – Elements of a trust - Whether transactions involved in a case will be held to be based on contractual agreement where there is no evidence of criminal breach of trust

CRIMINAL LAW AND PROCEDURE – DEFECTIVE CHARGE:- Charging an accused person on a set of facts which evidence discloses does not exist – Being charged for an amount different from what was actually put in evidence - Duty of court thereto

ADMINISTRATIVE AND GOVERNMENT LAW - POLICE - DUTY OF POLICE: Nominal complainant in a civil suit for damages for breach of contract or for an order for specific performance - Duty/Role of the Police under Section 4 of the Police Act Cap. P19 Laws of the Federation of Nigeria 2004 - Whether includes the settlement of civil dispute or debt collection

AGRICULTURE AND FOOD LAW – PROCUREMENT OF LIVE ANIMAL:- Calf giraffe – Contract of procurement of for a State entity – Matters arising therefrom – How treated

COMMERCIAL LAW – CONTRACT:- Where involves a State entity and a third party – Breach of – Whether can result in a criminal charge and subsequent conviction

DEBTOR AND CREDITOR – DEBT COLLECTION:- Deployment of Police as debt collection agents through the pretext of criminal charges – Attitude of courts thereto

ESTATE PLANING AND MANAGEMENT – TRUST:- Conditions precedent for a valid trust - Where a property is obtained deceitfully or through fraudulent and dishonest inducement – Whether such transaction cannot amount to a trust – Legal implications

TORT AND PERSONAL INJURY LAW – MALICIOUS PROSECUTION:- When a purely civil matter is reported to the Police –Character of report as one made *mala fide* – Justification – Liability of person making report – Basis of

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - INTERFERENCE WITH CONCURRENT FINDING(S) OF FACT(S): Principle that where there is evidence to support concurrent findings of lower courts, the Supreme Court will not interfere therewith – Exception thereto

WORDS AND PHRASES:- “Trial” – “Conviction” – Meanings of – Distinctions between

NOTABLE STATEMENT – ON POLICE MEDDLING IN CIVIL AFFAIRS AND DEBT COLLECTION:

"As I went through the facts of this case, I was wondering how a purely civil matter could easily metamorphose and transubstantiate into a purely criminal case. The end result now is that the Appellant has suffered irreparable damage, disgrace, shame, odiousness and untold hardship in the hand of the Police that is constitutionally and legally saddled with prosecution of criminal offences. The police have muzzled the rights and freedom of Nigerians even where cases are clearly outside their jurisdiction, power or corridor. If this is not curbed, everybody including the judicial officers will suffer always from floodgates of civil matters being hijacked by the police and transmuted into crimes. If this is not tackled, everybody would have suffered in the merciless hand of the police who has become a law unto itself in this country. The primary duty of the Police by Section 4 of the police Act is the prevention of crime, investigation and detection of crime and the prosecution of offenders. See IBIYEYE V. GOLD (2012) ALL FWLR (PT 659) 1074. The Police is not a debt recovery agency and has no business to dabble into contractual disputes between parties arising from purely civil transactions. See MCLAREN V. JENNINGS (2003) FWLR (PT 154) 528.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The Appellant, represented as "veterinarian, entered into a contract with the Ministry of Culture and Tourism, Rivers State, through one its Director of Tourism, to supply a calf giraffe in the sum of N3.5 Million which sum was paid into the bank account of the Appellant. After several months passed without delivering the giraffe as agreed, the Director sought and obtained a lien, ex parte on the bank account of the Appellant enabling the recovery of the yet un-dissipated fund by the Ministry. Subsequently, the matter was reported the matter to the Police, who arrested and arraigned the Appellant before the Chief Magistrate's Court for the offences of cheating and criminal breach of trust contrary to Sections 312 and 322 of the Penal Code. He was found guilty and sentenced to a fine of N5,000.00 or 1 year imprisonment for the offence of cheating and a fine of N8,000.00 or 2 years imprisonment for criminal breach of trust. In addition, the Appellant was ordered to pay the sum of N2,505,000.00 as compensation to the nominal complainant, being the balance on the contract yet to be recovered.

His appeal to the High Court was dismissed the appeal and the decision of the Chief Magistrate affirmed. His further appeal to the Court of Appeal received a similar outcome.

DECISION(S) APPEALED AGAINST

The Court of Appeal dismissed the appeal for lack of merit, thereby upholding the concurrent decisions of the two lower courts.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

1. Whether the lower Court was right to have upheld the conviction of the Appellant by the lower Courts for both criminal breach of trust and cheating based on the same factual situation in respect of one transaction in the same proceedings.

2. Whether the lower Court was right to have relied on the judgment of the trial Court to uphold the conviction and sentence of the Appellant for criminal breach of trust and cheating having regard to the evidence.

*BY RESPONDENTS*

1. Whether the lower Court was right to have upheld that the Appellant could be convicted for both criminal breach of trust and cheating based on the same factual situation in respect of one transaction in the same proceedings.

2. Whether the lower Court was right to have relied on the judgment of the trial Court to uphold the conviction and sentence of the Appellant for criminal breach of trust and cheating, having regards to the evidence adduced.

*AS ADOPTED BY COURT*

*[Supreme Court resolved Appeal based on issues donated by the Appellant]*

DECISION OF [CURRENT] COURT

1. Issues 1 and 2 resolved in favour of the Appellant.

2. The ingredients leading to the offences of cheating and criminal breach of trust are not the same.

3. In order to prove the offence of cheating, the prosecution must prove that the complainant was deceived and thereby fraudulently induced by the Appellant. On the other hand, the offence of criminal breach of trust does not involve deceit and/or fraudulent and dishonest inducement of the settlor to deliver the property for which the trust is created, to the trustee.

4. The prosecution to succeed in establishing the offence of criminal breach of trust, it must prove that the accused person was entrusted with property or dominion over it: that he misappropriated it, converted it to his own use or disposed of the said property; that the accused did so in violation of any direction of law, prescribing the mode in which such trust was to be discharged or any legal contract expressed or implied which he had made concerning the trust or that he intentionally allowed some other persons to misappropriate, convert or dispose of the property in violation of the mode of execution of the trust.

5. Based on the evidence, the transactions involved in this case were based on contractual agreement, as there is no evidence of criminal breach of trust and there is no law where a breach of agreement between two parties, which has no element of criminality, can result in a criminal charge and subsequent conviction. At best, it can be a breach of a contractual relationship which the criminal law lacks legal capacity or competence to enforce and punish.

**MAIN JUDGMENT**

PAUL ADAMU GALUMJE, J.S.C. (Delivering the Leading Judgment):

The Appellant herein, was introduced to Mrs. Sokari Davies, who was Director of Tourism, Ministry of Culture and Tourism, Rivers State of Nigeria as a consultant on Wild Animals by one Roland Ahmed in 2005. Ahmed who described the Appellant as his friend told Mrs. Sokari Davies that the Appellant was capable of supplying wild animals to the ministry. So when the need for purchase of wild animal arose, Mrs. Davies told the Commissioner in charge of her Ministry about the Appellant. Together they invited the Appellant where they discussed extensively about the supply of wild animals. In 2013, Mrs. Davies contacted the Appellant and sought to know what types of animals he had. The Appellant told her that he had Giraffes, Zebras and other animals, for sale. The Appellant after a formal discussion with the commissioner in charge of the ministry, agreed to supply a calf giraffe at the cost of Three Million, Five Hundred Thousand Naira (N3.5 Million). He supplied his Bank account no.2008212399 domiciled at the United Bank for Africa and promised to deliver the animal within two weeks. The Honourable commissioner directed Mrs. Davies and the Director of Finance to effect payment and ensure prompt delivery of the animal. Payment was effected on the 1st of February, 2013 and the Appellant sent a receipt for the payment to Mrs. Sokari Davies by e-mail. The animal was not delivered. Several months later, Mrs. Davies discovered that the Appellant had withdrawn substantial part of the money when the animal was yet to be supplied. She contacted a lawyer who applied for and obtained an order of lien on the account into which the money was paid. She wrote a letter of complaint to the Commissioner of Police, Kaduna State on the 26th of November, 2013 and the Appellant was subsequently arrested and was arraigned before a Chief Magistrate's Court Kaduna for the offence of criminal breach of trust and cheating contrary to Sections 312 and 322 of the Penal Code. By the time lien was placed on the account into which the money was paid, the Appellant had withdrawn N2,505,000.00 leaving a balance of N995,000.00.

The Appellant herein, was arraigned before a a on a First Information Report (FIR) on allegation of criminal breach of trust and cheating contrary to Sections 312 and 322 of the Penal Code. After the First Information Report was read and explained to the Appellant, he pleaded not guilty. In order to prove its case, the prosecution called three witnesses and tendered in evidence two written statements of the Appellant and a printout statement of UBA Account of the Appellant. These documents were admitted in evidence and marked Exhibits A1, A2, and B respectively.

At the close of the prosecution's case, the learned Chief Magistrate ruled that the prosecution had established a prima facie case of cheating and criminal breach of trust against the Appellant. The Appellant pleaded not guilty to the two counts charge that was framed by the Chief Magistrate and elected to give evidence in his defence. After his evidence in chief, the Appellant made several attempts to call another witness without success, and so he finally closed his case on the 5th of October, 2015. In a reserved judgment, delivered on the 23rd of October, 2015, the trial Chief Magistrate found the Appellant guilty as charged and sentenced him to a fine of N5,000.00 or 1 year imprisonment for the offence of cheating and a fine of N8,000.00 or 2 years imprisonment for criminal breach of trust. In addition, the Appellant was ordered to pay the sum of N2,505,000.00 as compensation to the nominal complainant, being the balance of the N3.5 Million paid to the Appellant by the nominal complainant for male calf giraffe which he failed to deliver to her, since the nominal; complainant had already retrieved the sum of N995,000.00 from the bank account of the convict at UBA Plc.

The Appellant was not happy with the decision of the Chief Magistrate. Being aggrieved, he appealed to the High Court and submitted two grounds of appeal. The appeal was heard and in a unanimous decision, the High Court (Coram M. L Bello and B. F Zubairu JJ) dismissed the appeal and affirmed the decision of the Chief Magistrate.

Once again, the Appellant was thoroughly dissatisfied with the decision of the High Court, and therefore appealed to the Court of Appeal, Kaduna Division on three grounds of appeal and submitted two issues for determination of the appeal. The Appeal was heard and in a reserved and considered judgment delivered on the 30th day of October, 2017, the Appellant's appeal was dismissed for lack of merit. The Appellant has finally brought this appeal against the decision of the lower Court. His notice of appeal, filed on the 28th November 2017, contains three grounds of appeal.

Parties filed and exchanged briefs of argument. Mr. Nylander, learned counsel for the Appellant formulated two issues for determination of this appeal as follows:-

1. Whether the lower Court was right to have upheld the conviction of the Appellant by the lower Courts for both criminal breach of trust and cheating based on the same factual situation in respect of one transaction in the same proceedings.

2. Whether the lower Court was right to have relied on the judgment of the trial Court to uphold the conviction and sentence of the Appellant for criminal breach of trust and cheating having regard to the evidence.

Mr. Emmanuel Ekhasemomhe, learned counsel for the Respondent also formulated two issues for determination of this appeal. They read thus:-

1. Whether the lower Court was right to have upheld that the Appellant could be convicted for both criminal breach of trust and cheating based on the same factual situation in respect of one transaction in the same proceedings.

2. Whether the lower Court was right to have relied on the judgment of the trial Court to uphold the conviction and sentence of the Appellant for criminal breach of trust and cheating, having regards to the evidence adduced.

For a proper consideration of the issues submitted for determination of this appeal, it is pertinent to set out in brief the facts of this case as highlighted in the judgment of the lower Court. The Appellant a "veterinarian" entered into a contract with the ministry of culture and tourism, Rivers State, through one Mrs. Sokari Davies, the Director of Tourism, to supply a calf giraffe in the sum of N3.5 Million. The said sum was paid on 1/2/2013 into the account of the Appellant domiciled at the United Bank for Africa (UBA). Appellant promised to deliver the calf giraffe in two weeks. Several months passed, no delivery was made despite repeated demands made to the Appellant to deliver. Mrs. Sokari Davies, who stood in for the ministry of culture and tourism, Rivers State, decided to check whether the money she deposited in the Appellant's account was still intact. To her surprise, the Appellant had been making piecemeal withdrawals leaving a balance of One Million Naira (N1,000,000.00) in the account. She now went to Court, sought for and obtained an order ex-parte, which placed lien on the Appellant's account, and by the time the order was served on the bank there was further withdrawal from the said account, which brought the balance to the credit of the Appellant down to Nine hundred and Ninety- five Thousand Naira (N995,000.00). This balance was subsequently transferred to the account of Mrs. Sokari Davies. Mrs. Sokari Davies who testified at the trial Court as PW1, reported the transaction to the police in Kaduna, where the Appellant lived. As a result of the report, the Appellant was arrested and arraigned before the Chief Magistrate's Court for the offences of cheating and criminal breach of trust contrary to Sections 312 and 322 of the Penal Code.

The Appellant, being the aggrieved party and the complainant in this appeal, I will adopt the two issues formulated on his behalf in the determination of this appeal.

On the first issue, learned counsel for the Appellant submitted that while the Appellant may be convicted for one of the two offences with which he was charged, depending on which one of them is properly established, he cannot properly be convicted for both offences in the circumstances of the facts and evidence of the instant case, especially, as the entire evidence is hinged on one and the same factual situation. Learned counsel further submitted that the two offences relate to different scenarios with different ingredients and cannot co-exist in the same factual situation borne out of a single transaction. In aid, learned counsel cited R Vs Sindair (1968) 3 ALL E.R 241 and Uzoagba Vs Cop (2014) 5 NWLR (Pt. 140) 441.

On the second issue for determination of this appeal, learned counsel submitted that the prosecution did not prove its case beyond reasonable doubt and the lower Court was wrong when it upheld the decision of the High Court that upheld the decision of the Chief Magistrate Court. Learned counsel urged this Court to resolve the two issues in favour of the Appellant and acquit him.

Learned counsel for the Respondent on issue one, submitted that the lower Court was right to have held that the Appellant could be convicted for both criminal breach of trust and cheating based on the same factual situation in respect of one transaction in the same proceedings. In aid, learned counsel cited Section 213 of the Criminal Code and the authorities in Garba Mailayi & Anor Vs State (1968) ANLR 117, and Major Dennis Toinpre Des Dokubos Vs The Nigerian Army (2015) LPELR 25969 (CA). In a further argument, learned counsel submitted that the Appellant at the trial Chief Magistrate's Court, did not canvass for separate trial for both offences despite the fact that he could have persuaded the trial Chief Magistrate's Court for a separate trial pursuant to the provisions of Section 213 of the Criminal Procedure Code. Still in argument, learned counsel submitted that the Appellant has failed to show that he was prejudiced by his trial and conviction for the said offences in single proceeding based on the same set of facts. Finally this Court is urged to resolve this issue in favour of the Respondent.

On the 2nd issue for determination of this appeal, learned counsel for the Respondent submitted that the lower Court was right to have relied on the judgment of the High Court to uphold the conviction and sentence passed on the Appellant for criminal breach of trust and cheating, having regard to the totality of the evidence adduced before the trial Court. According to the learned counsel, the Appellant at the lower Court did not canvass that the offences with which he was charged, were not established against him beyond reasonable doubt as such he cannot raise that issue before this Court. Finally learned counsel submitted that this is not one of those cases where the Appellate Court can disturb the concurrent findings and conclusions of three lower Courts as there is no violation of some principle of law and procedure which can be said to have resulted in miscarriage of justice. In aid, learned counsel cited Zakari Vs. Nigerian Army (2015) 62 NSCQR (pt. 1) 214 at 254: Alhaji Ganiyu Martins Vs C.O.P (2012) 72 MJSC (Pt. 11) 73 at 93 - 94.

The first question to be dealt with in this appeal is whether the lower Court was right to have upheld the conviction of the Appellant for both criminal breach of trust and cheating contrary to Sections 312 and 322 of the Penal Code. The lower Court, after making reference to Section 213 of the Criminal Procedure Code and having reviewed some authorities which were cited by learned counsel for respective parties came to the following conclusion:-

"Cheating and criminal breach of trust under Sections 312 and 320 are distinct offences with different ingredients, albeit similar. It is their similarity that permits their joinder in the same trial. The duty on the trial Court is to satisfy itself that the different ingredients constituting the offence have been proved.

As pointed out by the Respondent's counsel, had the Appellant felt prejudiced by the Joinder of charges, the same should have been stated at the inception of trial, with a request for separate trials. This not having been done, renders this complaint too late in the day."

With this comment, the lower Court resolved the first issue before it against the Appellant.

Before I peep into the provision of Section 213 of the CPC, I wish to reproduce the Appellant's first issue for determination before the lower Court, as follows:-

"Whether the lower Court was right to hold that the Appellant could be convicted for both criminal breach of trust and cheating based on the same factual situation in respect of one transaction in the same proceedings."

Section 213 of the CPC provides as follows:-

"Where a person is accused of several offences of the same or similar character he may be charged with and tried at one trial for any number of them, but if the Court, before the trial or at any stage of the trial before judgment is pronounced, considers that he may be prejudiced or embarrassed in his defence by such procedure or that for any other reason it is desirable to do so, the Court may order a separate trial of anyone or more of such charges."

Reading through the contents of the first issue that was submitted by the Appellant at both the lower Court and this Court, it is very clear that he was questioning his conviction and sentence for the two offences on a single transaction that was based on the same factual situation. Learned counsel for the Appellant, both at the lower Court and this Court never raised the issue of joinder of the offences of criminal breach of trust and cheating at the trial stage that is from arraignment to the judgment. His argument is not against the trial of the Appellant for the two offences at the same time. It is his argument that the Appellant could not properly be convicted for both offences based on the same set of facts. This line of argument is clearly admitted by learned counsel for the Respondent at paragraph 4.6 of the Respondent's brief of argument when he states as follows:-

"The most important consideration with respect to this issue is whether both offences were proved beyond reasonable doubt. Once this is ascertained and the answer is positive, a conviction for both offences based on the same set of facts in the same proceedings should stand..."

By this statement, it is clear that even if an accused is tried for several similar offences, the prosecution must prove beyond reasonable doubt, each of the offences before a conviction on any of them can stand. The mere fact that accused is found guilty for the one of the offences, is not a conclusive evidence that he is guilty for all the offences.

An arraignment and trial are different from conviction. Since the Appellant's issue one at the lower Court and this Court have not raised any question concerning arraignment and trial, all the submissions made by learned counsel for the Respondent regarding Section 213 of the CPC go to no issue.

The authority of Garba Mailayi & Anor Vs State {Supra) which was cited and relied upon by the learned counsel for the Respondent is not applicable in the instant appeal, as it has to do with the trial of joint offences and not conviction and sentence. Trial and conviction are distinct and separate words that carry different meaning. Trial is a formal judicial reception and examination of evidence in the process of determination of legal claims or in criminal matters, whether the prosecution has proved its case in an adversary proceeding while conviction is a final decision in which a person is found guilty of a criminal offence upon a criminal trial by the Court. It is the end product of the evidence received in the course of trial.

The ingredients leading to the offences of cheating and criminal breach of trust are not the same. The definition of the offence of cheating, relevant to this case is as contained in Section 320(a) of the Penal Code. This section provides as follows:-

"320 -Whoever by deceiving any person

(a) Fraudulently or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property."

The punishment section under which the Appellant was charged is Section 322 of the Penal Code. In order to prove the offence of cheating, the prosecution must prove that the Rivers State ministry of Culture and Tourism was deceived and thereby fraudulently induced by the Appellant to deliver the sum of N3.5 Million to it.

On the other hand the offence of criminal breach of trust is defined under Section 311 of the Penal Code as follows:-

"Whoever being in any manner entrusted with property or with any dominion over property, dishonestly misappropriates or converts to his own use that property or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits criminal breach of trust."

The offence of criminal breach of trust is punishable under Section 312 of the Penal Code. For the prosecution to succeed in establishing the offence of criminal breach of trust, it must prove the following ingredients:-

1. That the accused person was entrusted with property or dominion over it.

2. That he misappropriated it, converted it to his own use or disposed of the said property.

3. That the accused did so in violation of any direction of law, prescribing the mode in which such trust was to be discharged or any legal contract expressed or implied which he had made concerning the trust or that he intentionally allowed some other persons to misappropriate, convert or dispose of the property in violation of the mode of execution of the trust. See Uzoagba Vs C.O.P (2012) 5 NWLR (Pt.1401) 441; Federal Republic of Nigeria Vs Martins (2012) 14 NWLR (Pt. 1320) 287.

While the offence of cheating under Section 322 of the Penal Code involves deceit and or fraudulent and dishonest inducement of the person so deceived to part or deliver the property in issue to any person, the offence of criminal breach of trust does not involve deceit and/or fraudulent and dishonest inducement of the settlor to deliver the property for which the trust is created, to the trustee. For a trust to be valid, it must involve specific property, reflect the settlor's intent and be created for a lawful purpose. Where a property is obtained deceitfully or through fraudulent and dishonest inducement, such transaction cannot amount to a trust. Where there is no trust, breach of such trust cannot be founded by any tribunal or Court. By the different ingredients that lead to the commission of the two offences with which the Appellant was charged and convicted, there is no way that the Appellant could be properly convicted for the two offences, involving the same sets of facts of delivering money to the Appellant by the Rivers State Ministry of Culture and Tourism for the contract of supply of calf giraffe. The first issue is therefore resolved in favour of the Appellant.

The second issue for determination of this appeal, even at the risk of repetition is whether the lower Court was right to have relied on the judgment of the trial Court to uphold the conviction and sentence of the Appellant for criminal breach of trust and cheating having regard to the evidence. I wish to state straight away that the lower Court relied on the judgment of the High Court and not the judgment of the trial Chief Magistrate, since the appeal to it was from the decision of the High Court. Be that as it may, the complaint here is whether the prosecution did establish its case beyond reasonable doubt as to warrant a conviction for cheating and criminal breach of trust contrary to Sections 322 and 312 of the Penal Code. I have reproduced the provision of these sections of the Penal Code elsewhere in this judgment. Mrs. Sokari Davies, the prosecution's first witness testified as follows:-

"I met the accused Person in 2005. He was introduced to me as a consultant in wild animals by a friend, Roland Ahmed who claimed that the accused is his friend that could supply wild animals to us. So when the need arose, l told my commissioner then about him and the commissioner and I invited him during a conference we came to attend in Abuja at Ladi Kwali Hall of Sheraton Hotel. He come to us and we discussed with him about wild animals we wanted him to supply to us."

In his evidence in chief, the Appellant told the Court that he is a veterinarian and that he holds HND from the College of Agriculture and Animal Science Kaduna. In all this, no one gave evidence that the Ministry of culture and tourism, Rivers State was deceived and fraudulently induced to deliver the three million five hundred thousand naira to the Appellant. Mr. Roland Ahmed who was alleged to have introduced the Appellant as dealer in wild animals was not called as a witness to deny that the Appellant was not a veterinarian and never embarked on supply of wild animals as a business. Since there is no evidence of deceit on the part of the Appellant, the trial Court was wrong in finding him guilty of the offence of cheating.

Although it is not in the character of the Supreme Court to interfere with concurrent decisions of two or three lower Courts, however where such decision is unreasonable and cannot be supported by evidence and the law, this Court has a duty to interfere in order to meet the ends of justice. I am of the firm view that the lower Court acted in error, when it affirmed the decision of the Kaduna State High Court which in turn affirmed the decision of the Chief Magistrate's Court which found the Appellant guilty of the offence of cheating.

The next question is whether the prosecution established the offence of criminal breach of trust against the Appellant.

I have set out the ingredients of the offence of criminal breach of trust contrary to Section 312 of the Penal code elsewhere in this Judgment. The question is, was the Appellant entrusted with N3.5 Million by the Ministry of Culture and Tourism, Rivers State? Under cross examination, PW1, the star witness for the prosecution admitted at page 8 of the record of this appeal, as follows:-

"The contract to supply giraffe was given to the accused through me, by our ministry. The accused initially told me that he would get the giraffes from Chad, and later he said Niger. By that time, I wasn't aware of any security situation in the North." (Underlining is mine).

In his evidence, PW2, a police corporal, who recorded the statement of the Appellant, at page 9 of the record said:-

"On 26/11/2013, I was in the office when a case of criminal breach of trust and cheating was addressed to the C.O.P, by the Rivers State Government signed by Mrs. Sokari W. Davies against the accused person. That sometime in February, 2013, the complainant contracted his service to supply her with a giraffe calf worth N3.5 Million. That the giraffe was not supplied."

PW3, Inspector Yakubu Dabo, who was the team leader that carried out investigation into this matter, confirmed at pages 13 - 14 of the record of this appeal that the transaction between the Rivers State Ministry of Culture & Tourism and the Appellant was based on contractual agreement, when he stated as follows:-

"I know the accused person. On 26/11/2013, I was in Department of Criminal Investigation (D.C.I) when a letter of complaint was received written by Mrs. Sokari Davies, to the Commissioner of Police, Kaduna State, on behalf of Ministry of Culture & Tourism, Rivers State entered into contract with the accused person. And they paid him the sum of N3.5 Million for the supply of a male giraffe calf. Mrs. Sokari made the payment to the accused on behalf of the Ministry of Culture & Tourism, Rivers State. The money was deposited in a bank account No. 2008212399, UBA Plc Limited (sic). The accused person is the holder of the said account. The deposit was made on 1/2/2013. The accused promised to deliver the male giraffe calf in two weeks' time. After the payment he could not deliver the said giraffe as promised, which led to their reporting this case." (Underlining is mine)

All the prosecution witnesses testified that the transactions between the Ministry of Culture & Tourism, Rivers State and the Appellant were based on contract between the parties and that the contract had wholly failed because of the Appellant's non-performance. The second comment under Section 312 of the Notes on the Penal Code law by S. S Richardson, states as follows:-

"(2) Breach of trust is not the same thing as breach of contract. In all the cases given in the illustration to Section 311, in which a person is said to have committed criminal breach of trust, the property misappropriated is the property of another person or property of which the offender was not the beneficial owner."

For a criminal breach of trust to occur, there must be evidence of trust. A trust arises as a result of a manifestation to create it. It is a fiduciary relationship regarding property and charging the person with title to the property with equitable duties to deal with it for another's benefit. It is a property interest held by one person, called the trustee at the request of another person called the settlor for the benefit of a third party called the beneficiary. For the trust to be valid, it must involve specific property, reflect the settlor's intent and be created for a lawful purpose. A trust exists when property is to be administered by one person on behalf of another for some purpose other than the trustee's benefit. Where the property is administered for the benefit of the person holding it, it ceases to bear the meaning of trust.

In the instant case, the N3.5 million naira paid to the Appellant include cost for logistics and procurement of the giraffe and the Appellant's profit since the giraffe was not a commodity that was on display and could be bought for the N3.5 million.

The Appellant testified that the animal was not available in Nigeria and that its procurement was possible only in Niger Republic or Chad. Was he expected to trek to these countries to procure the calf giraffe with the money advanced to him. Clearly the intention of the Ministry of Culture & Tourism, Rivers State was for the Appellant to manage the money in such a way as to procure the calf giraffe. It was not its business to dictate how the giraffe was to be procured. There is no evidence that shows the beneficiary of the money that was given to the Appellant to buy the giraffe was a person other than the Appellant. A trust involves three elements: -

1. A trustee, who holds the trust property and is subject to deal with it for the benefit of one or more others.

2. One or more beneficiaries to whom and for whose benefit the trustee owes duties with respect to the trust property.

3. Trust property, which is held by the trustee for the beneficiaries.

In the instant case there are no beneficiaries other than the Appellant, as the money was deposited in the Appellant's account to be administered by him.

One worrisome procedure adopted at the Chief Magistrate's Court was the charge against the Appellant for criminal breach of trust and cheating the Ministry of Culture & Tourism in the sum of N3.5 million, inspite of the fact that the nominal complainant clearly stated in evidence that they had recovered the sum of N995,000.00 from the N3.5 Million naira which was paid into the Appellant's account. The only outstanding balance against the Appellant was in the region of N2,505,000.00. The Appellant was therefore convicted on a defective charge, which stipulated that he committed criminal breach of trust and cheating his victim in the sum of N3.Smillion. Although the error is not so material as to vitiate the proceedings in this case, it shows how desperate the trial Court had become in finding reasons to convict the Appellant.

Having considered the evidence at the trial Court, I am of the firm view that the transactions involved in this case were based on contractual agreement, as there is no evidence of criminal breach of trust. In Onagoruwa Vs State (1993) LPELR - 43456 (CA) at pages 67- 68 Paras, F- B, Niki Tobi, JCA (as he then was) said:-

"There is no law known to me where a breach of agreement between two parties, which has no element of criminality, can result in a criminal charge and subsequent conviction. At best, it can be a breach of a contractual relationship which the criminal law lacks legal capacity or competence to enforce and punish."

Although this is a decision of the Court of Appeal, I am very much persuaded to follow it in this case. The N3.5 Million naira was clearly a consideration for the contract between the parties which had wholly collapsed. The remedy in my view lies in civil litigation. The second issue for determination of this appeal is again resolved in favour of the Appellant.

Having resolved the two issues in favour of the Appellant, this appeal shall be and it is hereby allowed. The conviction and sentence passed on the Appellant as affirmed by the lower Court is set aside. The Appellant is acquitted and discharged forthwith.

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

I had the privilege of reading in draft the lead judgment of my learned brother, Galumje, JSC just delivered. I am in agreement with the reasoning therein and conclusion arrived thereat, that the appeal is meritorious and should be allowed. I too will allow the appeal.

Appeal allowed.

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

I have had a preview of the judgment of my learned brother, Paul Adamu Galumje, JSC, just delivered. His Lordship's reasoning and conclusion represent my views in this appeal.

The appellant herein entered into a contract with the Ministry of Culture and Tourism, Rivers State, through one Mrs. Sokari Davies, the Director of Tourism, to supply a male calf giraffe in the sum of N3.5 million. The total sum was paid into his bank account with United Bank for Africa on 1/2/13. Despite repeated demands, the calf giraffe was not supplied and the money was not refunded. Upon enquiry, Mrs. Sokari Davies discovered that the appellant had been making sundry withdrawals from the deposited sum. At the time of her enquiry the sum had been depleted by N2.5 million, leaving the sum of N1,000,000.00. she obtained an ex-parte order placing a lien on the account. By the time the order was served on the bank, further withdrawals had been made leaving a balance of N995,000.00.

Mrs. Sokari Davies made a complaint to the police in Kaduna, where the appellant resided. He was arrested and charged before the Chief Magistrate's Court with the offences of cheating and criminal breach of trust contrary to Sections 312 and 322 of the Penal Code. He was found guilty as charged and sentenced to a fine of N5,000 or 1 year imprisonment for the offence of cheating and a fine of N8,000.00 or 2 years imprisonment for criminal breach of trust. He was also ordered to pay N2,505,000.00 to the nominal complainant representing the balance of N3.5 Million for the male calf giraffe which he failed to deliver. The appellant challenged his convictions and sentences right through the hierarchy of the Courts from the High Court to the Court of Appeal. He was unsuccessful, hence the further appeal to this Court.

The crux of this appeal is whether the facts narrated above gave rise to a civil claim or whether the commission of criminal offences was disclosed. My learned brother has given a thorough consideration of this issue in the lead judgment. I am in complete agreement with him that what the facts disclose is a civil complaint of breach of contract. The sum of N3.5m was paid to the appellant in furtherance of the contract between the parties. The failure to deliver the calf giraffe meant that the consideration for the contract wholly failed. The remedy of the nominal complainant was in a civil suit for damages for breach of contract or for an order for specific performance, It was the duty of the Police to advise her accordingly and to decline to proceed with the complaint.

The role of the Police is clearly spelt out in Section 4 of the Police Act Cap. P19 Laws of the Federation of Nigeria 2004, to wit:

"4. The Police shall be employed for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged..."

As stated earlier, the compliant was purely civil with no element of criminality. The police ought to have referred the appellant to the Court to pursue a civil claim.

In the circumstances, and for the more detailed reasoning contained in the lead judgment, I find merit in this appeal. It is hereby allowed. The conviction and sentence passed on the appellant, as affirmed by the lower Court is hereby set aside. The appellant is accordingly acquitted and discharged.

**AMINA ADAMU AUGIE, J.S.C.:**

I read in draft the lead Judgment delivered by my learned brother, Galumje, JSC, and I agree with his reasoning and conclusions therein.

The Appellant is challenging the concurrent findings of the two lower Courts, regarding his conviction and sentence for the offences of criminal breach of trust and cheating. Yes, the position of the law is that where there is evidence to support such concurrent findings, they will not be disturbed unless they are shown to be perverse, or miscarriage of justice or violation of principles of law or procedure is shown on the Record - Ogoala V. State (1991) 2 NWLR (Pt. 175) 506.

It is also settled that the onus lies on the Appellant to give good reasons why this Court should interfere with the concurrent findings of the two lower Courts; and, as my learned brother, Galumje, JSC, said in the lead Judgment, it is clear from the facts and circumstances of this case that the situation in which the Appellant found himself, demands that this Court must intervene by doing something about it.

In other words, it is clear from the peculiar facts of this case that there are good reasons for this Court to disturb or interfere with the concurrent findings of the two lower Courts. There was nothing to indicate deceit on the part of the Appellant to ground a conviction for the offence of cheating; and there was no evidence to establish that the Appellant committed the offence of criminal breach of trust.

It is for this and other eloquent reasons in the lead Judgment that I also allow this Appeal and set aside his conviction and sentence imposed on the Appellant that was affirmed by the Court of Appeal.

The Appellant is, accordingly, acquitted and discharged.

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

I have had the benefit of reading in draft the leading judgment by my learned brother, Galumje, JSC. I agree with his lordship that the appeal be allowed, discharging and acquitting the Appellant.

The Appellant, a veterinarian living in Kaduna, entered into a contract with the Ministry of Culture and Tourism, Rivers State, through Mrs. Sokari Davies, the Director of Tourism, to supply a calf giraffe for a sum of N3.5 million. The said money was paid on 1/2/2013 into the UBA account . of the Appellant. The calf giraffe was to be supplied in 2 weeks but several months passed without the delivery amidst repeated demands. The money deposited was withdrawn in piece meals leaving only N1 Million in the account. By the Court's order, a lien was placed on the Appellant's account which had N995,000.00 standing and the money eventually transferred to Mrs. Davies. However, Mrs. Davies complained to the Commissioner of police vide a letter dated 26/11/2013, who arrested and arraigned the Appellant before a Chief Magistrate's Court, Kaduna.

As I went through the facts of this case, I was wondering how a purely civil matter could easily metamorphose and transubstantiate into a purely criminal case. The end result now is that the Appellant has suffered irreparable damage, disgrace, shame, odiousness and untold hardship in the hand of the Police that is constitutionally and legally saddled with prosecution of criminal offences.

The police have muzzled the rights and freedom of Nigerians even where cases are clearly outside their jurisdiction, power or corridor. If this is not curbed, everybody including the judicial officers will suffer always from floodgates of civil matters being hijacked by the police and transmuted into crimes. If this is not tackled, everybody would have suffered in the merciless hand of the police who has become a law unto itself in this country.

The primary duty of the Police by Section 4 of the police Act is the prevention of crime, investigation and detection of crime and the prosecution of offenders. See IBIYEYE V. GOLD (2012) ALL FWLR (PT 659) 1074. The Police is not a debt recovery agency and has no business to dabble into contractual disputes between parties arising from purely civil transactions. See MCLAREN V. JENNINGS (2003) FWLR (PT 154) 528. When, as in the circumstances of this action, a purely civil matter is reported to the Police, such a person cannot go scot-free as the report ought not to have been made at all since it is not within the purview of Police duties. It is a report made malafide and he will be equally liable for the action taken by the Police irrespective of whether he actively instigated them or not, since he had no business involving the Police in a purely civil matter in the first place. Such conduct which portrays disregard of the law and is aimed at using the coercive powers of the State to punish a contracting party in a purely civil matter ought to be mulcted in exemplary damages. See OKAFOR & ANOR V. AIG POLICE ZONE II ONIKAN & ORS (2019) LPELR- 46505.

Mrs. Sokari Davies being an enlightened person knows that reporting such a matter to the police, instead of going to Court to seek for enforcement of the said contract or damages for breach of same, is wickedness and malafide.

The charges for cheating and criminal breach of trust cannot have a place against the Appellant, let alone proving it to a conviction. The Appellant is hereby discharged and acquitted. He in fact deserves an unreserved apology from Mrs. Sokari Davies who set unjustly and malafide the criminal stone rolling against the Appellant.