**CAPTAIN GNH ASAKE**

**V.**

**THE NIGERIAN ARMY COUNCIL AND ANOTHER**

IN THE COURT OF APPEAL (IBADAN JUDICIAL DIVISION)

THE 25TH DAY OF MAY, 2006

SUIT NO: CA/I/232/2000

**LEX (2006) - CA/I/232/2000**

OTHER CITATIONS:

[2007] 1 NWLR (Pt.1015) pg.408

(2006) LPELR-CA/I/232/2000

**BEFORE THEIR LORDSHIPS:-**

JOHN AFOLABI FABIYI, JSC

AMINA ADAMU AUGIE, JSC

GERTRUDE IFUNANYA UDOM-AZOGU, JSC

**BETWEEN**

CAPTAIN GNH ASAKE - Appellants

AND

1. THE NIGERIAN ARMY COUNCIL

2. THE ATTORNEY-GENERAL OF THE FEDERATION - Respondents

**ORIGINATING COURT(S)**

MILITARY COURT CONVENED BY BRIG. GEN. G. O. ABBE, THEN GOC 2 MECH. DIVISION, NIGERIAN ARMY PURSUANT TO THE MILITARY COURT (SPECIAL POWERS) DECREE NO. 23 OF 1984 (Lt. Col. B. B. Usoro, Presiding)

**REPRESENTATION**

H. O. AFOLABI, Esq. with S. O. AJAYI, Esq. and O. O. OJO, Esq. - For the Appelants

MALLAM J. A. ADAMU - For the Respondents

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

CONSTITUTIONAL LAW - PRESUMPTION OF INNOCENCE:- Essence and basis of in criminal trials - Section 33(5) of the 1979 Constitution (now section 36(5) of the 1999 Constitution)

CONSTITUTIONAL LAW – RIGHT TO FAIR HEARING:- s. 33 (12) of the 1979 Constitution of Nigeria – Requirement that a person be charged only for an existing and well defined offence which penalty is prescribed in a written law – Applicability of to military court martial – How proved

CRIMINAL LAW AND PROCEDURE - BURDEN OF PROOF: Duty of the prosecution to prove the guilt of the accused person beyond reasonable doubt - Standard of proof that must be satisfied

CRIMINAL LAW AND PROCEDURE – PROOF OF CRIME:- Right of an accused person to remain silent and not to self-incriminate by refusing to adduce evidence – Constitutional guarantee of – Whether cannot be made a subject matter of comment by the prosecution and cannot be made a basis for finding of guilty of the allegation against him

CRIMINAL LAW AND PROCEDURE – PROOF OF OFFENCE:- Allegation of offence inconsistent with the provision of section 33(12) of the 1979 Constitution – Borrowing of money by an Officer from another subordinate - section 71 of the Army Act, 1960 (Revised) – Arraignment for conduct or neglect to the prejudice of good order and military discipline – Whether borrowing of money can constitute an offence under section 71 of the Nigerian Army Act, 1960 without offending the Constitutional requirement that the offence be well defined and its penalty is prescribed in a written law

CRIMINAL LAW AND PROCEDURE - STANDARD OF PROOF:- Duty of the prosecution to prove the case against the accused beyond reasonable doubt – Standard of proof - section 138( 1) of the Evidence Act in review

MILITARY LAW – COURT MARTIAL:- Appellate jurisdiction over decisions of a Military Court martial – Court with competence to hear same – Duty of Military Courts to furnish the facts and evidential basis for its conclusions reached clearly and concisely on the record to enable the appellate review

MILITARY LAW – COURT MARTIAL:- Arraignment for conduct or neglect to the prejudice of good order and military discipline under section 71 of the Army Act, 1960 (Revised)– Proof of – Evidence of borrowing money from a subordinate by an Officer – Whether satisfies the burden of proof

MILITARY LAW – COURT MARTIAL:- Burden of proof of alleged crime before a military court martial – Duty of prosecution to ensure that ingredients of crime alleged satisfies the requirements under s. 33 (12) of the 1979 Constitution of Nigeria – Effect of failure thereto

**PRACTICE AND PROCEDURE ISSUES**

APPEALS - APPEALS FROM MILITARY COURT:- Court with jurisdiction over decision of a Military Court Martial – Essential elements of Records that must be compiled from the proceedings of the Court Martial

EVIDENCE - HEARSAY:- Essence and purport of - Evidence which does not derive its value solely from the credit given to the witness himself, but which rests also in part on the veracity and competence of some other person – Legal effect

EVIDENCE - WITHHOLDING EVIDENCE:- Section 149(d) of the Evidence Act – Legal presumption arising therefrom – Applicability of to a Military Court

INTERPRETATION OF STATUTE - RULES 38(1), 132(2) AND 134(3) OF THE RULE OF PROCEDURE (ARMY) 1972:- Meaning(s) of

WORDS AND PHRASES - "CONDONATION": Meaning of

WORDS AND PHRASES:- “Hear-say evidence” – meaning of

**MAIN JUDGMENT**

FABIYI, J.C.A. (DELIVERING THE LEADING JUDGMENT):

This is an appeal against the decision of the Military Court convened by Brig. Gen. G. O. Abbe, the then GOC 2 Mech. Division, Nigerian Army pursuant to the powers conferred on him under the Military Court (Special Powers) Decree No. 23 of 1984. The court, presided over by Lt. Col. B. B. Usoro, handed out its decision on 4th July, 1994.

The appellant was arraigned before the Military Court on a single count charge which reads as follows:

"Statement of offence: Conduct to the prejudice of military discipline under section 71 of the NA Act, 1960 (Revised).

Particulars of offence: In that he at Monrovia, Liberia on or about November 91 while on OP Liberty borrowed the sum of $300 US from 79NA/12140 L. Cpl. Yau Suleiman and failed to pay back the said money, a conduct prejudicial to good order and military discipline."

The appellant was duly arraigned by the Military Court and he pleaded not guilty to the charge. The prosecution, in a bid to prove their case, called Col. B. A. Jinadu who was the Commanding Officer (C. O.) of the Battalion in which the incident allegedly happened. Put succinctly, the case of the prosecution was that while the appellant was a member of the Nigerian contingent on Operation Liberty to Liberia in 1991, he borrowed the sum of US $300 from L. Cp1. Yau Suleiman who was also a member of the contingent. The above stated Col. B. A. Jinadu was the sole witness for the prosecution. As P.W.1, he maintained that though the issue happened in Liberia, as the Commanding Officer of the appellant, he only got to know about it on their return to Nigeria when he had an interview with L. Cpl. Yau Suleiman based on a letter for redress of an injustice written by him. The letter written by L. Cp1. Yau Suleiman was not tendered before the Military Court.

P.W.1 said he listened to the complaint of L. Cpl. Yau Suleiman who claimed that the appellant borrowed the stated sum of US $300 from him in Liberia. The appellant was asked to state his own side of the matter. He denied borrowing the said amount from the complainant initially but later said the money was meant for a transaction which turned out to be a failure. P.W.1 said he told the appellant that he was wrong and that as far as he was concerned, the appellant was owing the soldier. P.W.1 said the appellant agreed to pay back the money in Naira in the presence of his Adjutant, Capt. Nnadi and RSM W01 Idrisu. P.W.1 said that he maintained that there was no problem as far as the appellant was going to pay the boy back, there will be no trouble. PW.1 said his Adjutant told him that the appellant went and gave the boy N500.00 and he told the Adjutant to keep the record of how he was paying the boy. PW.1 left the matter at that position and left the unit on posting.

P.W.1's statement, made under caution was admitted as exhibit 'A'. Under cross-examination, he said it was correct that he used 'executive action with fiat' to order the appellant to pay the soldier.

The appellant herein, as an accused before the Military Court, did not adduce any evidence thereat. In effect, he rested his case on that of the prosecution.

The Military Court was properly addressed by both counsel for the parties. Thereafter, the Judge Advocate gave his 'sum-up' in the case. To the best of his ability he made his views on the applicable law and procedure known to the Military Court with a view to assisting it to arrive at a just decision.

The Military Court made its findings which, in substance, led to the conclusion that the appellant improperly 'borrowed' the said sum of US $300 from L. Cp1. Yau Suleiman. The Military Court however observed that the evidence as to whether the said money has been fully paid back to the soldier is inconclusive. It was found unsafe to conclude that the said amount still remains unpaid.

The Military Court at that point then made what it called 'special findings' which reads as follows on page 79 of the record of appeal "4. Capt. Asake you are found guilty of the only charge before the court with the exception of the words 'and failed to pay back the said money'. The charge for which you are now convicted reads as follows:

(a) Statement of offence: Remains the same.

(b) Particulars of offence: In that he at Monrovia, Liberia on or about Nov. 91 while on Operation Liberty borrowed the sum of $300 (US Dollars), from 79NA/12140 L. Cp1. Yau Suleiman, a conduct prejudicial to good order and military discipline."

Thereafter, learned counsel for the accused at the Military Court entered a very passionate and moving plea in mitigation of sentence.

The court retired to deliberate over what should be the sentence. On resumption, the accused was sentenced to reduction in rank to Lieutenant with three seniority years in rank. As extant on page 4 of the respondent's brief of argument, 'the confirming authority however substituted the original sentence with a punishment of dismissal from service'.

The appellant felt unhappy with his conviction and sentence. This court granted him leave to appeal out of time on 19-3-2001.

The notice of appeal dated 26-3-01 which carries five grounds of appeal was filed on 15-5-01. By another application granted on 4-7-05, the appellant filed three additional grounds of appeal. However, the appellant had cause to abandon grounds 1 and 4 of his grounds of appeal.

When this appeal fell due for hearing on 6-3-06, each learned counsel on both sides of the divide adopted and relied on his client's brief of argument.

On page 2 of the appellant's brief of argument, the two issues couched for an adequate determination of the appeal read as follows:

"1. Whether on the totality of the pieces of evidence before the Military Court, the guilt of the accused person was proved beyond all reasonable doubt.

2. Whether having regard to the fact that the Commanding Officer had condoned the offence alleged against the appellant his trial and conviction by the Military Court is not a nullity."

Arguing issue 1, it was submitted on behalf of the appellant that his innocence must be presumed until the contrary is proved.

Learned counsel cited Ubanatu v. Commissioner of Police (1999) 7 NWLR (Pt. 611) 512 at 522. As well, he referred to section 33(5) of the 1979 Constitution (now section 36(5) of the 1999 Constitution).

He submitted that it is the duty of the prosecution to prove the guilt of the accused person beyond all reasonable doubt. He observed that an accused is not expected to prove his innocence unless the prosecution has been able to make out a prima facie case against him. Learned counsel cited Adeyemi v. State (1991) 6 NWLR (Pt.195) 1 at 39. He observed that failure of an accused to adduce evidence cannot be made a subject matter of comment by the prosecution and as well, a decision not to give evidence by an accused cannot be made a basis for finding him guilty of the allegation against him.

Learned counsel maintained that the prosecution needed to prove that the appellant indeed borrowed the sum of $300 US from L. Cp1. Yau Suleiman and that borrowing of money is prohibited or is an offence under military law or regulation. He maintained that the prosecution failed to prove the above requirements. He observed that L. Cp1. Yau Suleiman never testified and that the evidence of P.W.1 was a by-product of information given to him by the complainant which amount to hearsay. Learned counsel cited Pharmacist Board of Nigeria v. Adegbesote (1986) 5 NWLR (Pt.44) 707; Maigoro v. Bashir (2000) 11 NWLR (Pt. 679) 453; Utteh v. State (1992) 2 NWLR (Pt. 223) 257 at 273.

Learned counsel submitted that the prosecution ought to have brought L. Cp1. Yau Suleiman before the lower court to show that there was a complaint by him to P.W.1 and that there was financial transaction between the appellant and L. Cpl. Yau Suleiman. He felt that financial transaction was wrongly left to speculation by the Military Court. He cited Ahmed v. State (1999) 7 NWLR (Pt. 612) 641. He opined that the letter written by the L. Cp1 to PW.1 which prompted investigation was not tendered and such was contrary to the dictate of S. 149(d) of the Evidence Act.

Learned counsel submitted that the purported admissions which P.W.1 maintained that the appellant made to him were not such to be relied upon by the prosecution. He observed that the mode of admissions was not stated. He further stressed the point that the statement of the appellant was not tendered despite the fact that P.W.1's statement was tendered as exhibit 'A'. Learned counsel pointed it out that vital witnesses to wit Bn Adjutant, Capt. Nnadi and RSM WOI Idrisu allegedly called during PW.1's interrogation of the appellant were not invited to adduce evidence. He felt that it was wrong to rely on the mere ipsi dixit of PW.1 to ground conviction.

Learned counsel finally submitted that the charge against the appellant is unknown to any written law. He referred to section 33(12) of the 1979 Constitution and cited Aoko v. Fagbemi (1961) 1 All NLR 400; Ifegwu v. Federal Republic of Nigeria (2001) 13 NWLR (Pt. 729) 103 at 138. Learned counsel submitted that borrowing money is not an offence as an act that will constitute an offence is not left to conjecture.

Learned counsel observed that section 71 of the Nigerian Army Act, 1960 is contained under the sub-head of miscellaneous offences which covers sections 63 to 71. The sub-head created various offences and section 71 which talks of conduct or neglect can only be construed along the line of other offences created in previous sections 63-70 of the Act vide the ejusdem generis rule of construction principle. He cited Russel v. Russel (1987) 2 NWLR (Pt. 57) 437; A.-G., Bendel State v. Aideyan (1986) 2 NWLR (Pt. 21) 175.

Learned counsel felt that there is no law which forbids borrowing of money and the trial of the appellant for such an act is a nullity. He urged us to so hold.

Arguing issue 1, learned counsel for the respondent took off with the point whether the act of borrowing money from a subordinate constituted an offence. He referred to Manual of Military Law, 1972, Chapter 1, paragraph 6 and section 2(iv) of same. He submitted that borrowing of money by an officer from his subordinate in inappropriate circumstances constituted an offence.

He felt that P.W.1, the Commanding Officer of 2 Mech. Battalion was the real complainant and that the appellant made admission to him. He felt that corroboration was not necessary and cited Adelumola v. The State (1988) 1 NWLR (Pt. 73) 683, (1988) 1 NSCC 456 at 473.

Learned counsel for the respondent submitted that P.W.1's evidence was not hearsay. He cited Utteh v. State (supra).

I need to start the consideration of this appeal with the point relating to whether the act of borrowing money from a subordinate by an officer in the Nigerian Army is an offence. The appellant, as accused person before the Military Court, was arraigned for an act, said to be contrary to section 71 of the Nigerian Army Act, 1960 (Revised) which provides as follows:

"Any person subject to military law under this Act who is guilty of any conduct or neglect to the prejudice of good order and military discipline shall, on conviction by court-martial, be liable to imprisonment for a term not exceeding two years or any less punishment provided by this Act."

At this point, it is apt to reproduce section 33(12) of the 1979 Constitution which was applicable at the material time of this action.

It provides as follows:

"Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this sub-section, a written law refers to an Act of the National Assembly or a law of a State, any subsidiary legislation or instrument under the provisions of a law."

It is clear to me that by the clear provision of section 33(12) of the 1979 Constitution as reproduced, nobody can be convicted of any offence except that created under a written law. See Aoko v. Fagbemi (supra), Ifegwu v. FRN (supra). Borrowing of money by an officer from his subordinate is not expressly made an offence under section 71 of the Nigerian Army Act, 1960 (Revised). I strongly feel that an act that will constitute an offence cannot be left to conjecture at the whims and caprices of the GOC 2 Mech. Division, Nigerian Army. Such is not in tune with the provision of section 33(12) of the 1979 Constitution. I am afraid; section 71 of the Army Act, 1960 (Revised) under which the appellant was arraigned cannot stand. That being the position, I agree with the appellant's counsel that borrowing of money is not an offence under section 71 of the Nigerian Army Act, 1960. Therefore, the arraignment, conviction and sentence imposed on the appellant are nullities and must be set aside anon.

Let me, as a follow up to the above, consider whether on the totality of the pieces of evidence before the Military Court, the guilt of the appellant was proved beyond reasonable doubt. Vide the convening order, the Military Court was directed to apply the provisions of the Evidence Act, Cap. 112, LFN, 1990.

It is basic that the innocence of the appellant must be presumed until the contrary is proved. This tallies with the provision of section 33(5) of the 1979 Constitution (now section 36(5) of the 1999 Constitution). See Ubanatu v. C.O.P. (supra). It is the duty of the prosecution to prove the guilt of the accused person beyond reasonable doubt. No duty is imposed on the accused to prove his innocence. See Adeyemi v. State (supra) at p.39. And failure of the accused to adduce evidence cannot be made a subject matter of comment by the prosecution. As well, a decision not to adduce evidence by the accused cannot be made a basis for finding him guilty of the allegation against him.

The real launching pad of the prosecution's case is proof that the appellant, indeed, borrowed the sum of $300 US from L. Cp1. Yau Suleiman.

P.W.1 said L. Cpl. Yau Suleiman wrote a letter to him which prompted him to embark upon an investigation. I note that the letter was not tendered before the Military Court as it should have been. Section 149(d) of the Evidence Act enjoined the Military Court to presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. One feels tempted to presume that if the letter written by L. Cp1. Yau Suleiman to P.W.1 was tendered, it would have been unfavourable to the prosecution's case. See Union Bank of Nig. Ltd. v. Nnoli (1990) 4 NWLR (Pt. 145) 530.

I note here that L. Cp1. Yau Suleiman who complained to P.W.1 that the appellant borrowed money from him was not called to give evidence before the Military Court. The soldier should have confirmed that he wrote a letter to complain to P.W.1. As well, he would have identified such a letter. He was a material witness who ought to have been called by the prosecution to testify on his allegation that he lent the appellant money. If he had been called, he would have been subjected to cross-examination, a potent tool for perforating falsehood. But the soldier was not called and no plausible explanation was given for failure to call him. I strongly feel that alleged financial transaction between the soldier and the appellant was wrongly left to speculation by the Military Court. Refer to Ahmed v. State (supra).

I note here that P.W.1 said during his investigation, the soldier claimed that he lent the appellant money. P.W.1 said his Adjutant, Capt. Nnadi and RSM W01 Idrisu were in attendance when the soldier told them that he borrowed money to the appellant. To my mind, this piece of evidence amount to hearsay. In Utteh v. State (supra) at p. 273, a piece of evidence has been described as hearsay if it is evidence of the contents of statement made by a witness who is himself not called to testify. In essence, hearsay evidence in its logical sense is all evidence which does not derive its value solely from the credit given to the witness himself, but which rests also in part on the veracity and competence of some other person. See also Maigore v. Bashir (supra).

Clearly, what P.W.1 said he heard from the soldier is hearsay evidence which was not admissible and must be disregarded since the basis of the complaint - borrowing of money - transaction was not proved, the launching pad of the prosecution's case collapsed.

P.W.1 said the appellant admitted that he took money from the soldier but it was not a loan; rather it was for a transaction which failed. I note that no statement of the appellant was tendered. On the contrary, it was P.W.1's statement made on caution that was tendered as exhibit' A'. Such appears unusual. P.W.1 said he gave 'executive fiat order' to the appellant to pay the soldier and if done, there would be no problem. P.W.1 said his Adjutant told him that appellant paid the soldier N500. Again, this is hearsay. P.W.1 said he ordered his Adjutant, Capt. Nnadi to take record of payments made by the appellant. Neither the Adjutant - Capt. Nnadi nor RSM W01 Idrisu testified. Apart from that, the record of payments allegedly made by the appellant to the soldier as ordered by P.W.1 was not tendered as an exhibit. It is not surprising that the Military Court found that proof of payment of 'loan' was inconclusive. I agree with the lower court.

It appears to me that the prosecution left much to conjecture.

Vital witnesses were not called and material exhibits were jettisoned.

The conduct of the case was deficient. It was wrong to rely solely on the ipsi dixit of P.W.1 whose evidence, in the main, was made up of hearsay upon hearsay.

With the above position of things, can it be said that the prosecution proved their allegation beyond reasonable doubt? I have my utmost reservation. Over five decades ago, Lord Sankey (L.C.) in Woolmington v. D.P.P. (1935) A.C. 462 clearly pronounced that it is the duty of the prosecution to prove the case against the accused beyond reasonable doubt. See Nasiru v. State (1999) 2 NWLR (Pt. 589) 87 at p. 89; Teper v. R (1952) A.C. 480; Akinyemi v. State (supra) at p. 464. I must call to mind here that proof beyond reasonable doubt has been codified in section 138( 1) of the Evidence Act.

Put bluntly, I have not been persuaded and I feel unable to agree with the learned counsel for the respondent that the case against the appellant was proved beyond reasonable doubt. It was not; as a lot of salient facts was left in the air, leaving yawning gaps.

Let me touch briefly the issue relating to condonation of the alleged offence by P.W.1 the Commanding Officer (C.O.) at the material time in the alternative. Appellant's counsel felt the alleged offence was condoned vide section 119, Nigerian Army Act, Cap. 294, LFN, 1990.

Condonation has been defined in Black's Law Dictionary, 7th Edn., pages 291-292 as 'a victim's implied forgiveness of an offence by treating the offender as if there had been no offence'. And 'condone' means 'to voluntarily pardon or overlook'. P.W.1 was the Commanding Officer of the appellant. He related how he investigated the alleged complaint of L. Cp1. Yau Suleiman.

He said the appellant agreed to pay the soldier his money. On page 20 lines 15-18 of the record of appeal, he stated as follows:

"I said there is no problem as far as he was going to pay the boy back, there will be no trouble. I was told he went and gave the boy the sum of N500.00."

On page 31 lines 20-23, P.W.1 - the C.O. stated as follows:

"He was happy that I was not taking any disciplinary action against him which I will have done. He knows this. "

At page 35 lines 29-36 to page 36 lines 1-3 of the record, the following exchange took place between the Court and P.W.1:

"Court: Col. Jinadu Sir, when the case was reported to you and the officer admitted that he took the money, why didn't you charge him for discipline sake?

P.W.1: I will like to tell you that the officer and soldiers of that BN had just returned from a very exhaustive operation and as the COI was humane. I knew I could have had a BOI instituted but the fact that the officer told me he will pay, as a father I thought I should look at it with levity."

On page 73 of the transcript record of appeal, the Judge advocate, in his summing up, felt that rule 38 of Rules of Procedure (Army) 1972 implied that such a plea of condonation is a plea in bar of trial which ought to have been made before the charge was pleaded to and not after arraignment. He felt it was therefore too late in the day to entertain such a plea.

The Military Court in its findings at page 78 lines 18-21 said 'even then, the import of Rule 38 of the R.P.(A) 1972 is that at that stage of address it was too late for the defence counsel to have introduced the issue of condonation which he never addressed at the arraignment stage'. In short, the Military Court bought the idea sold to it by the Judge advocate. But is the position taken correct?

Rule 38(1) of the Rule of Procedure (Army) 1972 reads as follows:

"38(1) An accused, before pleading to a charge, may offer a plea in bar of trial in reliance upon section 132(2) or section 134(3) of the Act."

Section 132(2) of the Act relates to limitation of time for trial of an offence to three years where applicable. Section 134(3) of the Act relates to prohibition of trial in respect of a charge already disposed of. Rule 38(1) makes no allusion to condonation and cannot be inferred as being amenable for a plea at the bar. In any event, the stance of the C.O. - P.W.1 is that he did not condone the alleged offence. I cannot see how the appellant could have banked upon such a plea. It is non sequitor. To my mind, the finding of the Military Court, based on quibble direction was erroneous.

P.W.1 said he asked the appellant to pay the soldier and there will be no trouble. He said he was told that the appellant paid N500.00 to the boy. He was not taking any disciplinary action against the appellant which he P.W.1 would 'have done'. P.W.1 said as a father, the looked at the matter with levity.

I earnestly feel that P.W.1, a fine officer and a gentle man' should have kept to his words. His yes should be yes and his no, no. In my opinion, P.W.1 genuinely felt that he settled the miniature allegation 'against the appellant and condoned the misdemeanour.

Put succinctly, P.W.1 the C.O. condoned the alleged act of the appellant.

In short, the offence charged is not known to any valid written law. The alleged offence was not proved beyond reasonable doubt.

In the alternative, the misdemeanour (if indeed there was any) was condoned by P.W.1 - the Commanding Officer. The two issues are resolved in favour of the appellant against the respondent.

In conclusion, the appeal, viewed from all angles, is meritorious.

It is hereby allowed. The conviction and sentence of the appellant by the Military Court as well as the Confirming Authority's substitution of the original sentence with a punishment of dismissal of the appellant from service are hereby set aside. The appellant is hereby discharged and acquitted.

**AUGIE, J.C.A.:**

I have read in draft the lead judgment just delivered by my learned brother, Fabiyi, JCA and I agree with his reasoning and conclusions. The appellant was convicted for borrowing money.

It is a fundamental principle; first of all written into the 1959 Bill of Rights, then embodied in subsequent Nigerian Constitutions - that no person shall be convicted of a criminal offence unless that offence is defined and the penalty is prescribed in a written law - see section 33(12) of the 1979 Constitution, Aoko v. Fagbemi (1961) 2 All NLR 400; & Udoku v. Onugha (1963) 2 All NLR 107. In this case, the appellant was charged with "Conduct to the Prejudice of Military Discipline under section 71 of the NA Act (Revised)", and it could be argued that the failure to pay back the sum of $300 borrowed from a junior officer was prejudicial to military discipline, but that was not the charge for which the appellant was convicted and dismissed from the Army. When making its findings, the Military Court excised the words - "and failed to pay back the said money" from the charge and convicted the appellant for the "offence" of borrowing $300 from the said junior officer. Borrowing money is not an offence known to law, and the appellant's conviction on that ground, which led to his dismissal from the Army, is outrageous and unwarranted. There was no basis for the conviction, and if there was any justification known to the Military Authorities, it was not reflected in the record of proceedings. Military Courts must remember that appeals against their decisions lie to this court, and the facts and evidential basis for the conclusions reached must therefore be clear on the record to enable an appellate court determine whether or not it had been right in its approach to the case and the conclusion arrived at - see Shekete v. The Nigerian Air Force (2000) 15 NWLR (Pt. 692) 868. As it is, the appellant's conviction and sentence for borrowing money cannot stand and it is hereby set aside.

I abide by the orders in the lead judgment.

**UDOM-AZOGU, J.C.A**:

I have read in draft the judgment just delivered by my learned brother, John Afolabi Fabiyi, JCA. I agree with his conclusions and reasoning. The question whether the appellant borrowed the sum of $300 US dollars from L. Cpl. Yau, was never answered. Where on earth is it a criminal offence to borrow money? If merely to borrow is made an offence it will definitely conflict with section 33(12) of the 1979 Constitution which provides:

"Subject as otherwise provided by this Constitution a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed by written law; and in this sub-section, a written law refers to an Act of the National Assembly or a law of a State, any subsidiary legislation or instrument under the provisions of law."

The instant charge obviously does not meet the terms of the constitutional provision. The trial was froth with illegalities. The letter which L. Cp1. Yau Suleiman PW.1 claimed to have been written by the accused was not tendered. Why was such an important letter not tendered? The record of payments allegedly made by the appellant to the soldier as ordered by P.W.1 was not tendered. Those are areas where section 149(d) comes into play. The principal actor in this drama like Capt. Nnadi and RSM WOI Idrisu were not produced to testify. To put it mildly, the criminal court failed to follow any rules of procedure during the trial. Being a criminal trial, proof is beyond reasonable doubt not beyond a shadow of doubt. See Bakare v. State (1987) 1 NWLR (Pt.52) 579 at 587. See also Ozaki v. State (1990) 1 NWLR (Pt. 124) p. 92; Patrick Ikemson & 2 Ors. v. The State (1989) 3 NWLR (Pt. 110) 455 - 510; Onubogu v. The State (1974) 9 SC 1.

The respondent never proved any offence let alone proving beyond reasonable doubt.

Having acknowledged that the appellant was a member of the Nigerian contingent on Operation Liberty to Liberia one would have thought that the appellant deserved more humane treatment. There appears that there is more that meets the eyes in this case.

For the above reasons and the more elaborate reasons contained in the lead judgment, I also find that the appeal has merit and is allowed. I also set aside the conviction and sentence of the Military Court and the Confirming Authority and discharge and acquit the appellant.

Appeal allowed.